Notre Dame Law Review

Volume 63 | Issue 5 Article 5

1-1-1988

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The Golden Wedding Year: *Erie Railroad Company v. Tompkins* and the Federal Rules

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Although this symposium is dedicated to the celebration of the fiftieth anniversary of the Federal Rules of Civil Procedure, in the world of civil procedure enthusiasts, 1938 has additional significance. In that same year the Supreme Court announced what one of its members later called "one of the most important cases in American legal history."[1] The case was *Erie Railroad Co. v. Tompkins*,[2] and it had and still has particularly important implications for the Federal Rules. In *Erie* the Court announced that it was returning to the states the power to create common law, since "[t]here is no federal general common law."[3] Because this declaration occurred at the same time the Supreme Court exercised its authority to promulgate the first set of federal civil rules, it underscored that the federal judiciary nonetheless was competent to determine its own matters of procedure. In this way, the two events were married: federal rulemaking would be allowed to continue as long as it did not step into the prohibited bounds of substance left to state control by *Erie*.

Consequently, 1988 is more than a birthday, it is the golden wedding year of these two events. As on all such anniversary occasions, it seems appropriate to look back at how this union has prospered during the last fifty years. Similar to most marriages of long duration, we can find some serious points of controversy and tension; yet both the *Erie* doctrine and the Federal Rules have endured. This raises two questions that seem worth investigation. The first is how this marriage has survived some of the inevitable problems it has faced. The second is what insights the past fifty years can provide into resolving future tensions.

I. Historical Background

A brief recitation of how the pairing of the respective powers given to the federal courts in the Rules of Decision Act[4] and in the Rules Enabling Act[5] came about is necessary to appreciate the current state of affairs. The development of the notion that different constraints exist on federal power when dealing with substantive, as contrasted with procedural, matters did not spring forth newborn in 1938. The First Judiciary

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1 Black, *Address*, 13 Mo. B.J. 173, 174 (1942).

2 304 U.S. 64 (1938).

3 *Id.* at 78.

4 Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 92 (codified as amended at 28 U.S.C. § 1652 (1982)).

5 Act of June 19, 1934, ch. 651, §§ 1-2, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (1982)).

Act[6] recognized this division by treating separately the question of governing law depending on whether the matters involved were procedural or substantive.[7] Although this division has existed since the beginning of the federal court system,[8] the distinction between substantive and procedural matters was insignificant until the adoption of the Rules Enabling Act in 1934.[9] Until that time, the federal courts were directed by Congress to apply the procedural law of the states in which they sat.[10] The Enabling Act freed the federal courts from their state law bondage and gave the Supreme Court rulemaking authority. Contained within that authorization was the constraint that the rules adopted should not "abridge, modify or alter any substantive right."

In fact, when the Enabling Act was adopted, the substantive right prohibition might not have been viewed as terribly restrictive since the creation of federal common law was at its zenith and the Rules of Decision Act was narrowly construed under the then nearly century-old doctrine of *Swift v. Tyson*.[11] But this division of power took on increasing significance when the Supreme Court overruled *Swift*; Justice Brandeis declared unconstitutional the interpretation of the Rules of Decision Act that gave the federal courts common lawmaking authority except when a state statute or constitution or a local matter was involved.[12] Although arguments continue even to this day as to what constitutional constraints actually exist,[13] no one contests that the impact of *Erie* was to return to the states a lawmaking power that the federal judiciary had usurped dur-

6 Ch. 20, 1 Stat. 73 (1789).

7 Section 34 of the First Judiciary Act, also known as the Rules of Decision Act, provided that the "laws of the several states . . . shall be regarded as rules of decisions in trials at common law. . . ." Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 92 (codified as amended at 28 U.S.C. § 1652 (1982)). For cases in equity, the federal courts were told that they should follow the rules "heretofore followed." The Supreme Court was given equity rulemaking authority in the Process Act of 1792. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276. Separate provisions in the Judiciary Act dealt with governing law questions for procedural matters in nonequity cases; these provisions required the courts to follow the practice of the states in which they sat. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 94. Consequently, except for equity proceedings, the federal courts were directed to look to state law as a source of both substantive and procedural authority. However, the fact that these directions were contained in different provisions intimated that the conclusions reached on the source of governing law in 1789 were not immutable.

8 For a more detailed description of the statutory history behind the development of federal procedure, see 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1002 (1987).

9 *See supra* note 5.

10 The original Process Act, *supra* note 7, was replaced by the Conformity Act of 1872. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197 (1872) (repealed 1934).

11 41 U.S. (16 Pet.) 1 (1842). For a brief, but cogent discussion of the application of the *Swift* doctrine, see C. WRIGHT, LAW OF FEDERAL COURTS § 54 (4th ed. 1983).

12 304 U.S. at 71, 77-78.

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no Federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in nature or "general" . . . .

Id. at 78.

13 *See, e.g., infra* note 17. *See generally* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 4.2, at 196-97 (1985).

ing the *Swift* era.[14] It is ironic that the Federal Rules of Civil Procedure first appeared in that same year, releasing the federal courts from the constraints of state law on the matters contained in the Rules. The year 1938 thus began a new era in the balance of power between state and federal courts—one that was to be controlled by the wavering (sometimes almost evanescent) line between substance and procedure.

Before examining how that balance has been maintained, two additional points bear mention. The first is simply an observation. It may be that according to Justice Brandeis' view of the limitations on federal court power there is no marriage of equal partners here. Although *Erie* itself involved only an interpretation of the Rules of Decision Act, Justice Brandeis was the sole member of the Court to dissent from the adoption of the Federal Rules in 1938.[15] The reasons are not clear,[16] but one speculation is that, to him, the constitutional restrictions were so strong that judicial rulemaking would be suspect.[17] Whatever its merits, that view clearly did not prevail in the Court, as witnessed by the adoption of the Federal Rules. Indeed, in his concurring opinion in *Erie*, Justice Reed acknowledged the difference when he observed, "no one doubts federal power over procedure."[18]

The second matter to note is the Supreme Court's 1965 decision in *Hanna v. Plumer*,[19] upholding the applicability of substituted service of process under the Federal Rules in the face of conflicting state law.

14 For a thorough historical and social account of the *Swift* and *Erie* cases and the events surrounding them, see T. FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM (1981).

15 302 U.S. 783 (1937).

16 Justice Brandeis advanced no reasons in his dissent from the rules. *Id.* After reviewing all the evidence of the time regarding what might be Justice Brandeis' reasoning, Professor Burbank has argued that Brandeis objected to the entire enterprise of federal rulemaking, not the specific set of federal rules themselves, and that his concerns were practical rather than constitutional, stemming from a belief that it was not necessary to displace state law. Letter of Stephen Burbank to Andreas Lowenfeld (Mar. 6, 1985).

17 This view would not mean that the federal courts necessarily would have remained wedded to state procedure. Legislation passed by Congress could fill the gap, which a delegation to the Supreme Court of rulemaking authority could not. This conclusion rests on the notion that Justice Brandeis saw two different constitutional restraints on the federal courts. The first was the tenth amendment: neither Congress nor the federal judiciary were competent to invade the substantive sphere left to the states. He stated this view in *Erie*. 304 U.S. at 78-79. *See also* T. FREYER, *supra* note 14, at 162. The second limit involved the separation of powers: federal courts cannot become rulemakers, only Congress has the authority to do so under U.S. CONST. art. III, § 2, coupled with the Necessary and Proper Clause, U.S. CONST. art. I, § 8. This argument does not appear openly in *Erie*. But then the exact meaning of the constitutional portion of Justice Brandeis' *Erie* opinion remains debatable. *See* C. WRIGHT, *supra* note 11, § 56.

The separation of powers argument is advanced today to challenge the propriety of judicial rulemaking. *See, e.g.*, Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1007 (1983). *See generally* W. BROWN, FEDERAL RULEMAKING AND POSSIBILITIES (Fed. Jud. Center 1981) (discussion of proposals to shift power to promulgate Federal Rules to Congress). Indeed, considerable historical research has revealed that Congress' primary concern in drafting the first Rules Enabling Act was the allocation of lawmaking authority between the legislature and the judiciary, and that the preservation of states' rights was secondary. *See* Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106 (1982); Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 985, 996-98 (1987). Whatever the historic merits of these arguments, the tenth amendment restraints are the primary interest in this paper.

18 304 U.S. at 92 (Reed, J. concurring).

19 380 U.S. 460 (1965).

Hanna is additional evidence that federal rulemaking proceeds on a parallel track with state common lawmaking power. Further, as long as the Federal Civil Rules do not intrude into substantive spheres, they remain constitutional,[20] and control over conflicting state law. This latter point is important because it underscores the dominance of federal procedural authority, as well as the importance of determining whether that authority, or substantive rulemaking (which is left to the states), is involved.[21]

Having stated that the division of federal and state competence was established in 1938 and reenforced in the Supreme Court's later decision in *Hanna* does not mean that clear bright lines of authority existed then or now. Rather, it merely sets the parameters of the inquiry. The peaceful coexistence of federal rulemaking and state common law control depends on reaching some general agreement on what constitutes matters of "substance" and what remains properly "procedural." An examination of how the Supreme Court and the lower courts have dealt with that problem reveals both successes and failures in reaching a common understanding during the last fifty years.

Although most often the Federal Rules have been applied without any questions arising as to whether they improperly abridge substantive rights, the success of this division of authority depends on how it has operated in the "gray" areas—the trouble zones of this marriage.[22] That inquiry will begin with an examination of the specific guidance provided by the Supreme Court on the meaning of the term "substantive rights," as it is used to limit the permissible scope of the Federal Rules. Then this article will look carefully at how the Court's standard has been applied in the particularly difficult area of the applicability of those Federal Rules that interact with state statutes of limitations.[23] A review of this troublesome area will reveal whether the tenth amendment restrictions acknowledged by Justice Brandeis have been effectively ignored. Additionally, this area offers insight into whether the Supreme Court has articulated sufficiently clear guidelines for the lower federal courts to preserve the balance of power struck in 1938. Analysis of the interaction between Federal Rules and state law in the area of statutes of limitations thus may provide some basis for a prognosis regarding how similar gov-

20 Chief Justice Warren, writing for the Court in *Hanna*, noted that Congress had the power under the Judiciary Clause, U.S. CONST. art. III, § 2, to provide for rules of procedure in the federal courts, and that the Rules Enabling Act thus was constitutional. 380 U.S. at 471-74. This argument was essentially the same as Justice Reed's concurring opinion in *Erie*. *See supra* note 18. Therefore, according to Chief Justice Warren, the proper question for a federal court confronted with differing state and Federal Rules is to determine whether the Federal Rule is properly within the scope of the Enabling Act; that is, whether it abridges a substantive right. If it is within the enabling legislation and it conflicts with state law, the Federal Rule controls under the Supremacy Clause, U.S. CONST. art. VI. 380 U.S. at 464, 471-74.

21 The *Hanna* test also includes the notion that Federal Rules will control only if they conflict with state law. If no conflict exists, and it is possible to apply both state and federal law, then federal courts should do so. 380 U.S. at 469-470. This additional element has been of considerable importance and is the one on which many lower court decisions have turned. *See infra* Part III. *See generally* 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS § 4510 (1982).

22 *See, e.g.*, 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 21, §§ 4508-4510, at 4512.

23 FED. R. CIV. P. 3, 4(j), and 15(c). *See infra* Part III.

erning law questions involving the proper scope of the Federal Rules are likely to be answered in the future.

II. The Supreme Court Defines Substantive Rights

The definition of "substantive rights" or "substance" would have several entries in any legal dictionary, even if it were limited to situations involving governing law questions.[24] For purposes of this article, the inquiry into the proper line between substance and procedure is not, as noted Chief Justice Warren in *Hanna*, the same as a "relatively unguided *Erie* choice."[25] Rather, the question analyzed here is how the term "substantive rights" is defined for purposes of the Rules Enabling Act, which prohibits the promulgation of any Federal Rule that "abridges, modifies or enlarges a substantive right."[26]

The narrow focus of the definition[27] has important implications. Under the *Hanna* Court's approach, the presence of a Federal Rule gives the federal judiciary added authority to ignore state law.

> To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.[28]

As long as the Rule is valid under the Enabling Act,[29] and that Act is constitutional (which Chief Justice Warren resolved affirmatively in *Hanna*),[30] the Rule controls over conflicting state law.[31] Some deference to state interests was suggested in the Court's recognition that there should be a careful inquiry into whether the federal and state laws actually clash. If they do not, then the federal courts may consider whether state law should apply in light of the Rules of Decision Act policies expressed in *Erie*.[32]

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24 380 U.S. at 471. For example, governing law questions involving statutes of limitations have been answered differently when the choice of law is between two states, rather than between federal and state law. In the former situation, statutes of limitations traditionally have been treated as procedural. *See* Bournias v. Atlantic Maritime Co., 220 F.2d 152, 154 (2d Cir. 1955). In the latter, the Supreme Court has deemed them outcome determinative and substantive for Rules of Decision Act purposes. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). In diversity suits, both characterizations may be used. *See, e.g.*, Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953).

25 380 U.S. at 471.

26 28 U.S.C. § 2072 (1982). Even with that limitation, arguments can be made about the appropriate definition. *See* 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 21, § 4509, at 144-45.

27 Compare the approach taken under the Rules of Decision Act. *See infra* note 32.

28 380 U.S. at 473-74.

29 If the rule is improper, it cannot be applied. Under those circumstances, the court would be faced with asking whether the matters involved were to be controlled by state law under the Rules of Decision Act and *Erie*.

30 380 U.S. at 472. *See also supra* note 20.

31 *Id.* at 473-74.

32 *See id.* at 470.

The definition of substance for Rules of Decision Act purposes has evolved in a series of cases since *Erie*. Two cases immediately following *Erie* merely invoked the procedure/substance distinction to rule in favor of state law. *See* Palmer v. Hoffman, 318 U.S. 109, 116-17 (1943); Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 212 (1939). In Guaranty Trust Co. v. York, 326 U.S. 99 (1945), the Court established the outcome determination test. *Id.* at 109. In 1958, the Supreme Court revised that standard to incorporate notions of comparing and balancing the competing federal and state

The adoption of this standard, as well as the *Hanna* Court's recharacterization of *Erie* as a general policy inquiry,[33] caused Justice Harlan to write a concurring opinion in which he described the majority's standard as the "arguably procedural *ergo* constitutional" test.[34] Given *Hanna's* minimal restraints on federal rulemaking, a question arises whether the Enabling Act effectively eradicates the Rules of Decision Act limits on federal power, at least when a Federal Rule is implicated. Justice Harlan suggested that it would be more appropriate to provide a clear definition of substantive rights so that federal courts could determine when *Erie* controlled and demanded deference to state law.[35] Whether the application of Justice Harlan's approach or Justice Warren's more limited Rules Enabling Act inquiry would produce results more consistent with the original design of this marriage of powers and restraints is not important here. The critical recognition is that the boundaries set in 1938 must be reevaluated in light of the ones established in 1965, for those now remain as our guideposts in determining whether an appropriate balance has been achieved.

Hanna addresses the issue of when a rule improperly invades the substantive sphere protected in the Enabling Act.[36] The *Hanna* Court endorsed the approach taken in two earlier Supreme Court decisions:[37] *Sibbach v. Wilson & Co.*[38] and *Mississippi Publishing Corp. v. Murphree*.[39] Reference to those cases underscores the narrowness of the limitation on federal power to control substantive law under Enabling Act authority.

Sibbach upheld the validity of Federal Civil Rules 35 and 37, requiring the petitioner to submit to a physical examination for discovery purposes. Petitioner had conceded that the Rules were procedural in character, but had argued that the application of the Rules invaded substantial rights—rights to privacy.[40] The Court specifically found that Congress did not intend by its use of the term "substantive rights" in the Enabling Act to include the vague notion of all "important and substantial rights theretofore recognized."[41] Rather, the term embraced "rights conferred by law to be protected and enforced in accordance with the

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policies. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537-38 (1958). That standard was refined further and given a policy framework in Hanna v. Plumer, 380 U.S. 460 (1965). Federal courts determine whether they will stray impermissibly into the substantive preserve guaranteed the states under the Rules of Decision Act by considering whether the application of federal law would encourage forum-shopping or result in the inequitable administration of the laws. *Id.* at 467-68. Only a substantial alteration in the enforcement of state-created rights is suspect. *Id.* at 468-69. For a discussion of how these standards have been applied, see 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 21, § 4511.

33 *See supra* note 32.

34 380 U.S. at 476 (Harlan, J., concurring).

35 Justice Harlan would have required state law to be applied whenever the issue involved the "primary decisions respecting human conduct which our constitutional system leaves to state regulation." *Id.* at 475.

36 *See generally* 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 21, § 4509.

37 380 U.S. at 464-65.

38 312 U.S. 1 (1941).

39 326 U.S. 438 (1946).

40 312 U.S. at 11, 14.

41 *Id.* at 13.

adjective law of judicial procedure."[42] The Court concluded: "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[43]

The Supreme Court in *Mississippi Publishing* further narrowed the substantive rights limitation. It applied the *Sibbach* standard to uphold the validity of Rule 4(f), which authorizes service of process anywhere within the state in which the district court sits, not merely to the surrounding district. In an opinion by Chief Justice Stone, the Court acknowledged that the operation of Rule 4(f) "will undoubtedly affect" the defendant's rights.[44] However, that impact could be disregarded. "Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects. . . ."[45] Most important was the fact that Rule 4(f) "does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights."[46]

By reference to these two precedents in *Hanna*, Chief Justice Warren made clear that the Rules Enabling Act's substantive rights restriction only would proscribe rulemaking that would *significantly affect* the decisional rules underlying the adjudication of the right to relief. Not surprisingly, Rule 4(d)(1), authorizing substituted service of process, was found to be within the proper scope of the Act by the *Hanna* Court.[47]

The *Sibbach* inquiry into whether "a rule really regulates procedure" thus offers no real standard by which lower courts can examine the validity of the Federal Rules.[48] Nonetheless, it is not necessary to conclude that the *Hanna* Court skewed the balance of state and federal power envisioned by Justice Brandeis in 1938. Rather, the Court's interpretation of the Enabling Act simply recognized that Congress had the power "to regulate matters which, though falling within the uncertain area between

42 *Id.*

43 *Id.* at 14.

The Supreme Court took a similar approach in upholding the validity of Federal Rule 54(b), governing certification of judgments in multiple claims actions for immediate appeal. *See* Cold Metal Process Co. v. United Eng'g & Foundry Co., 351 U.S. 445 (1956). It said:

> The amended rule meets the needs and problems of modern judicial administration by adjusting the unit for appeal to fit multiple claims actions, while retaining a right of judicial review over the discretion exercised by the District Court in determining when there is no just reason for delay. This does not impair the statutory concept of finality embraced in § 1291, and . . . is within the rulemaking power of this Court.

Id. at 453.

44 326 U.S. at 446.

45 *Id.* at 445.

46 *Id.* at 446.

47 *Hanna*, 380 U.S. at 464.

48 *See* 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 21, § 4509, at 141-42. Not surprisingly, this narrow interpretation of the Enabling Act's restrictions has been criticized. *See, e.g.*, Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 718-20 (1974); Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 360-64 (1980).

substance and procedure, are rationally capable of classification as either,"[49] and that Congress did so in the 1934 legislation.

A strong presumption exists (indeed, one that to date never has been rebutted) that any rule that has gone through the enabling process is procedural.[50] Thus, perhaps it is not surprising that lower courts engaging in a *Hanna* analysis often appear merely to be paying lip-service to this portion of the inquiry,[51] if they even include it. This does not mean, however, that all restraints have disappeared or that the Federal Rules and rulemaking power have attained a position of complete dominance. What has happened is that the "battlefield" positions have changed.

In *Hanna*, Chief Justice Warren made an important suggestion concerning federal restraints when he discussed other Supreme Court cases in which, although a Federal Rule was implicated, state law was applied.[52] He explained and approved those results, noting that in those cases the scope of the Federal Rule was found insufficiently broad to cover the point in issue. Consequently, no clear conflict existed between state and federal law, and the federalism boundaries present in *Erie* compelled the application of state law.

This addition to the governing law inquiry arguably preserves the proper balance of power between state and federal interests and sustains our marriage of equal partners. Undue emphasis on or enlargement of federal power is avoided not only by application of the admittedly weak Enabling Act restraints, but also by careful scrutiny of the question whether the federal and state rules actually conflict. This scrutiny requires a serious investigation into the proper scope of the Federal Rule, both in terms of the rulemakers' intentions as well as in light of substantive restraints.[53]

The question remains whether this refinement on the governing law standard has served as an effective curb on the dominance of the Federal Rules. An affirmative answer depends on the lower courts' understanding of two things: (1) how to accomplish a proper *Hanna* analysis; and (2) the fact that the *Hanna* Court's ruling in favor of federal law did not dilute *Erie*'s mandate of deference to state law unless strong federal interests are implicated. A good testing ground for that inquiry is the case law dealing with Federal Rules that allegedly implicate a state statute of limitations.

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49 380 U.S. at 472.

50 As described by Justice Harlan in his concurrence in *Hanna*,

> [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. Since the members of the Advisory Committee, the Judicial Conference, and this Court who formulated the Federal Rules are presumably reasonable men, it follows that the integrity of the Federal Rules is absolute.

Id. at 476.

51 *See, e.g.*, cases cited *infra* note 104. The notion that the Supreme Court can act objectively in evaluating the validity of rules earlier promulgated by it also has been challenged. *See* J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 96-98 (1977).

52 380 U.S. at 470.

53 *See generally* 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 21, § 4510, at 170-71.

III. The Federal Rules and State Statutes of Limitations

There are three Federal Rules that facially appear to affect otherwise relevant state statutes of limitations: Federal Rule 3, providing that civil actions are commenced by filing; Federal Rule 4(j), setting forth a 120-day time limit for service of process; and Federal Rule 15(c), authorizing the relation back of amendments after the limitations period has expired. Before examining the experience under these provisions, two observations merit review.

First, a review of lower court decisions confronting *Erie* problems involving the applicability of these three Rules reveals that the lower courts often have misunderstood the standard enunciated in *Hanna*, resulting in conflicting decisions. Although this observation probably is not shocking to students of civil procedure or federal courts, it certainly is troublesome to those who prize coherence in the law or who, perhaps naively, look to the Supreme Court to establish workable guidelines for lower court application.

The second observation may be more surprising, however. Experience has shown that the lower courts have not used (or abused) their authority to ignore state law conflicting with a Federal Rule. In fact, some cases even indicate that an understanding of how to achieve a proper *Erie* analysis when state limitations are involved may be emerging in the 1980s. The implications of these observations on future rulemaking and rule interpretation questions will be explored later. What follows now is a discussion of the evidence supporting them.

A. *Federal Rule 3*

Questions regarding the applicability of Federal Rule 3, which deems an action commenced by filing, in the face of a state law linking commencement to service, no longer pose problems in the lower courts because the Supreme Court has provided a firm response. The issue first arose in a pre-*Hanna* case, *Ragan v. Merchants Transfer & Warehouse Co.*.[54] The Court held that the federal court was bound to follow the state rule because that rule was an integral part of the state's statute of limitations.[55] As declared by the Supreme Court, the limitations period cannot be given a "longer life in the federal court than it would have had in the state court without adding something to the cause of action. We may not do that consistently with *Erie Railroad Co. v. Tompkins*."[56]

The same issue returned to the Court in the 1980 case of *Walker v. Armco Steel Corp.*,[57] and the Court reaffirmed *Ragan*'s conclusion that state law controls. Justice Marshall explained that the situation at hand did not involve a direct conflict between the Federal Rule and state law.[58] Unlike the state provision, Rule 3 on its face and in light of the Advisory

54 337 U.S. 530 (1949).

55 *Id.* at 534. The suit was found to be untimely because, although it was commenced prior to the running of the statute of limitations, service was not accomplished until after. *Id.* at 533.

56 *Id.* at 533-34.

57 446 U.S. 740 (1980).

58 *Id.* at 749-50.

Committee's comments is not designed to act as a tolling rule for state limitations provisions.[59] Instead, "Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations."[60] Given this construction of the Rule, *Erie* commands deference to state law.[61]

The results in these cases support the second observation suggested earlier, that is, that the federal authority to promulgate a separate set of procedural rules has not been interpreted as authorizing intrusion into spheres traditionally deemed within state control.[62] Further, the fact that this issue had to go to the Supreme Court a second time after *Hanna* illustrates the difficulties that lower courts have had in understanding how to make a proper governing law inquiry.

Some of the lower court confusion can be attributed to Justice Harlan's concurring opinion in *Hanna*.[63] In particular, he suggested that the majority had misconceived the constitutional premises of *Erie*, which would require in some circumstances that a state rule prevail even if it conflicted with a Federal Rule. Instead, the Court had found a "grant of substantive legislative power in the constitutional provision for a federal court system . . . setting up the Federal Rules as a body of law inviolate."[64] Nowhere did Justice Harlan address the majority's suggested limitation: that the Federal Rules should control only if an inquiry into the proper scope of the rule revealed that federal and state law were directly in conflict.[65] Indeed, the majority had cited the *Ragan* opinion at that point in its decision.[66] Instead, when Justice Harlan discussed *Ragan*, he argued that it was decided wrongly and that "the interest of the federal system in proceeding under its own rules should have prevailed."[67] Justice Harlan's interpretation of the majority decision conflicted with the majority's seemingly approving reference to the *Ragan* result and its suggestion of how that result could be accomplished by carefully delineating the scope of the Rules. This conflict led some lower courts to interpret *Hanna* as authorizing federal rule control, even as others continued to uphold *Ragan*.[68] In any event, *Walker* firmly resolved the governing law debate with respect to Rule 3,[69] and, more impor-

59 *Id.* at 750-51.

60 *Id.* at 751. By contrast, and even more recently, the Court construed Rule 3 as providing a tolling rule in federal question cases. West v. Conrail, 107 S. Ct. 1538 (1987).

61 446 U.S. at 750.

62 The conclusion that statutes of limitations are appropriately within state control, in the absence of specific federal legislation, is supported by the Supreme Court's decision in Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945). This fact was acknowledged in both *Ragan*, 337 U.S. at 532, and *Walker*, 446 U.S. at 745.

63 380 U.S. 460, 474 (1965).

64 *Id.* at 475-76 (Harlan, J., concurring).

65 *Id.* at 470.

66 *Id.* at 470 n.12.

67 *Id.* at 477.

68 A thorough examination of the lower court experience involving Rule 3 and state statutes of limitations may be found in 4 C. WRIGHT & A. MILLER, *supra* note 8, § 1057.

69 This does not mean that all Rule 3 governing law questions have been resolved. Lower courts sometimes differ in construing state provisions to determine whether the state commencement rule is bound up with the statute of limitations. If it is not, then deference need not be given to state law. *See* the decisions cited in 4 C. WRIGHT & A. MILLER, *supra* note 8, § 1057 nn.8-10.

tantly, should have clarified the standard to be applied to analogous questions under Rules 4(j) and 15(c).

B. *Federal Rule 4(j)*

The experience under Rule 4(j) is relatively sparse, yet revealing, since that provision was added to the Federal Rules in 1983, after *Walker*. Specifically, the Rule provides that service must be accomplished within 120 days after the complaint is filed. Failure to meet this requirement results in dismissal "without prejudice" if no good cause is shown as to why service was not accomplished within that period. The potential interaction between Rule 4(j) and statutes of limitations is clear,[70] as is the *Erie* or *Walker* dilemma.[71]

In a case in which the Rule 4(j) period is shorter than the relevant limitations period, for example, the application of the Federal Rule would not shorten impermissibly the life of the cause of action since Rule 4(j) provides for dismissal without prejudice.[72] The party may refile if the state permits recommencement after a dismissal not on the merits.[73] Like Rule 3, the application of the Federal Rule serves a legitimate objective in the federal court system. It encourages more efficient litigation by reducing the delay between the institution of suit and service[74] and does not adversely impact on the statute of limitations.[75]

A more difficult question is posed if the state statute of limitations runs before the end of the 120-day grace period. For example, if suit is filed one week before the limitations period expires and state law, which ties commencement to service, allows only a sixty-day grace period for service, can Rule 4(j) be invoked to allow the suit to continue when service is made on day 100? Would an affirmative response to that question impermissibly enlarge the state limitations period?

There are two possible responses to those questions. The first is to read *Walker* as requiring that state law control and that the 120-day period operates only so long as the state requirements recognize a live

70 *See* 4 C. WRIGHT & A. MILLER, *supra* note 8, § 1056, at 187-94; Siegel, *Practice Commentary on Amendment of Federal Rule 4 (Eff. Feb. 26, 1983) with Special Statute of Limitations Precautions*, 96 F.R.D. 88, 101-09 (1983).

71 *See* Mullenix, *The New Federal Express: Mail Service of Process Under Amended Rule 4*, 4 REV. LITIGATION 299, 331-34 (1985).

72 The same conclusion would apply if the 120-day period elapses after the statute of limitations has run and service still is not accomplished. The federal court's dismissal and refusal to find good cause would terminate the lawsuit. Though technically the dismissal is without prejudice, the party would have no opportunity to refile. However, in that case, the action cannot go forward because the state limitations period prevents its refiling, not because the Federal Rule shortened the life of the cause of action.

73 *See, e.g.*, Yarber v. Allstate Ins. Co., 674 F.2d 232, 233 (4th Cir. 1982); Shuford v. K.K. Kawamura Cycle Co., 649 F.2d 261, 262 (4th Cir. 1981). If the state does not recognize a grace period for refiling, then the operation of Rule 4(j) effectively terminates the action. *See generally* 4 C. WRIGHT & A. MILLER, *supra* note 8, § 1056, at 193-94. However, in that event, the action still is cut off because of state law, which treats the Rule 4(j) dismissal as final.

74 *See generally* 4A C. WRIGHT & A. MILLER, *supra* note 8, § 1137, at 385.

75 *But see* Bryant v. Ford Motor Co., 832 F.2d 1080 (9th Cir. 1987) (en banc) (dissenting opinion) (Rule 4(j) cannot be reconciled with California rule allowing three years for service on John Doe defendants and Federal Rule must govern).

claim to exist.[76] However, unlike Rule 3, a narrow construction of the Rule as unrelated to limitations periods arguably is not necessary or reasonable in order to avoid a conflict with state law.[77] The *Walker* Court noted that "[t]he Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies."[78]

If Rule 4(j) is construed to act as a tolling provision, the Federal Rule could control. The question whether Rule 4(j) so construed would violate the Rules Enabling Act limitations need never be seriously considered because of the unusual circumstances surrounding the 1983 rule amendments. Those amendments were not the product of the ordinary rulemaking process; rather, they were the first to be enacted by Congress.[79] As congressional legislation, therefore, the provision is not limited by the Enabling Act's substantive rights prohibition[80] and a construction demanding its application would not be inconsistent with the original concerns of Justice Brandeis about federal *judicial* power.[81] This conclusion is only mildly comforting, however, since a similar provision appeared in the proposed 1982 rule amendments[82] and there is no indication that Congress took control of the amendment process because of Rules Enabling Act concerns.[83]

Against this background and analysis, it is interesting to look at the experience of the lower courts. In particular, two reported cases deal in some detail with the potential governing law questions surrounding Rule 4(j).[84]

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76 The wisdom of this interpretation for practitioners cannot be seriously questioned. *See, e.g.*, Siegel, *supra* note 70, at 106 ("[W]hen the statute of limitations is at stake, it is better to bow than to differ. Bowing, in this context, means taking such steps as will satisfy all possible criteria, rather than indulging oneself with too rosy an assumption.").

77 Such a narrow construction would entail viewing the rule as only "a time requirement for service triggered by the filing of a complaint under Rule 3." 4A C. WRIGHT & A. MILLER, *supra* note 8, § 1137, at 396. Although this narrow construction is feasible and limits the scope of the rule to matters clearly within the rulemaking power, one may question whether it is meaningful or realistic. Even Professors Wright and Miller do not seem convinced. *See* 4 C. WRIGHT & A. MILLER, *supra* note 8, § 1057, at 206 ("Although Rule 3 is inapplicable for limitations purposes in diversity actions, Rule 4, as amended in 1983, is both applicable and relevant to the tolling of the statute of limitations.").

78 *Walker*, 446 U.S. 740, 750 n.9 (1980).

79 *See* Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1983).

80 *See* Sentry Corp. v. Harris, 802 F.2d 229, 233 n.7 (7th Cir. 1986); Walker, *The 1983 Amendments to Federal Rule of Civil Procedure 4— Process, Jurisdiction, and Erie Principles Revisited*, 19 WAKE FOREST L. REV. 957, 977 (1983).

81 *See supra* note 17.

82 Proposed 1982 amendments to Rule 4, *reprinted in* 93 F.R.D. 255, 258 (1982). The Advisory Committee Notes attached to proposed subdivision (j) make no mention of statute of limitations questions. *Id.* at 263. The absence of attention to the issue has been questioned elsewhere. *See* Siegel, *supra* note 70, at 977.

83 For a discussion of the changes and concerns reflected in Congressional action, see 4A C. WRIGHT & A. MILLER, *supra* note 8, § 1137, at 386-90. The House Report accompanying the bill to delay the effect of the Supreme Court's 1982 proposals refers to concerns about ambiguities as to how Rule 4(j) would interact with the limitations statutes, but appears to focus on the meaning of the terms "dismissal without prejudice," rather than on the validity of the rule insofar as it might allow the continuation of an action after the statute had run. H. REP. No. 662, 97th Cong., 2d Sess. 4-5, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 595, 597-98.

84 Two additional cases exist, but are not holdings. *See* Sentry Corp. v. Harris, 802 F.2d 229, 233 n.7 (7th Cir. 1986) (federal question case in which state limitations borrowed. Court never reached

The Second Circuit in *Morse v. Elmira Country Club*,[85] confronted the problem whether the New York statute of limitations, which relies on service for commencement, would bar a federal diversity suit in which plaintiff mailed service to defendant before the state statute ran, but defendant's refusal to return the required acknowledgement resulted in personal delivery after the limitations period had expired, but within the 120 days allowed by Rule 4(j). The district court had dismissed the action, relying on *Walker*[86] but the Second Circuit reversed. The court's decision, however, does not suggest Federal Rule dominance. Rather, it rests on the conclusion that state law controls the tolling of the statute, whereas federal law controls the proper method of service.[87] Under this interpretation, federal law determined how to treat the effectiveness of mail service under the circumstances in the case and the court found it to be accomplished before the statute ran. The appellate court rejected the argument that the suit also was timely because personal service was achieved within the Rule 4(j) period. The court held that the argument that Rule 4(j) effectively adds 120 days to the state statutory period "is a dubious proposition at best in light of *Walker*. . . ."[88] The court also noted that the legislative history supporting the Rule suggests that Congress was cognizant of the distinction between tolling rules and service rules and did not intend to enact any rule that would affect the statutory period.[89]

The second case involving Rule 4(j) presented a slightly different situation. In *Poulos v. Wilson,*[90] plaintiff filed suit and actually served process eight days before the Vermont statute of limitations expired. However, under state law, plaintiff had an additional time constraint — service had to be accomplished within thirty days after filing (in contrast to Rule 4(j)'s 120-day period) to constitute proper commencement. In the case at hand, thirty-one days had elapsed.[91] The district court reviewed the entire *Erie* line of cases and found that the Vermont rule was similar to that in *Walker* and was an integral part of the state statute of limitations.[92] Further, it noted that since the *Walker* Court had concluded that Rule 3 was not intended to displace state tolling rules and the Supreme Court had in another decision commented that Rule 4 deals only with process,[93] it was unwilling to conclude that Rule 4(j) should

plaintiff's Rule 4(j) argument, but commented in a footnote that the rule does not operate as a tolling provision in diversity cases); Bryant v. Ford Motor Co., 832 F.2d 1080 (9th Cir. 1987) (en banc) (dissenting opinion) (Rule 4(j), which was more restrictive than state law, viewed as controlling).

85 752 F.2d 35 (2d Cir. 1984).
86 102 F.R.D. 199, 200 (W.D.N.Y. 1984).
87 *Morse*, 752 F.2d at 38.
88 *Id.* at 42.
89 *Id.*
90 116 F.R.D. 326 (D. Vt. 1987).
91 *Id.* at 328.
92 *Id.* at 329.
93 Schiavone v. Fortune, 477 U.S. 21, 30 (1986).

displace any "state rules that describe the steps needed to commence an action so as to toll the state limitations period."[94]

The Supreme Court implicitly confirmed the correctness of these analyses in its 1987 decision in *West v. Conrail*.[95] Although that case involved a federal question, the Court in a footnote stated that in diversity suits "state law not only provides the appropriate period of limitations but also determines whether service must be effected within that period."[96]

The ease with which the lower courts have concluded that the proper scope of Rule 4(j) is limited to a process provision, not a tolling rule, is notable, particularly in light of the ambiguities appearing to support Federal Rule dominance. Perhaps the restrained approach taken by the courts is not surprising since it was suggested in the legislative history surrounding the 1983 amendments to Rule 4.[97] Nonetheless, the fact that lower courts readily have adopted this interpretation demonstrates that, despite the opportunity for the expansion of federal court power in this setting, the federal courts have followed *Erie*, ruling with great deference to state law. It also suggests that *Walker* may have resolved the confusion about the proper analysis to be used when evaluating governing law questions involving the Federal Rules.

C. *Federal Rule 15(c)*

Rule 15(c) provides yet another challenge to the lower courts' understanding of the balance between state power over substance and federal power over procedure. This section analyzes the experience under Rule 15(c), both after *Hanna* and then after *Walker*, to see whether governing law issues have been resolved readily or any differently there. Before discussing the lower courts' treatment of these issues, however, it is important to understand the special questions raised under Federal Rule 15(c), as they differ somewhat from those arising under Federal Rules 3 and 4(j).

Rule 15(c) provides authority for the federal courts to allow the amendment of pleadings adding claims for relief or changing the parties against whom a claim is made after the relevant statute of limitations has run. Specifically, Rule 15(c) allows those amendments to relate back to the filing of the action whenever the amendments meet the standards set out in the Rule.[98] The requirements relating to amendments which

94 116 F.R.D. at 330. The court also relied on Morse v. Elmira Country Club, 752 F.2d 35 (2d Cir. 1984) to support its conclusion.

95 107 S. Ct. 1538 (1987).

96 *Id.* at 1541 n.4.

97 See the Report of the Department of Justice to the House Judiciary Committee on the proposed legislative amendments of Rule 4. That report is reprinted in the Congressional Record of the House hearings and may be found at 96 F.R.D. 81, 120 n.14 (1983).

98 Relation back of amendments involving additional claims or defenses requires that they arise out of the "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." If a party is to be changed, the court must find additionally that "within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake

change parties were given a narrow construction by the Supreme Court in its 1986 decision in *Schiavone v. Fortune*.[99] The Court held that the language in the Rule requiring that the notice to the newly named defendant must have been provided "within the period provided by law for commencing the action against the party," referred to the applicable statute of limitations and did not include the time period that might be allowed for service of process under Rule 4(j). Although this construction can be criticized,[100] it avoids any suggestion that the Federal Rule impermissibly enlarges the limitations period. Perhaps because of this, the Court avoided the opportunity in *Schiavone* to address the *Erie* question.[101]

Stated generally, the primary governing law issue that arises is whether the Rule 15(c) standard should control when state law includes different standards for the relation back of amendments adding claims or parties. Where the federal relation back criteria are more liberal than the state's, the application of Rule 15(c) arguably serves to enlarge the period for bringing a timely claim in violation of the state limitations period. Conversely, if the federal criteria are more restrictive than the state, their application and the resultant denial of the amendment arguably shortens the state statutory period. Viewed this way, a decision to allow Federal Rule dominance appears inconsistent with the Supreme Court's sensitivity in *Ragan* and later in *Walker* to avoiding rule constructions that impermissibly affect the state statutory period. Consequently, as was true in the cases involving Rules 3 and 4(j), the question becomes whether it is possible to construe Rule 15(c) in such a way that it would not conflict with, but would allow deference to, state law. If not, then it is necessary to consider whether the Rule is valid under the Enabling Act standard.[102]

A review of the treatment of Rule 15(c) by the lower federal courts reveals their difficulties in understanding the Supreme Court's standard for analysis, as well as the potential for conflicting results. Prior to 1980 and the *Walker* clarification of *Hanna* and *Ragan*, a majority of the courts reached their conclusions on the governing law issue with no discussion,[103] often never even citing the relevant Supreme Court doc-

concerning the identity of the proper party, the action would have been brought against the party." FED. R. CIV. P. 15(c).

99 477 U.S. 21, 30 (1986).

100 *See Schiavone*, 477 U.S. at 32-40 (Stevens, J., dissenting); Bauer, *Schiavone: An Un*-Fortune-*ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720 (1988).

101 *See* Lewis, Jr., *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507, 1545 (1987).

102 *See infra* text accompanying notes 125-27.

103 The following cases held that Rule 15(c) was more liberal than the state law and that Rule 15(c) controlled. These courts gave little or no attention to the basis for this conclusion, nor did they cite *Hanna* or *Ragan*. *See, e.g.*, Ingram v. Kumar, 585 F.2d 566, 570 n.5 (2d Cir. 1978); Gifford v. Wichita Falls & S. Ry. Co., 224 F.2d 374, 376 (5th Cir. 1955); Grandey v. Pacific Indem. Co., 217 F.2d 27, 29 (5th Cir. 1954); Petsel v. Chicago, B. & Q. R. Co., 202 F.2d 817, 863 (8th Cir. 1953); American Fidelity & Casualty Co. v. All Am. Bus Lines, 190 F.2d 234, 237 (10th Cir. 1951); Patraka v. Armco Steel Co., 495 F. Supp. 1013, 1016 (M.D. Pa. 1980); Pittman v. Anaconda Wire & Cable Co., 408 F. Supp. 286, 290-91 (E.D.N.C. 1976); Garr v. Clayville, 71 F.R.D. 553, 555 (D. Del. 1976); Thomas v. Medesco, Inc., 67 F.R.D. 129, 131 (E.D. Pa. 1974); United States for Use of E & R Constr.

trine.[104] Others avoided the issue by ruling that the federal and state rules essentially were similar or would produce the same results.[105]

The courts that actually tackled the governing law question, like the earlier courts dealing with the applicability of Rule 3, were divided in their conclusions. A majority held that the Federal Rule should control.[106] Some based that conclusion on a finding that a direct conflict between the federal and state relation back rules existed so that, relying on *Hanna*, federal law should govern.[107] At least one court distinguished *Ragan* on the ground that, unlike Rule 3, Rule 15(c) could not be construed to avoid a conflict.[108] Yet others held that *Hanna* overruled *Ragan*[109] (a conclusion now known to be erroneous). Those courts hold-

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Co. v. Guy H. James Constr. Co., 390 F. Supp. 1193, 1201-02 (M.D. Tenn. 1972); Swartzwelder v. Hamilton, 56 F.R.D. 606, 608 (M.D. Pa. 1972); Carroll v. Sterling Hotel Co., 16 F.R.D. 99, 100 (M.D. Pa. 1964); Russell v. Pay Way Feed Mills, Inc., 221 F. Supp. 314, 317 (D. Kan. 1963); Borup v. National Airlines, 117 F. Supp. 475, 476-77 (S.D.N.Y. 1954). *But see* Straub v. Jaeger, 9 F.R.D. 672, 675 (E.D. Pa. 1950).

In some cases the court never stated whether the federal rule was more liberal, more restrictive or identical to the state relation back rule, but merely ruled that Rule 15(c) prevails, without citing either *Hanna* or *Ragan*. *See, e.g.*, Anderson v. Phoenix of Hartford Ins. Co., 320 F. Supp. 399, 405 (W.D. La. 1970); C. Corkin & Sons, Inc. v. Tide Water Assoc. Oil Co., 20 F.R.D. 402, 404 (D. Mass. 1957); Robert W. Irwin Co. v. Sterling, 14 F.R.D. 250, 257 (W.D. Mich. 1953). The same lack of analysis appears in some cases holding that state law applies. *See, e.g.*, McNamara v. Kerr-McGee Chem. Corp., 328 F. Supp. 1058, 1059 (E.D.N.C. 1971); Brennan v. Rooney, 139 F. Supp. 484, 489 (E.D. Pa. 1956); DeFay v. East & West Ins. Co., 101 F. Supp. 922, 925 (N.D. Ill. 1951).

104 A few cases decided the governing law question without discussion, but cited *Hanna* for authority, ruling that the Rule 15(c) governs. *See, e.g.*, Royal Indem. Co. v. Petrozzsino, 598 F.2d 816, 820 (3d Cir. 1979); Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088, 1093 n.2 (N.D.N.Y. 1977); Tabacalera Cubana v. Faber, Coe & Gregg, Inc., 379 F. Supp. 772, 776 (S.D.N.Y. 1974). Others ruled in favor of state law without discussion, but relying on *Ragan*. *See, e.g.*, Nave v. Ryan, 266 F. Supp. 405, 407 (D. Conn. 1967); Nayer v. Robertshaw-Fulton Controls Co., 195 F. Supp. 704, 706-07 (D. Mass. 1961); Tarbert v. Ingraham, 190 F. Supp. 402, 404-05 (D. Conn. 1960). *But compare* Fricks v. Louisville & Nashville R.R. Co., 46 F.R.D. 31, 33 (N.D. Ga. 1968) (ruling that Rule 15(c) controls by distinguishing *Ragan*).

105 *See, e.g.*, Skidmore v. Syntex Laboratories, Inc., 529 F.2d 1244, 1249 (5th Cir. 1976); Travelers Ins. Co. v. Brown, 338 F.2d 229, 234 (5th Cir. 1964); Russell v. New Amsterdam Casualty Co., 303 F.2d 674, 680-81 (8th Cir. 1962); Taormina Corp. v. Escobedo, 254 F.2d 171, 174 (5th Cir. 1958); Burns v. Turner Constr. Co., 265 F. Supp. 768, 769 (D. Mass. 1967); Cone v. Shunka, 40 F.R.D. 12, 14 (W.D. Wis. 1966); Wm. T. Burton, Inc. v. Reed Roller Bit Co., 214 F. Supp. 84, 86 (W.D. La. 1963); Frankel v. Styer, 209 F. Supp. 509, 510 (E.D. Pa. 1962); Melzer v. Hotel Corp. of Am., 25 F.R.D. 62, 67 n.7 (N.D. Ohio 1959); Smith v. Potomac Edison Co., 165 F. Supp. 681, 685 (D. Md. 1958); Ross v. Philip Morris Co., 164 F. Supp. 683, 688-89 (W.D. Mo. 1958); Wholesale Supply Co. v. South Chester Tube Co., 20 F.R.D. 310, 314-15 (E.D. Pa. 1957); Ackerley v. Commercial Credit Co., 111 F. Supp. 92, 96-97 (D.N.J. 1953); Janis v. Kansas Elec. Power Co., 99 F. Supp. 88, 91 (D. Kan. 1951).

106 *See, e.g.*, Davis v. Piper Aircraft Corp., 615 F.2d 606, 611-12 (4th Cir. 1980); Welch v. Louisiana Power & Light Co., 466 F.2d 1344, 1345-46 (5th Cir. 1972); Loudenslager v. Teeple, 466 F.2d 249, 250 (3d Cir. 1972); Crowder v. Gordons Transp., Inc., 387 F.2d 413, 417-19 (8th Cir. 1967); Goodman v. Poland, 395 F. Supp. 660, 682-83 (D. Md. 1975); Applied Data Processing, Inc. v. Burroughs Corp., 58 F.R.D. 149, 151-52 (D. Conn. 1973); Anderson v. Phoenix of Hartford Ins. Co., 320 F. Supp. 399, 405 (W.D. La. 1970); Holmes v. Pennsylvania N.Y. Cent. Transp. Co., 48 F.R.D. 449, 451-52 (N.D. Ind. 1969); Scalise v. Beech Aircraft Corp., 47 F.R.D. 148, 150-51 (D. Del. 1969); Newman v. Freeman, 262 F. Supp. 106, 110-13 (E.D. Pa. 1966); Meredith v. United Air Lines, Inc., 41 F.R.D. 34, 39 (S.D. Cal. 1966); Martz v. Miller Bros. Co., 244 F. Supp. 246, 249-50 (D. Del. 1965). *But see* Magno v. Canadian Pac., Ltd., 84 F.R.D. 414, 415-16 (D. Mass. 1979).

107 *See, e.g.*, *Davis*, 615 F.2d at 611-12; *Crowder*, 387 F.2d at 417-19; *Goodman*, 395 F. Supp. at 682-83; *Meredith*, 41 F.R.D. at 39.

108 *See Davis*, 615 F.2d at 611-12.

109 *See, e.g.*, *Applied Data Processing, Inc.*, 58 F.R.D. at 152; *Scalise*, 47 F.R.D. at 150-51; *Newman*, 262 F. Supp. at 111.

ing that the Federal Rule controlled assumed without explanation that their construction of Rule 15(c) comported with the Rules Enabling Act restrictions.[110]

On the opposite side of the spectrum, fewer courts held in favor of applying the relevant state law to determine whether a particular amendment should relate back. Not surprisingly, prior to *Hanna*, those courts so ruling uniformly found *Ragan* to compel that result.[111] Confronted with the *Hanna* Court's deference to the Federal Rules, a few courts nonetheless still ruled in favor of state law.[112] In one case the court reached that conclusion because it found that it was clear that Rule 15(c) did not apply to the computation of the limitations period.[113] The First Circuit, which found the more restrictive Federal Rule to be in conflict with the relevant state law, held in favor of state law. The court reasoned that a Federal Rule cannot be applied if it defeats state substantive law and that *Hanna* requires the application of a conflicting Federal Rule only when two strictly procedural rules are in direct conflict.[114]

The point here is not to suggest that the results in these cases were improper. Rather, it is simply to emphasize the lack of consensus (and perhaps understanding) in the lower courts of how to make a proper *Hanna* analysis.

The results and analysis found in the reported opinions since *Walker* remain, at least on the surface, divided. Sixteen reported opinions presenting Rule 15(c) governing law questions have appeared since 1980.[115] Eleven ruled in favor of Federal Rule control;[116] five ruled in favor of state law.[117] Of the eleven decisions favoring Federal Rule

110 *See, e.g.*, *Davis*, 615 F.2d at 611-12; *Crowder*, 387 F.2d at 417-19; *Goodman*, 395 F. Supp. at 682-83; *Holmes*, 48 F.R.D. at 452; *Scalise*, 47 F.R.D. at 150-51; *cf., e.g.*, *Welch*, 466 F.2d at 1345-46; *Meredith*, 41 F.R.D. at 39-40 (no mention of any Rules Enabling Act implications).

111 *See, e.g.*, Cummings v. Greif Bros. Cooperage Co., 202 F.2d 824, 827 (8th Cir. 1953); Talley v. Piersen, 33 F.R.D. 2, 4 (E.D. Pa. 1963); St. Paul Fire & Marine Ins. Co. v. Continental Bldg. Operating Co., 137 F. Supp. 493, 494-95 (W.D. Mo. 1956); Nola Elec. Co. v. Reilly, 93 F. Supp. 164, 172 (S.D.N.Y. 1949), *cert. denied sub nom.* Reilly v. Goddard, 340 U.S. 951 (1951).

112 *E.g.*, Marshall v. Mulrenin, 508 F.2d 39, 44-45 (1st Cir. 1974); Burns v. Turner Constr. Co., 265 F. Supp. 768, 769-70 (D. Mass. 1967), *aff'd on other grounds*, 402 F.2d 332 (1st Cir. 1968); West v. Atlas Chem. Indus., Inc., 264 F. Supp. 697, 701 (E.D. Mo. 1966).

113 *West*, 264 F.Supp. at 701.

114 *Marshall*, 508 F.2d at 44.

115 Eighteen decisions actually have been found. But in two of them the courts found the state and federal rules on relation back to be identical so that they did not need to make a choice regarding the governing law. *See* Farris v. Moeckel, 664 F. Supp. 881, 895 & n.4 (D. Del. 1987); Odence v. Salmonson Ventures, 108 F.R.D. 163, 167 n.3 (D.R.I. 1985).

116 *See* Johansen v. E.I. Du Pont de Nemours & Co., 810 F.2d 1377, 1380 (5th Cir.), *cert. denied*, 108 S. Ct. 148 (1987); Santana v. Holiday Inns, Inc., 686 F.2d 736, 740 (9th Cir. 1982); Contemporary Mission, Inc. v. New York Times Co., 665 F. Supp. 248, 255 (S.D.N.Y. 1987), *aff'd*, 842 F.2d 612 (2d Cir. 1988); Thomas v. Mitchell-Bradford Chem. Co., 582 F. Supp. 1373, 1375 (E.D.N.Y. 1984); Florence v. Krasucki, 533 F. Supp. 1047, 1050-52 (W.D.N.Y. 1982); Gabriel v. Kent Gen. Hosp., 95 F.R.D. 391, 393 (D. Del. 1982); Curry v. Johns-Manville, 93 F.R.D. 623, 625 n.3 (E.D. Pa. 1982); Anastacio v. Holiday Inns, Inc., 93 F.R.D. 560, 563 (D.N.J. 1982); American Banker's Ins. Co. of Fla. v. Colorado Flying Academy, 93 F.R.D. 135, 137 (D. Colo. 1982); Kasko v. American Gage & Mach. Co., 90 F.R.D. 162, 163 (E.D. Pa. 1981); Roesberg v. Johns-Manville, 89 F.R.D. 63, 66-67 (E.D. Pa. 1981).

117 *See* Lindley v. General Elec. Co., 780 F.2d 797, 799-801 (9th Cir.), *cert. denied*, 476 U.S. 1186 (1986); Knauer v. Johns-Manville Corp., 638 F. Supp. 1369, 1376-79 (D. Md. 1986); Layton v. Blue Giant Equip. Co., 105 F.R.D. 83, 86 (E.D. Pa. 1985); Santiago v. Becton Dickinson, 539 F. Supp. 1149, 1152-53 (D.P.R. 1982); Covel v. Safetech, Inc., 90 F.R.D. 427, 432-33 (D. Mass. 1981).

15(c), three contain no discussion and no reference to Supreme Court decisions under the *Erie* doctrine.[118] Five others simply hold that *Hanna* controls, with no reference either to *Ragan* or *Walker*.[119] There may be several explanations for this phenomenon, such as that the lower courts remain confused as to what the relevant authority is, or that the history and authority supporting federal rule control prior to the *Walker* Court's clarification and reaffirmation of *Ragan* is so deeply embedded that, in the absence of clear Supreme Court guidance on Rule 15(c), the lower courts will continue to give "knee-jerk" responses. The implications of this latter view are most distressing. Given the crowded Supreme Court docket, the notion that no understandable standard exists and that the scope of each federal rule must be tested in the Supreme Court before controversy is dispelled means prolonged chaos. But the future is less bleak if we look more carefully at those Rule 15(c) opinions that actually confront *Walker*. They suggest that an understanding and consensus may be evolving concerning how to reconcile the scope of the Federal Rules with state control over substantive matters, such as the statute of limitations.

Of the seven opinions considering *Walker*, three favor the application of Federal Rule 15(c),[120] and four rule in favor of state law.[121] Distinctions between the underlying facts involved in these two sets of cases may justify the different conclusions reached on the governing law issue. Further, these opinions reveal that at least some federal courts are very aware of the careful balancing of state and federal interests required under *Erie*; they have not broadly construed either *Hanna* as automatically commanding federal rule dominance, or *Walker* as demanding deference to state law whenever the statute of limitations is implicated. No "litmus paper" test has emerged.

Although each of the three cases upholding federal rule dominance relied on *Hanna*, they went further. In each case the federal rule was more liberal than the state provision on relation back. It was noted that ruling in favor of federal law would not promote forum-shopping in violation of *Erie* since the question of amendments and relation back arises after the suit is filed and thus is unlikely to enter into the choice of a forum.[122] *Walker* was distinguished on the ground that the Supreme

118 *See Gabriel*, 95 F.R.D. at 393; *Curry*, 93 F.R.D. at 625 n.3; *Kasko*, 90 F.R.D. at 163.

119 *See Johansen*, 810 F.2d at 1380; *Santana*, 686 F.2d at 740; *Contemporary Mission, Inc.*, 665 F. Supp. at 255; *Thomas*, 582 F. Supp. at 1375; *Anastacio*, 93 F.R.D. at 563.

120 *See* Florence v. Krasucki, 533 F. Supp. 1047 (W.D.N.Y. 1982); American Banker's Ins. Co. of Fla. v. Colorado Flying Academy, Inc., 93 F.R.D. 135 (D. Colo. 1982); Roesberg v. Johns-Manville Corp., 89 F.R.D. 63 (E.D. Pa. 1981). In each of these cases it was not clear that a different result would have been commanded by state law; nonetheless, the court went on to complete a careful *Erie* analysis. *See Florence*, 533 F. Supp. at 1053 n.3; *American Banker's*, 93 F.R.D. at 137; *Roesberg*, 89 F.R.D. at 66.

121 *See* Lindley v. General Elec. Co., 780 F.2d 797 (9th Cir. 1986); Knauer v. Johns-Manville Corp., 638 F. Supp. 1369 (D. Md. 1986); Santiago v. Becton Dickinson & Co., 539 F. Supp. 1149 (D. P.R. 1982); Covel v. Safetech, Inc., 90 F.R.D. 427 (D. Mass. 1981). A fifth decision honoring state law exists, but the court there reached its conclusion based on an interpretation of Federal Rule 15(c) as incorporating state law, not on an analysis of the *Erie* doctrine. *See* Layton v. Blue Giant Equip. Co., 105 F.R.D. 83, 86-87 (E.D. Pa. 1985).

122 *See Florence*, 533 F. Supp. at 1052-53; *Roesberg*, 89 F.R.D. at 67.

Court there was concerned with a situation in which suit would be barred in state court when originally filed in the federal forum so that allowing the federal suit to go forward would violate the state statute of limitations.[123] In contrast, Rule 15(c) deals only with amendments, and these cases were timely when they were filed. Finally, it was noted that unlike the limited purposes of Rule 3, Rule 15 involves strong federal policies of deciding cases on their merits. Further, its application would not invade any state limitations policies directed at assuring defendant notice within the prescribed period, because the standards of Rule 15(c) also are premised on adequate notice being accomplished.[124]

These same observations also support the conclusion that Rule 15(c) is valid under the Rules Enabling Act, given the minimal restrictions imposed by the substantive rights prohibition in that statute.[125] Although the operation of the Rule might affect the litigants' rights, it fosters a legitimate procedural purpose—that of avoiding decisions on technicalities rather than the merits by allowing simplified pleading, liberal amendments and the easy joinder of claims and parties.[126] Rule 15(c) in no way modifies the decisional rules by which the court will adjudicate the rights involved.[127]

In contrast, an important element in the decisions supporting the application of state law was the finding in each of those cases that the relevant state rule was directly related to the limitations period or the state's definition of the cause of action so that *Walker* controlled.[128] In addition, however, each decision went on to find that deference to state law satisfied the policies underlying *Erie*.

In two of the cases, the courts upheld the application of state rules allowing the substitution of named defendants for John Does without requiring compliance with the standards of Rule 15(c). The Federal Rule was construed as not dealing with the question of the permissible use of John Does. Rather, Rule 15(c) was deemed applicable only when the limitations period had run. Therefore, the Federal Rule did not conflict with the state law.[129] The third case involved a state provision allowing a change of parties based solely on the fact that the additional claims arose out of the same transaction as the original action. There, the court found that adhering to state law was consistent with the general purpose of the Federal Rule, which was to create a liberal climate for amendments. Thus, unlike *Hanna*, it would not violate federal policy to apply state law.[130] In each of these three cases, the courts applied the careful rule construction urged by the *Hanna* Court to find that no real conflict ex-

123 *See Florence*, 533 F. Supp. at 1051; *American Bankers*, 93 F.R.D. at 137; *Roesberg*, 89 F.R.D. at 67-68.

124 *See Florence*, 533 F. Supp. at 1052.

125 *See supra* text accompanying notes 36-47.

126 *See* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1503, at 535 (1971).

127 *See also* 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 21, § 4509, at 148-60.

128 *See* Lindley v. General Elec. Co., 780 F.2d 797, 801 (9th Cir.), *cert. denied*, 476 U.S. 1186 (1986); Knauer v. Johns-Manville Corp., 638 F. Supp. 1369, 1376 (D. Md. 1986); Santiago v. Becton Dickinson & Co., 539 F. Supp. 1149, 1153 (D.P.R. 1982); *Covel*, 90 F.R.D. at 429.

129 *See Lindley*, 780 F.2d at 801; *Santiago*, 539 F. Supp. at 1153.

130 Covel v. Safetech, Inc., 90 F.R.D. 427, 431-32 (D. Mass. 1981).

isted between federal and state law. In the fourth case, the court was not able to avoid finding a conflict; state law was more restrictive than federal. However, the court noted that the state rule was strongly substantive in character, creating a condition precedent to suit, rather than merely a statute of limitations. To allow the application of the Federal Rule would produce the inequitable administration of the law that *Hanna* and *Erie* both foreswore.[131] Thus, all the courts carefully investigated the purpose of both the state and federal rules and deferred to the state's right to control substantive matters.

In sum, these post-1980 Rule 15(c) decisions are additional evidence that the balance between federal and state power has not been shifted automatically to federal rule dominance. Rather, the kind of careful inquiry into the proper scope of the federal and state rules suggested by *Hanna* has ensured attention to state interests.[132] If these cases are any indication, the lower courts, at least post-*Walker*, appear to appreciate how to analyze this issue to assure that state interests are not overlooked.[133] As *Hanna* itself exemplifies, this does not mean that the Federal Rules always must take a back seat. "Instead, all that is required is a sensitive application of the Civil Rules that accommodates state concerns, and—in the rare cases of clear conflict—a limited decision that an individual Rule cannot be applied in light of a particular conflict with a specific state policy."[134] These cases have accomplished this goal.

IV. Conclusion and Prognosis

There have been several recent attacks on Rule amendments and current Rules that suggest growing tension in this marriage of state and federal powers.[135] For example, the 1983 amendments to Rules 11 and 26 authorizing mandatory sanctions for attorney "misconduct" have been challenged as creating new substantive rights for winning parties.[136] Consider also the furor over the proposed amendments to Rule 68 on offers of settlement, challenging their validity under the Rules Enabling Act on the ground that the proposal might be inconsistent with Congressional desire to encourage civil rights litigation through attorney

131 *See Knauer*, 638 F. Supp. at 1379.

132 It has been suggested that Rule 15(c) may present a situation in which a federal rule should be subordinated to important state substantive policies tied to the limitations period even when the federal rule is on point. *See* Lewis, Jr., *supra* note 101, at 1554.

133 The approaches just described are appropriate from the limited standpoint this paper takes—do the courts appreciate the kind of careful policy analysis required since *Hanna* and the need to construe the rules carefully to allow for deference to state law when appropriate. I have not attempted to investigate whether the precise rule or construction achieved by the courts appears correct. This latter inquiry might produce additional layers of controversy. *See, e.g.*, Lewis, Jr., *supra* note 101, at 1524-34. For example, in the case of the more restrictive Federal Rule which was held not controlling, in part because the purposes underlying rule 15(c) were deemed satisfied by application of the state's approach, *Schiavone* now may suggest that a construction of the rule in light of its purpose, rather than its plain meaning, may be inappropriate. *See* Bauer, *supra* note 100. It is not clear that *Schiavone* should be read that broadly since it did not deal with the governing law problem. Nonetheless, the potential for future confusion on that conclusion remains.

134 *See* 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 21, at 142.

135 *See generally* W. BROWN, *supra* note 17, at 86-93.

136 *See* Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1007-09 (1983).

fee awards to successful litigants.[137] Even more broadly, the availability of class actions under Federal Rule 23 has been seen as changing the stakes of litigation to such a degree that its use has been challenged, on the one hand, as altering substantive rights[138] and, on the other, as denying rights because of the broad binding effect of the judgments entered.[139]

The political pressures in each of these settings ultimately may produce a legislative solution.[140] That solution, if it comes, should not result in a wholesale stripping of judicial rulemaking authority.[141] Rather, Congress should respond more specifically to curtail the scope or impact of Federal Rules in particular areas in which political interests demand intervention.[142] Consequently, it will remain for the courts to determine the validity of most Rule challenges, deciding whether the line between substance and procedure has been crossed.

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137 *See* Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 MICH. J.L. REF. 425 (1986); Silverstein & Rosenblatt, *A Square Peg In a Round Hole: The Application of Rule 68 to Awards of Attorney's Fees in Civil Rights Litigation*, 16 CONN. L. REV. 949, 962-67 (1984); Note, *The Conflict Between Rule 68 and the Civil Rights Attorneys' Fee Statute: Reinterpreting the Rules Enabling Act*, 98 HARV. L. REV. 828, 838-46 (1985). *But see* Simon, *Rule 68 at the Crossroads: The Relationship Between Offers of Judgment and Statutory Attorney's Fees*, 53 U. CIN. L. REV. 889, 904-05 (1984) ("Rule 68 functions as a purely procedural device to assist the court in determining the extent of a prevailing plaintiff's right to attorney's fees under section 1988.").

138 The availability of class relief has caused the courts to adapt new techniques of case management as well as to develop approaches to allow various issues to be proved collectively, rather than individually. These changes, which may have the effect of allowing suits to go forward that before would not have been brought, thus have expanded the potential for enforcement of certain laws. For example, in the securities fraud area, in which reliance must be proved, the Supreme Court has ruled that reliance may be inferred from the materiality of the misstatements or omissions, allowing for easier class action certification because it no longer presents an individual issue. *See* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 152-53 (1972). *See generally* 7B C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1781, at 48-50 (1986). Such changes provide ammunition for class action antagonists to charge that the substantive law is being altered improperly merely to accommodate the smooth functioning of a federal rule. *See* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits — The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 5-10 (1971); Comment, *The Impact of Class Actions on Rule 10b-5*, 38 U. CHI. L. REV. 337, 367-68 (1971). The validity of these criticisms is ably countered elsewhere. *See* Hazard, *The Effect of the Class Action Device Upon the Substantive Law*, 58 F.R.D. 307 (1973). The point here is simply to note that these tensions are ongoing and will continue, as they are part of the nature of the rulemaking process. *See, e.g.*, Fyr, *On Classifying Class Suits: A Reply to Mr. Ross*, 27 EMORY L.J. 267 (1978).

139 *See generally* 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 138, § 1789.

140 Problems in less politically controversial areas also have been identified to suggest the need for congressional review of the rulemaking process. *See* Lewis, Jr., *supra* note 101, at 1565-69.

141 Most recent proposals to amend the Rules Enabling Act leave rulemaking to the judiciary, but seek to expand the representativeness of the Advisory Committee and ensure broader and longer opportunity for criticism. *See, e.g.*, H.R. 1507, 100th Cong., 1st Sess. (1987). *See generally* W. BROWN, *supra* note 17, at 79-86.

142 For example, after challenges to class actions under the Truth in Lending Act on the ground that the use of the class device carried the statutory remedy to an extreme, Congress amended the statute to allow class relief, but placed a ceiling on damages. 15 U.S.C. § 1640(a)(2)(B) (1982). *See generally* 7B C. WRIGHT, A. MILLER & M. KANE, *supra* note 138, § 1804.

The areas just mentioned present tough cases. However, given the examination of how the courts have handled like questions in the equally difficult area of statutes of limitations, it is reasonable to expect that they will remain mindful of Justice Brandeis' *Erie* constraints and will construe the state and federal rules involved in such a way as to honor those policies. And we should not be surprised if, in the next fifty years, these results do not come easily, but only after some confusion. For, as noted by Professor Wright, "federalism is not a tidy concept."[143]

143 C. WRIGHT, *supra* note 11, at 364. *See also id.* at 387.