Swift to Erie/York, Hanna and Beyond: Proposed Solutions for a Major Problem of Diversity Jurisdiction

E. Blythe Stason Jr.
Marshall-Wythe School of Law, College of William and Mary

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Courts Commons, and the Jurisdiction Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol1/iss1/7

This Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
SWIFT TO ERIE/YORK, HANNA AND BEYOND: PROPOSED SOLUTIONS FOR A MAJOR PROBLEM OF DIVERSITY JURISDICTION

E. Blythe Stason, Jr. *

I. Introduction

A. Historical Background

Diversity jurisdiction of the United States District Courts is a leading feature of the American constitutional federation. Authorized by Article III of the Constitution\(^1\) and early implemented by Congressional enactment,\(^2\) diversity jurisdiction attempted to protect nonresident litigants in state courts from the sectional prejudice that was prevalent at the time. "Diversity courts"\(^3\) are required by the Rules of Decision Act to apply state law.\(^4\) This arrangement immediately created serious difficulties. One was whether diversity courts should apply state or federal "procedural"\(^5\) law. The more serious problem of characterization of state law as "substantive" or "procedural" did not arise until 1938. That year marked the enactment of the Federal Rules of Civil Procedure\(^6\) and the landmark decision of

---

\*Associate Professor of Law, Marshall-Wythe School of Law, College of William and Mary. A.B. 1946; M.A. 1947; LL.B. 1956, University of Michigan; LL.M. 1957, Harvard.


2 28 U.S.C. § 1332(a) (1964) (corresponds to Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 79) provides for original diversity jurisdiction, and 28 U.S.C. § 1441 (a) (1964) provides for such jurisdiction by removal, where the principal amount in dispute is valued at $10,000 or more.

3 This terminology is not only convenient as shorthand, but expressive of the temporary hybridization of District Courts that occurs when they take jurisdiction of causes arising under state law.

4 The Rules of Decision Act says: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1964).

5 Owing to the uncertain meaning of the words "substantive" and "procedural", particularly when used in diversity matters, they will be enclosed in quotation marks as a warning to handle them with discretion.

6 See Rules Enabling Act, 28 U.S.C. § 2072 (1964). That statute, in pertinent part, provides: "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions. Such rules shall not abridge, enlarge or modify any substantive right . . ." [Italics added.]
Prospectus

*Erie R.R. Co. v. Tompkins.* There the Supreme Court decided that the Constitution requires diversity courts to apply "substantive" state law, whether statute or judicial opinion. Pre-*Erie* courts were governed by the mandate of *Swift v. Tyson* that the words "law of the several states" in the Rules of Decision Act apply to state statutes. In matters of general import diversity courts were free to apply federal common law to "substantive" questions of more than local significance and to disregard state decisional law.

The primary justification for the *Swift* rule was that it would establish a uniform body of law in the diversity courts (and hopefully in the state courts). Naturally enough, this hope was never realized in the state courts which continued to follow the decisional law of their own state. The *Swift* rule created a federal common law that frequently differed from state law. Some litigants, preferring federal law, fabricated diversity jurisdiction in order to gain access to the federal courts. Those able to obtain diversity jurisdiction had a choice of "substantive" law not open to local adversaries. Such "forum shopping" generated much well-deserved criticism.

Despite its drawbacks and the failure of its major purpose, the *Swift* rule remained the law for nearly a century. It declined in force as much of the area of its operation came to be regulated by state statute.

*Swift* was overruled on constitutional grounds in *Erie R.R. Co. v. Tompkins.* Mr. Justice Brandeis, speaking for the Court, declared that diversity courts must apply state law to "substantive" issues. He said:

> The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. . . . *(T)*he unconstitutionality of the course pursued has now been made clear. . . .

> 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. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law ap-

---

7 *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938). [Hereinafter cited as *Erie*]
8 41 U.S. (16 Pet.) 1 (1842)
9 Note 4 *supra*.
10 See *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928). The outraged dissent in that case by Mr. Justice Holmes was an important part of the foundation for overruling *Swift* in *Erie*.
11 *Erie*, *supra* note 7.
12 Mr. Justice Brandeis here refers to the words "laws of the several states" as used in the Rules of Decision Act, Note 4 *supra*, to govern diversity litigation. These words were deemed by the Court in *Swift v. Tyson* to refer only to state statutes where matters of general significance were concerned. Despite recent judicial developments, see text accompanying notes 48-76, casting doubt on the meaning of *Erie* today, this *Erie* interpretation remains good law. *C.I.R. v. Estate of Bosch*, 387 U.S. 456 (1967) and cases cited therein.
Diversity Characterization

applicable in a state whether they be local in the nature or 'general'.\textsuperscript{13} [Italics added]

The \textit{Erie} rule that diversity courts are constitutionally required\textsuperscript{14} to apply state law to issues found “substantive”, combined with applicability of the concurrently created Federal Rules \textit{except where} they are likely to “abridge, enlarge or modify any substantive (state-created) right,”\textsuperscript{15} posed a fundamental problem: What test shall courts use in determining whether a given issue is “substantive” or “procedural”? Characterization\textsuperscript{16} of these two words in the traditional conflict of laws context has been difficult; their meaning in diversity cases has proven impossible to establish. The task of diversity courts is further complicated by the natural tendency of judges to use each of these very familiar terms in its orthodox sense.\textsuperscript{17}

The greatest difficulty of all in diversity characterization is caused by the sensitivity of the political area involved—the area where state and federal constitutional powers abut, and where the relative powers of state and nation are ill defined. The courts have had to feel their way in this touchy situation, deciding each case without adequate guidance from the past and simultaneously attempting to establish guideposts for the future. At best these attempts have proved only partially successful. Above them all looms \textit{Erie}, towering like a rock in the swirling fog and withholding all attack by its strength and indistinctness.\textsuperscript{18}

\section*{B. Purposes of this Article}

There are four purposes of this article: \textit{First}, to expose more fully the nature and dimensions of the difficult problem of determining whether a

\begin{thebibliography}{99}
\bibitem{Erie} \textit{Erie, supra} note 7, at 77-78.
\bibitem{Many} Many, including Mr. Justice Reed in his partially concurring opinion in \textit{Erie}, 304 U.S. at 90-92, believed the constitutional language to have been unnecessary. \textit{See} Stason, \textit{Choice of Law Within the Federal System: Erie v. Hanna}, 52 \textit{CORNELL L.Q.} 377, 387 n. 34. For criticism of the author's acceptance of \textit{Erie}'s constitutional foundation, see Editorial Comment by Professor Keeffe in 53 \textit{A.B.A.J.} 865 (1967). As the constitutional force of \textit{Erie} has been widely accepted for nearly thirty years, further discussion of that issue seems inappropriate.
\bibitem{Characterization} “Characterization” is the conflict-of-laws term for identifying the legal category, e.g., contracts v. tort; “substance” v. “procedure”—for a given issue or law. Accordingly, characterization involved in this discussion will be termed “diversity characterization.” Regarding the difficulty of characterizing as “substantive” or “procedural,” \textit{see} the listing of eight separate purposes for “substance-procedure” characterization in Cook, \textit{“Substance” and “Procedure” in the Conflict of Laws}, 42 \textit{YALE L. J.} 333, 341-7 (1933).
\bibitem{Inappropriateness} To illustrate the inappropriateness of such use, \textit{see} the author’s listing, text accompanying notes 79-90, \textit{infra}, of several legal issues deemed “procedural” in interstate conflict of laws but either occasionally or universally found to be “substantive” in diversity matters.
\bibitem{Generality} This comment is intended not as criticism of \textit{Erie} qua decision, but as a reminder that the very generality of its operative words makes it an imprecise guide in diversity characterization.
\end{thebibliography}
particular rule is "substantive" or "procedural"; Second, to discuss the various judicial attempts to solve it; Third, to show the shortcomings of those attempts, as manifested in both established doctrine and current federal judicial opinions; and, Fourth, to propose some solutions.

It should be made clear that we are involved here with a question of allocating power within our federal union. Diversity characterization functions as an unintended device allocating power between state and federal judiciaries. The difficulties inherent in our basic problem are magnified because feelings run high in this area, and opinions differ widely. The author of this article is not a partisan of either "states' rights" or centralization of power in the federal government. An allocation of power was made by the framers of the Constitution nearly two hundred years ago, and the durability of their product attests to the wisdom of their effort. Circumstances have changed radically since then, and corresponding changes in power allocation are probably needed now. The author believes that power should be allocated to state or nation according to current needs and relative capabilities. Some alteration by judicial "legislation" is both inevitable and desirable. It is believed, however, that most of the required change should be made in the authorized manner — with the combined consent of the governed and those politically responsible to them, and not by politically unresponsive judges.

II. Development of Diversity Jurisdiction:
The Four Stages of Erie

A. Introduction

In order to understand the diversity characterization doctrine that has been established since Erie, the double constitutional base of that case should be reviewed. Erie stated that Swift v. Tyson was unconstitutional in two ways: it had (1) deprived state court litigants of equal protection of the laws by allowing litigants with similar claims in diversity cases a choice of "substantive" law, and (2) invaded powers reserved to the states by the Tenth Amendment, by prescribing a federal general common law for state-created causes of action ungoverned by state statute. It should be noted here that the Erie Court said nothing about "forum-shopping" by name, thus indicating a belief that this evil was a result of Swift's unconstitutionality rather than a cause.

As with other important and disputed constitutional pronouncements, a handful of leading judicial opinions mark the principle stages of Erie's career. Most of these are well known to practicing lawyers and scholars alike; hence, no attempt will be made to discuss them individually in detail. Each will be briefly mentioned, however, to trace the post-Erie course of diversity characterization, in order to show its principle features and
present position. There are four overlapping but distinct stages in the
development of that characterization: extension, clarification, limitation
and partial negation.

B. Extension of Diversity Characterization under Erie

One week after the Erie decision Ruhlin v. New York Life Insurance
Co.\(^{19}\) stated that Erie governs diversity suits in equity.\(^{20}\) Three years later, in Griffin v. McCoach,\(^{21}\) the Court applied Erie uniformity\(^{22}\) to forum-
state public policy. This extension was quite significant as it established the
basis for the important "policy-balance" approach that began to appear
shortly thereafter and now plays an important part in diversity characteri-
zation. The same year, Erie uniformity was extended in Klaxon Co. v.
Stentor Electrical Mfg. Co.\(^{23}\) to state conflict of law rules.

In contrast with these two extensions of Erie is Sibbach v. Wilson &
Co.\(^{24}\) There the Court characterized as "procedural" the issue of whether
the plaintiff in a tort action can be required to take a physical examina-
tion as provided in Federal Rules 35 and 37. Speaking through Mr. Justice
Roberts, the Court first stated that the Federal Rules are "procedural"
per se for diversity purposes.\(^{25}\) It then enunciated its diversity character-
ization test, saying:

The test must be whether a rule really regulates procedure — the ju-
dicial process for enforcing rights and duties recognized by substan-
tive law and for justly administering remedy and redress for disregard
or infraction of them.\(^{26}\)

\(^{19}\) 304 U.S. 202 (1938).

\(^{20}\) Suits in equity were not covered by the Rules of Decision Act, 28 U.S.C. § 1652, in 1938; it then applied only to "trials at common law", the Act has since been amended to govern all "civil actions." 28 U.S.C. § 1652 (1964).

\(^{21}\) 313 U.S. 498 (1941).

\(^{22}\) One of the Erie Court's major purposes in holding that the Rules of Decision Act governs state judicial law as well as state statutes, was to ensure as far as possible that the disposition of any given case would be the same in the diversity court as it would have been in its proper state court. The Court sought to achieve this uniformity by requiring diversity courts to apply state "substan-
tive" law, in order to eliminate the unconstitutional invasion of state reserved powers and the infringement of non-diverse parties' constitutional right to equal protection of the laws that prevailed under Swift v. Tyson. It will therefore be called "Erie uniformity."

\(^{23}\) 313 U.S. 487 (1941).

\(^{24}\) 312 U.S. 1 (1941).

\(^{25}\) Id. at 11. See also, Hanna v. Plumer, 380 U.S. 460, 469-74 (1965). [Hereinafter cited as Hanna]

\(^{26}\) 312 U.S. at 14. The Court in effect begged the question, implying a rigid, exceptionless belief that the judicial processes for enforcing legal rights can never have any "substantive" effect recognizable as such in the context of diversity jurisdic-
tion. Indeed, the Court's definition of "substantive" is circular; it essentially defines the word in terms of itself.
In 1945, the Supreme Court extended *Erie* uniformity to state statutes of limitation.\(^{27}\) It did the same for state "door-closing" statutes in 1947\(^{28}\) and 1949;\(^{29}\) for state bond-posting requirements for shareholders' derivative actions;\(^{30}\) for tolling provisions of state statutes of limitation\(^{31}\) in 1949; for the validity of contract arbitration clauses\(^{32}\) in 1956.

**C. Clarification of Diversity Characterization under Erie: Creation of Standards**

Meanwhile, the Supreme Court was attempting to establish a reliable test for *Erie* characterization. The Court in *Guaranty Trust Co. v. York*\(^{33}\) went far toward attaining that goal. Speaking for the Court, Mr. Justice Frankfurter remarked that ordinary meanings of the word "substantive" are unsuitable for use in diversity matters. He then continued:

The question is . . . whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a state that would be controlling in an action upon the same claim by the same parties in a State Court?\(^{34}\)

The intent of *Erie*, he declared, was to insure that in all diversity cases " . . . the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a state court."\(^{35}\)

The Court thus enunciated what is now called the "outcome test" for determining substantive law in the *Erie* sense.\(^{36}\) After the *York* decision, the outcome test was the principle instrument used by the Supreme Court in its rapid extension of *Erie*. That test has come to be regarded as an essential part of the *Erie* doctrine, which is sometimes referred to as "*Erie/York*.”

**D. Limitation of Erie/York: Byrd v. Blue Ridge**

The outcome test is a sensible and easily understood guide for distinguishing between "substance" and "procedure" in diversity cases. It had


\(^{33}\) York, *supra* note 27, and accompanying text.

\(^{34}\) Id. at 109.

\(^{35}\) Id. at 109. [Italics added.]

\(^{36}\) York did not inaugurate the outcome test. It was employed by the First Circuit in 1940 in a sophisticated opinion by Judge Magruder, Sampson v. Channell, 110 F. 2d 754, 756 (1st Cir.1940).
Diversity Characterization

to be applied with some restraint, however, to forestall a natural tendency to overuse. The Court first employed it to extend *Erie* rapidly and rather widely, at the expense of federal law, including the Federal Rules. The Court then began to doubt the wisdom of such extension. The first sign of retreat was *Byrd v. Blue Ridge Electrical Co-operative, Inc.*

In *Byrd* the Court had to decide whether the defendant's tort immunity under the state statute must be decided by the judge, according to forum-state law, or by the jury, as required by federal law. The Court, speaking through Mr. Justice Brennan, agreed that a jury might well be "outcome determinative" in the *York* sense. It then said that in cases where, as here, the rule in question is neither the source of state-created rights nor "bound up" with such rights, but is merely the "form or mode" for enforcing them, the outcome test requires application of state law only if the policy upon which it is based outweighs that behind the contrary federal law. The Court concluded that the federal policy was stronger and held the outcome test is inapplicable. While unsatisfactory in some ways, the "policy-balance" test has come to be recognized by the Supreme Court as a major part of its diversity characterization machinery. It has been used to limit the outcome test in a number of cases, and evolved in accordance with the present centralist trend into the still more restrictive position adopted in 1965 by the Supreme Court in *Hanna v. Plumer*.

E. Partial Negation of Erie/York: Hanna v. Plumer

The recent *Hanna* decision is one of the most thought-provoking and controversial of the *Erie* progeny. It represents the Court's first real attempt to totemize *Erie* — to acknowledge its existence but deny what many believe to be its essential meaning — and thereby to accomplish a partial return to the *Swift* rule.

A personal injury action was brought against the administrator of a decedent in a Massachusetts diversity court. Substituted service valid under Federal Rule 4(d)(1), but void under Massachusetts law, was made on the administrator. The facts of the case thus brought a Federal Rule into square and unavoidable conflict with state law. The reader will note that *Byrd* does not qualify the outcome test, but implicitly negates it instead. While that test was designed as a definition of "substantive" for diversity purposes, the *Byrd* Court quietly declined to accept it as such, and characterized the law in question in another, unspecified, way.


*Hanna, supra* note 25.

*Id. at* 470. The Court said that this was the first such conflict. 380 U.S. at 472. But see, *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), where the Supreme Court applied the forum-state tolling provision of

---


38 The reader will note that *Byrd* does not qualify the outcome test, but implicitly negates it instead. While that test was designed as a definition of "substantive" for diversity purposes, the *Byrd* Court quietly declined to accept it as such, and characterized the law in question in another, unspecified, way.


41 *Hanna, supra* note 25.

42 *Id. at* 470. The Court said that this was the first such conflict. 380 U.S. at 472. But see, *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), where the Supreme Court applied the forum-state tolling provision of
Prospectus

Justice Warren, the Court said that the Rule must govern for two reasons. First, application of the federal instead of the state service requirement did not contravene the "twin aims" of *Erie* — to prevent inequitable administration of the law and forum-shopping. Second, *Erie* is inapplicable where the Federal Rules are concerned. The Court stated:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions. [Citations Omitted] For the constitutional provision for a Federal-court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure are rationally capable of classification as either. [Citation Omitted]

Neither *York* nor the cases following it ever suggested that the rule there laid down for coping with situations where no Federal Rule applies is coextensive with the limitation on Congress to which *Erie* had adverted.43

Mr. Justice Harlan, in an excellent concurring opinion, agreed with the *Hanna* result but took serious exception to its rationale. He objected in particular to the Court's elevation of the Rules to a position of impregnability where, because they have presumably been "rationally" classified as "procedural" by those charged with their formulation and adoption, they must always be applied regardless of their "substantive" impact.

As Justice Harlan pointed out, the Court cast doubt upon the position of prior diversity characterization standards by declining to overrule or even specifically limit any of the cases in which such standards had been developed. It even declined to overrule *Ragan v. Merchants Transfer Warehouse Co.*,44 the one case in which the Supreme Court had apparently discarded a Federal Rule in favor of state law. By leaving these landmark cases technically alive and in full health, yet effectively declaring

---

43 Id. at 471-472.
44 See note 31 supra.
that applicable Federal Rules must always prevail, the Court left diversity characterization under *Erie* in a state of confusion and uncertainty. *First,* it cast doubt upon *Erie*’s meaning by referring to that case as having “twin aims.” The general view has been that *Erie* had but a single objective: to require the same result in each diversity case that would have occurred had its cause of action been brought in the forum-state court. *Second,* the Court required application of the Federal Rules to issues lying in the gray zone between “substance” and “procedure,” thus implying that that zone does not exist where the Rules are concerned. It did not, however, state explicitly that this is so, leaving a question as to whether state law can ever be applied in derogation of a Rule. *Third,* the Court left the position of prior characterization doctrine in a state of uncertainty even where the Rules are *not* involved, for how can one say what is left by *Hanna* of the outcome test, the policy-balance test, or any other judicial gloss upon the “substantive” language of *Erie?* *Hanna* apparently barred the outcome test where the Rules are concerned, for application of Rule 4(d)(1) clearly affected the result. It did not, however, provide guidance where other federal law—equally supported by the Constitution—is concerned.

At all events, *Hanna*’s plain objective was an ouster of *Erie* from matters involving the Federal Rules of Civil Procedure.46

**F. Present State of Diversity Characterization: *Erie/York* in the Light of *Hanna***

There is little question that *Hanna,* despite its careful avoidance of explicit injury to prior landmark cases, represents a turning-point in the history of diversity jurisdiction. It is the Court’s first clear move to limit *Erie*’s scope. Also there is little question that the reasoning employed by the *Hanna* court has created much judicial uncertainty about the current meaning and value of the *Erie* doctrine. That uncertainty is clearly reflected in the opinions handed down since 1965, and was foreshadowed by Mr. Justice Harlan in his *Hanna* concurrence:

... I respect the court’s effort to clarify the [*Erie* characterization] situation in today’s opinion. However, in doing so I think it has misconceived the constitutional premises of *Erie* and has failed to deal adequately with those past decisions upon which the courts below relied.47

45 But see post-*Hanna* cases denying that this is so.
47 *Hanna,* supra note 25, at 474.
To indicate the conflict in judicial views of Hanna's meaning, and the consequent effect upon prior characterization doctrine, some of the forty-odd cases citing Hanna are discussed below. Those involving the Federal Rules are most pertinent, of course, and will be mentioned first. Some support Hanna fully or even extend it; others support the Ragan rule as distinguishable on its facts. Some indication of judicial attitudes toward Hanna will also be indicated, but only a reading of the cases themselves can give a true picture of this more subjective matter.

1. Cases Involving the Federal Rules. One of the first cases following Hanna is Sylvestri v. Warner & Swasey Co. It involved, as did Ragan, a clash between the tolling provision of a state statute of limitation and Federal Rule 3. As in Ragan, the suit was timely filed under the Federal Rule but not under the state statute. The District Court held that the Rule was controlling under Hanna. In so holding, the Court indicated its belief that Hanna had overruled Ragan sub silentio. The Court concluded that Hanna and Ragan, although differing in detail, had reached opposite results on essentially similar facts. It said:

The principle applied in Ragan was that if "one is barred from recovery in the state court, he should likewise be barred in the federal court." . . . This principle cannot survive Hanna because admittedly the plaintiff in Hanna was barred from recovery in the state courts.

The emphasis in Hanna is rather on the supremacy of the Federal Rules when squarely in conflict with state law plus promotion of a policy to prevent 'forum shopping.'

This view has been rejected by the Sixth Circuit in Sylvester v. Messler and by the Eighth Circuit in Groninger v. Davidson. Each applied state tolling provisions instead of Rule 3 under facts similar to those in

---

48 See text accompanying notes 52 and 53, infra.
50 Rule 3 provides that an action is commenced by filing the complaint, while the state tolling provision states that the action shall be commenced for limitation-tolling purposes only upon proper service of process. An action may therefore be time-barred under the latter rule and not the former, if the complaint was timely filed but service was either incorrectly made or made after the statute of limitations had run. Those were the facts in both Ragan and Sylvester.
51 244 F.Supp. at 527. To the same effect, see Newman v. Freeman, 262 F.Supp. 106, 111 (E.D.Pa. 1966); Callan v. Lilybelle, Ltd., 39 F.R.D. 600 (S.D.N.Y. 1966) (alternative ground); and Morman v. Standard Oil Co., Div. of American Oil Co., 263 F.Supp. 911 (D.S.Dak. 1967) (The Morman court indicated its confusion by citing Ragan and Hanna together for the proposition that "statutes of limitation, in diversity cases, . . . are tolled, at the moment of the summons and the complaint after filing by the clerk are delivered to the United States Marshal for service within the time period allowed under the laws of the state where such actions are brought." 263 F.Supp. at 912.)
53 364 F.2d 638 (8th Cir. 1966).
Diversity Characterization

Ragan and Sylvestri. This difference of view among the lower federal courts seems firmly held, and its resolution may require an opinion by the Supreme Court.

A number of other Federal Rules have been involved in diversity cases under Hanna. In Pinewood Gin Co. v. Carolina Power & Light Co. the Court allowed joinder of the plaintiff's insurer under Rules 17(a) and 19(a) in an action for injury to personal property rejecting contrary state law. The Court looked upon Hanna as precluding it from even examining the issue of outcome-determination.

2. Cases not Involving Federal Rules. A number of diversity cases not involving Federal Rules have also cited Hanna, but few declare it controlling or even persuasive. It is naturally in these cases that the courts tend to indicate their doubt as to Hanna's meaning: Does it have any important influence upon cases that, unlike itself, do not involve the Rules? One non-Rule case is Boutin v. Cumbo, where the Court actually extended the outcome test to borrowing statutes. This was a natural companion extension to Ragan, for both borrowing statutes and tolling provisions are designed to work in conjunction with statutes of limitation, which are substantive under York's outcome test. In Bolick v. Prudential Life Insurance Co. the forum-state statute barring incontestibility of the life insurance policy involved in the case was inconsistent with a particular clause in the policy. The defendant insurer argued that Hanna barred application of the statute. The Court, unfortunately omitting to set forth the defendant's reasoning, said: "Fortunately, this controversy unlike that [in Hanna] . . . invites no bending of the rule of Erie." In Anderson v. Moorer the Fifth Circuit affirmed the frequently-disputed proposition that a diversity court is merely another forum-state tribunal, saying: "This Court sits, in a diversity action, as another Alabama court. We cannot entertain any action not maintainable in an Alabama court, and the Alabama state courts would not allow relitigation . . ." The court in Lapides v. Doner held that the forum-state rule against taking jurisdiction of cases involving the internal affairs of foreign corporations was one of venue, hence "procedural". The "guideline" built into the corresponding federal law that gave the diversity court discretion to hear such cases was applicable instead.

---

54 Both courts said Hanna and Ragan are distinguishable. To the same effect is O'Shea v.Binswanger, 42 F.R.D. 21 (D. Md. 1967).
56 For dictum to the same effect, see Stone v. Terranella, 372 F.2d 89 (6th Cir. 1967).
59 Id. at 739. [Italics added.]
60 372 F.2d 747 (5th Cir. 1967).
61 Id. at 751.
Andry v. Maryland Casualty Co.\textsuperscript{64} held that state law governed tolling of the applicable state statute of limitations.\textsuperscript{65} The Andry court so held, despite its statement that the statute was "procedural" in a nondiversity sense, because its application was outcome-determinative under \textit{York}, and, unlike the state service-of-process law in \textit{Hanna}, it did not conflict with a Federal Rule. The court said:


Whether the latter language in \textit{Andry} draws the proper "substance-procedure" boundary under \textit{Hanna} is impossible to say at this time. Recently, in \textit{Mull v. Ford Motor Co.},\textsuperscript{67} Chief Judge Lumbard indicated that a policy-balancing test might be used instead of \textit{Hanna} to decide the question of whether state or federal law establishes the standard for sufficiency of evidence to justify the direction of a verdict in a diversity case, implying thereby that \textit{Hanna} may be confined to "rule-clash" situations.\textsuperscript{68}

Remember that the post-\textit{Hanna} cases where Rule 3 was rejected under \textit{Ragan} in favor of state law have created a split of authority as to whether \textit{Hanna}'s apparent "federal-supremacy" doctrine is applicable even where the Federal Rules are involved. Where they are not, judicial opinion, discussed above, indicates that prior \textit{Erie} doctrine is at least partially alive. A footnote in a recent Fourth Circuit case may be indicative. In \textit{Bowman v. Curt G. Joa, Inc.},\textsuperscript{69} the court held that diversity courts must apply state law to certain questions of personal jurisdiction. Then it said:

The decisions in . . . [\textit{Byrd} and \textit{Hanna}] do not alter the \textit{Erie} rationale [that the constitution requires state-federal uniformity of judicial result in state-law cases] so as to warrant disregarding the interest of the State in controlling the jurisdictional reach of the courts sitting therein.\textsuperscript{70}

\textsuperscript{64} 244 F.Supp. 143 (E.D. La. 1965).
\textsuperscript{65} Rule 3 was not involved here.
\textsuperscript{66} 244 F.Supp. 143, 144-145 (1965).
\textsuperscript{67} 368 F.2d 713 (2d Cir. 1966).
\textsuperscript{69} 361 F.2d 706 (4th Cir. 1966).
\textsuperscript{70} \textit{Id.} at 711, n. 11.
This language, while in a mere footnote, indicates the Fourth Circuit's intent to limit Hanna rather than Erie, where the former's language permits.

Two final cases cast still further shadows upon the effect of Hanna on existing diversity characterization doctrine. In the first, Mintz v. Allen, the court applied the forum-state bond-posting statute in a shareholder's derivative action under "rule-clash" facts resembling those in Cohen. The opinion in the second case, Graziano v. Pennell, is particularly interesting because of the well-known preference of its author, Judge Friendly, for uniform application of the Federal Rules. In Graziano, the appellant appealed from an order dismissing his diversity action as time-barred under forum-state law. He did so upon the ground that a saving clause in the state statute of limitation was applicable. Denying appellant the benefit of that clause, because New York courts would have done so under the facts, and because the failure to conform would have affected the outcome of the case in derogation of strong New York state legislative policy, Judge Friendly said:

Although "outcome determination" analysis was never intended to serve as a talisman, Hanna v. Plumer at 466-7, it is not to be discarded but rather is to be applied with "reference to the twin aims of the Erie rule: discouragement of forum shopping and avoidance of inequitable administration of the laws." 380 U.S. at 468 . . . The years have trimmed some of the dicta in Guaranty Trust v. York . . . but the Hanna decision made clear that the core of the Guaranty case remained unaffected . . . It remains true that when no recovery on a right created by state law could be had in a state court because the action is effectually time barred, "the accident of a suit by a non-resident litigant in a federal court instead of a state court a block away, should not lead to a substantially different result." 326 U.S. at 107-9.

Keen analyst though he is, Judge Friendly appears here to be unsure of Hanna's effect upon Ragan. He is even unsure of its effect upon York. While he says that the "core" of York was untouched by Hanna

72 Note 30 supra. Mintz was before the court on pendent, not diversity, jurisdiction. The fact is not significant for present purposes, however. See U.M.W. v. Gibbs, 383 U.S. 715 (1966).
73 371 F.2d 761 (2d Cir. 1967).
74 Id. at 764.
75 Judge Friendly indicated this doubt in another part of the Graziano opinion, saying "The passing of Ragan would bring no tears from us . . . and an able district judge [Wyatt, in Sylvestri] in this circuit thinks Hanna, in fact, administered the happy dispatch . . ." Id. at 763. [Italics added.]
The foregoing survey shows that a sort of battle-line is rapidly being drawn among the various lower federal courts, with representatives of the Hanna ideology on one side and Erie/York partisans on the other. Since it is doubtful whether the Supreme Court will clarify matters in the near future, or whether the diversity characterization dilemma is capable of satisfactory judicial clarification, a legislative solution is strongly urged.

III. Difficulties Involved in Diversity Characterization: A Summary

A. The Federal-State Power Conflict

Diversity jurisdiction in its present form has given rise to a third court system—the diversity courts. The characterization problems that must be dealt with by its judges changed when Erie replaced Swift, but they did not become easier. The first of these is that diversity characterization frequently brings state and federal law into conflict. In this connection, however, it should be noted again that that unique form of characterization necessarily functions at times as a device for power allocation. It did so in Hanna, for example, where the Supreme Court employed it to make the federal rule-making power supreme in an area where realms of state and federal constitutional authority overlap.

B. Unnecessary Complexities

A second difficulty is the unnecessary ramifications and complications that can grow from what might be called the “diversity characterization syndrome”. Two sources of complexity that have been discussed recently in scholarly journals are the doctrines of forum non conveniens and the indispensable party. The apparently inevitable interrelationship of diversity characterization problems with the problems involved in each of these doctrines creates complex, time-consuming difficulties that the litigant should not be compelled to endure.

C. Contradictions between Diversity and Nondiversity Characterization

“Substance-procedure” terminology in diversity cases, introduced and compelled by Erie’s critical use of the word “substance”, has contributed

---

78 This is especially true under amended Rule 19. See 53 Va.L.Rev. 1209 (1967).
Diversity Characterization

greatly to the basic difficulty in diversity characterization. The normal use of these familiar words is in the context of intrastate cases, where they are employed to allocate issues between the two sets of laws adopted by each jurisdiction, one to govern positive rights and the other to govern judicial mechanics. Furthermore, particular issues tend to receive their usual intrastate characterization in interstate conflict of laws matters although this should not always occur, as different policies are frequently involved. Considerations involved in either of these two situations differ so greatly from those encountered in diversity characterization, however, that use of those same words in the latter context invites both inaccuracy and unnecessary difficulty.

The use of “substance” and “procedure” in diversity cases has frequently produced different characterization from that in the state courts. A brief list of these inconsistent characterizations will suggest the difficulties involved. The following matters, usually characterized “procedural” in state courts, are, or may sometimes be, considered “substantive” in diversity matters:

(a) Rules regarding privileged communications.\(^7^9\)
(b) Choice of law rules.\(^8^0\)
(c) Rules regarding res judicata and collateral estoppel.\(^8^1\)
(d) Rules regarding sufficiency of evidence to justify direction of a verdict.\(^8^2\)
(e) Rules regarding jurisdiction over subject-matter.\(^8^3\)
(f) Rules regarding jurisdiction over parties.\(^8^4\)
(g) State statutes of limitation.\(^8^5\)
(h) Tolling provisions of state statutes of limitation.\(^8^6\)

---

\(^7^9\) Hill v. Huddleston, 263 F.Supp. 108 (D. Md. 1967). The Hill court qualified its position by saying that, while a diversity court should apply state law to matters involving privileged communication, it is not settled that \textit{Erie} requires that result.

\(^8^0\) Klaxon, supra note 23, and Sampson, supra note 36. See also, such post-\textit{Hanna} cases as Mack Trucks, Inc., v. Bendix-Westinghouse, Co., 372 F.2d 18, 20 (3d Cir. 1966) and Debbis v. Hertz Corp., 269 F.Supp. 671 (D. Md. 1967). For a re-examination of fundamental considerations, read the remarks of Professor Cavers in \textit{Change in Choice of Law Thinking and its Bearing on the Problem}, A.L.I. \textsc{Study of the Division of Jurisdiction Between State and Federal Courts}, (Tentative Draft No. 1) at 154 (1963). Professor Cavers suggests that the \textit{Klaxon} rule may be neither constitutionally required, nor even desirable in all cases.

\(^8^1\) Mull v. Ford Motor Co., 368 F.2d 713 (2d Cir. 1966).


\(^8^4\) Guaranty Trust Co. v. York, supra note 27. \textit{See also}, such post-\textit{Hanna} cases as Atkins v. Schumitz Mfg. Co., 372 F.2d 762 (6th Cir. 1967).

\(^8^5\) Ragan v. Merchants Transfer & Warehouse Co., note 31 supra and the post-\textit{Hanna}
D. Difficulty in Formulating Standards

By the time Hanna was decided in 1965, “substance-procedure” characterization had been made uncertain by the concurrent existence of three different methods of characterization. One was normally employed by the state courts. The diversity courts realized that abandonment of the state standard was necessary, for characterization in diversity matters serves a different purpose. But examination of the cases occasionally reveals a tendency of the judges to employ the old, familiar usages of the two ancient words, “substance” and “procedure”, judges frequently forgot that these words are mere labels that must now be attached to new meanings.

The second method of characterization, designated for diversity matters alone, was the outcome test announced in York. The Court attempted, without lasting success, to define the word “substantive” in terms of the parties' principal objective in bringing their diversity cause. Its goal was to ensure Erie uniformity by forbidding application of federal law when the result would differ substantially from that available under state rules.

The third method was the policy-balance test of Byrd. The Court attempted to limit York's outcome test, by holding that outcome-determinative state law that is neither “substantive” itself nor “bound up with” “substantive” law, will be deemed “substantive” under the outcome test if the policy it involves is more compelling than that upon which the corresponding, contrary, federal law is based. While Byrd has gained many adherents, it appears to contain a basic misconception of York. York said that “outcome-determinative” is “substantive” in the Erie sense; Byrd merely said that outcome-determinative state laws will be applied under some circumstances even if they are deemed “procedural” under another, unspecified, standard.

Finally, the Supreme Court handed down Hanna v. Plumer. In Hanna, the Court apparently intended to establish two tests: (1) a state law is

---

88 Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940) and Palmer v. Hoffman, 318 U.S. 109, 116-119 (1943). See also, such post-Hanna cases as Peterson v. Mountain States Tel. & Tel. Co., 349 F.2d 934 (9th Cir. 1965).
89 Maryland Casualty Co. v. Williams, 377 F.2d 389 (5th Cir. 1967).
91 York, supra note 27.
“substantive” in the *Erie* sense if its difference from the federal law that would otherwise be applicable may lead to forum-shopping, or if application of that federal law would lead to “inequitable administration” of the laws; (2) Federal Rules are always “procedural” for diversity purposes, because *Erie* is irrelevant where the Rules are concerned, and, in any event, the Rules have been “rationally” classified as “procedural” by those charged with their preparation and adoption.

What is a diversity court today to make of all this? What test, or tests, will it use when the application of federal v. state law is in issue? It seems clear that the answer has not yet been found. The judges have marched sturdily along, divided in their views of *Hanna* and handling each case on an ad hoc basis. Obviously, this is not good enough. The unsatisfactory state of the law must plainly be remedied. What seems equally plain and considerably more important is that the *Hanna* doctrine of the supremacy of the Federal Rules at the expense of powers constitutionally reserved to the states must somehow be prevented from undermining our constitutionally federated union.

IV. Solution of the Diversity Characterization Dilemma

A. Assumptions Underlying Proposed Solution

Certain assumptions underlie a discussion of possible ways to alleviate or solve diversity characterization problems. The first of these is that for diversity characterization purposes, the terms “substance” and “procedure” have no inherent meaning. A reliable definition for use in the diversity courts alone is a “must” if their use in that context is to continue. It is submitted that the only way to establish such definitions is by legislation.

Second, compromise is needed if a satisfactory solution to the problems here outlined is to be formulated and accepted. Diversity jurisdiction lies at the vital center of our federal structure, having been established to care for a special need created by that structure. State and federal power zones abut in diversity causes; inevitably, they sometimes overlap. That is to say, in deciding whether to apply federal or state law to any particular issue in a diversity case, the court may well have to invade the one power zone or the other. This is a practical fact, whatever theory may say. For example, application in *Hanna* of Federal Rule 4(d)(1) deprived Massachusetts of its normally unquestioned right uniformly to apply its rules regarding service of process on decedents’ administrators. On the other hand, the *Ragan* court barred a diversity court from applying Federal Rule 3, one of a group of rules that that court is duty bound to employ. This overlap is illustrated by the fact that the same Court

---

decided *Ragan* and *Hanna* only six years apart, holding in the earlier case that Rules must be denied application on the ground of outcome-determination, and in the latter that outcome-determination is inapplicable where Rules are concerned. In theory, no overlap exists; in practice, it does.

Third, the need for simplicity and reliability must be remembered in formulating whatever test is adopted. It is probable that no acceptable test for diversity characterization can be truly universal; but basic simplicity and clarity, however, are probably within reach. Legislation seems required to attain them, however; for one hundred and twenty-five years of devoted and able judicial effort and experimentation have shown that a sound and lasting solution is beyond judicial capability.

Fourth, it must be remembered that times have changed. With them, the reasons for diversity jurisdiction have probably changed as well. Is its principal purpose still antidiscrimination? Or is it primarily a mere convenience, as some recent commentators have suggested? Is it now chiefly useful for experimentation or as a means for providing more expert courts than the states can muster for clients whose circumstances require this added expertise and can generate the requisite diverse citizenship? These questions must be answered before a proper solution can be found.

Finally, and most important, the rights of the litigants must be considered. Contrary to frequent judicial implications, the courts exist for them, and not the other way around. "Procedural" rules are mere devices to expedite the dispensation of parties' rights, not ends in themselves. The abstract symmetry of their universal application may be appealing, but it is irrelevant to the dispensation of justice. This point may seem obvious; its mention was prompted, however, by a consciousness that certain very able federal courts seem more preoccupied with the abstract desirability of uniform application of federal law than with the rights and convenience of those whom both courts and laws were created to serve.

**B. Some Proposed Solutions for the Diversity Dilemma**

There is probably no single complete and practicable solution to the many and varied problems encountered in diversity characterization. A compromise approach is needed, and the following short list of suggestions may provide a useful idea or two for those charged with supplying the best possible answer. They were chosen to present a spectrum of possibilities.

---

93 See, e.g., Wright, Field & Frank, *An Analysis of the American Law Institute's Proposals on the Division of Jurisdiction Between State and Federal Courts*, 17 S.CAR.L.REV. 660 (1965), and particularly Mr. Frank's comments, beginning at 677.

Diversity Characterization

Some are offered merely for contrast with more modest and realistic proposals, and not in the expectation or even remote hope that they will be adopted. Others are put forth as genuine suggestions for use in the near future.

(1) *Abolish Diversity Jurisdiction.* This plan has been mooted since the days of *Swift v. Tyson,* by those who feel that diversity jurisdiction is more trouble than it is worth, and has, in any event, outlived its original purpose. It has no chance at all of adoption, since its opponents would include not only scholars but the federal bench, the state bench (whose opposition would probably be based in part upon prospective inheritance of diversity cases), and many members of the practicing bar. It would probably require constitutional amendment. That solution would eliminate at once the headaches and time-wasting futilities involved in seeking the unattainable — a foolproof and universally approved judicial standard for diversity characterization. It would also relieve federal district judges of their present schizoid status as members of the “diversity bar”. In so doing, it would also take from their backs most of the burden of meting out justice concurrently under two systems of “substantive” law, state and federal, thus leaving them free to concentrate upon federal-question matters. Furthermore, it would appear that the original reason for diversity jurisdiction, sectional prejudice of the state courts against nonresident parties, is a fading factor today, and is being supplanted by a simple preference for federal courts and the Federal Rules. It is doubtful if such preferences are sufficient to justify continuance of diversity jurisdiction. If some can have these advantages, why not all?

(2) *Swift Expanded.* Another solution, less extreme but also likely to require constitutional amendment, is the adoption of an expanded form of *Swift v. Tyson* — one that applies federal law in all diversity cases.95 Combine this return to *Swift* with applicability of the Federal Rules under suitable amendment of the Rules Enabling Act, and diversity characterization problems of consequence would be a thing of the past. All such problems would then be decided entirely under federal law. Consider, however, the effect of this plan upon our federal structure!

Again, this plan is suggested more for contrast than in the belief or hope that it will be adopted.

(3) *Compromise Solutions.* Within the realm of practical politics, two ideas might be suggested. *First,* amend the Rules Enabling Act to provide that neither the Federal Rules, other federal law,96 nor federal policy shall be applied in diversity cases. This would leave diversity courts free to decide all matters, both “substantive” and “procedural”, under state law. It would eliminate time-wasting and uncertain efforts to characterize, and

95 Note that no distinction is made between statute and common law in either the diversity jurisdiction provision of Article III or the Rules of Decision Act. Nevertheless, repeal of the latter and amendment of the former would doubtless be required.

96 With a few exceptions, such as the transfer statute, 28 U.S.C. § 1404 (1964).
permit the diversity court to step almost exactly into the shoes of the forum-state tribunal.

While this plan would doubtless be opposed by bench, bar, and scholars as an unjustifiable inroad upon the Federal Rules, they would be less opposed to this solution than to the complete abolition of diversity jurisdiction. It also presents no apparent constitutional objections.97

A second possibility would be enactment of the outcome test of Guaranty Trust Co. v. York. One of the objections to the outcome test is its theoretical applicability in most cases. Therefore, it would have to be carefully limited under the rule of reason to prevent abuse. Thus limited, it would provide a realistic and reliable guide, couched in terms of result rather than label. This solution will not eliminate diversity characterization problems, of course. It can, however, be supported as the one least likely to arouse fatal opposition, yet most capable of providing a rule for diversity characterization that is at once simple, clear and workable. Furthermore, it is the only test that has proved generally satisfactory even in its judicial form.

V. Conclusion

Diversity jurisdiction, constitutionally created as a desirable concomitant of the legal interrelationship of states and nation created by our national federation, has been the source of perplexing and probably unnecessary problems. These arose from the holding of Erie R. R. Co. v. Tompkins and from the Rules Enabling Act which stated that district courts, when sitting in cases involving state-created causes of action, shall apply state "substantive" law but federal "procedural" rules. The terms "substantive" and "procedural" have, themselves, contributed substantially to those problems because they are used in many connections other than diversity, and necessarily have come to mean a different thing in each context. In addition, the federal court's duty to characterize for diversity purposes brings it face-to-face with the emotionally-charged task of choosing between federal laws, and those enacted under powers constitutionally reserved to the states. At times this choice necessarily involves actual infringement of overlapping state or federal constitutional powers.

Most present characterization standards, particularly as they stand under Hanna, are uncertain, mutually contradictory, and difficult to apply. Indeed, it now appears at least possible that no judicial standards for diversity characterization meeting the requirements of simplicity, clarity, and practicality will ever be evolved. It is reasonable, therefore, to recommend that Congress cut the Gordian Knot by legislatively adopting the outcome test of Guaranty Trust Co. v. York. This test will be a compro-

97 This plan has already been proposed by a practicing lawyer, E. L. Merrigan, Esq., of the Louisiana and New York Bars, in his article, Erie to York to Ragan — A Triple Play on the Federal Rules, in 3 Vand. L. Rev. 711 (1950).
mise between the ideal and the attainable. Care must be exercised to prevent its overuse at the expense of laws designed and used primarily or entirely to govern the operation of the federal judicial mechanism. The outcome test, thus limited, may in the end generate sufficient support to achieve Congressional acceptance.