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Federal Rules of Civil Procedure—Service of Process—Test of Applicability in Diversity Cases—*Hanna v. Plumer*, 380 U.S. 460 (1965)

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Casenotes

FEDERAL RULES OF CIVIL PROCEDURE—SERVICE OF PROCESS—TEST OF APPLICABILITY IN DIVERSITY CASES—*Hanna v. Plumer*, 380 U.S. 460 (1965).

I. INTRODUCTION

Hanna, a citizen of Ohio, sued in the United States District Court for the District of Massachusetts for damages, alleging personal injuries resulting from the negligence of one Osgood, a Massachusetts citizen who was deceased when the action was filed. Plumer, a citizen of Massachusetts and executor of Osgood's estate, was named defendant.

Service was made pursuant to Rule 4(d)1 of the Federal Rules of Civil Procedure by leaving copies of the summons and complaint with defendant's wife at his residence. Defendant answered, alleging that the action could not be maintained because the Massachusetts statute which regulates actions against executors and administrators requires service "by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice . . . filed in the proper registry of probate. . . ."[1] Three days after defendant's answer was filed, the statute of limitations controlling actions against executors elapsed. The District Court granted defendant's motion for summary judgment on the ground that adequacy of service was to be measured by state law, not by the Federal Rule, and the attempted service of process was materially defective by the Massachusetts criterion.

The Court of Appeals for the First Circuit agreed that the issue of adequacy of service is a question of substantive law and therefore beyond the scope of authority of the Federal Rules of Civil Procedure. The Rules Enabling Act, the court noted, expressly forbids the abridgment, enlargement, or modification of any substantive right through the operation of the Federal Rules.[2] Citing two Supreme Court precedents,[3] the court applied the rule that

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[1] MASS. GEN. LAWS ANN. ch. 197, § 9 (1958).

[2] 28 U.S.C. § 2072 (1964). The term "Federal Rules" in this casenote will denote the Federal Rules of Civil Procedure promulgated by the Supreme Court and enacted in 1938.

[3] Ragan v. Merchants Transfer Co., 337 U.S. 530 (1949). Federal Rule 3, which provides that an action is commenced when the complaint is filed, was held inapplicable because the Kansas law requiring service in order to toll the statute of limitations would produce a different outcome of the trial, and therefore state law must control. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). A New Jersey law requiring security for expenses in shareholder's derivative suit was

where use of the federal law would bring a significantly different result in the case, the conflict must be considered substantive and state law must be applied. Here, if Federal Rule 4(d)1 controlled, then Hanna had sued before the running of the statute of limitations and the action could proceed to trial. Conversely, according to the Massachusetts law, he had failed to serve process within the time limit and his cause of action had terminated. Since the choice of federal or state law would be "outcome-determinative" the question is inherently substantive. It was under this analysis that the Court of Appeals affirmed the decision of the court below.[4]

On certiorari, the Supreme Court reversed, holding that the Federal Rule governing service of process is supported by statutory and Constitutional authorization, and is not subject to the "outcome-determinative test" developed in the line of cases following *Erie R.R. Co. v. Tompkins*.[5] The Court's rationale was that the appropriate test of the validity of a Federal Rule under the Rules Enabling Act and the Constitutional limitations of federal power, is whether or not upon the Rule's inception it could rationally have been classified as "procedural," *i.e.*, as part of the judicial process for administering remedy and redress for infraction of substantive rights and duties.[6] Under this standard, Rule 4(d)1 is valid and consequently controls service of process in the instant case despite the state law and policy providing for delivery in hand to executors.

II. THE PROCEDURAL LIMITATION ON THE FEDERAL RULES: TWO DISTINCT TESTS FOR TWO CONTEXTS OF THE ISSUE

Chief Justice Warren's opinion for the court (there were no dissents) suggests that the case is intended to provide a touchstone for future choices between state and federal law in diversity cases. The opinion rules out the application to this case of any form of the outcome-determinative test—but only after indicating, by way of a comprehensive dictum, that there are specific guidelines for that test's future application. The *Hanna* case is significant, then, first

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held applicable in a diversity case despite Federal Rule 23 which does not require such security.

[4] Hanna v. Plumer, 331 F.2d 157 (1st Cir. 1964).

[5] 304 U.S. 64 (1938). *Compare* Guaranty Trust Co. v. York, 326 U.S. 99 (1945). In a diversity suit in a federal court to recover in equity upon a state-created right, it was held that plaintiff could not recover because the New York statute of limitations would have barred recovery had the suit been brought in a state court.

[6] Hanna v. Plumer, 380 U.S. 460, 464 (1965).

for its indication that the Federal Rules have been rescued from the "eerie area of Erie."[7] Secondly, it casts new light upon the use of the outcome-determinative test to distinguish substance from procedure in all those *Erie* cases where state and federal laws conflict, but no state law directly and explicitly contradicts a Federal Rule.[8] The opinion distinguishes two kinds of state-federal choice of law problems arising from two important legal events of 1938: The adoption of the Federal Rules and the decision in *Erie R.R. Co. v. Tompkins.*

The Court in *Hanna* points out that both the Rules Enabling Act and the *Erie* rule command federal courts to apply state substantive law and federal procedural law. It immediately adds, however, that the tests in these two contexts of the substantive-procedural issue need not be and in fact are not the same.[9]

A. Caveat on the Outcome-Determinative Principle

Where a Federal Rule is silent on a particular detail or qualification of a court procedure, and the corresponding state law explicitly provides for that detail, there is an indirect conflict between the two laws. Also, where a strong policy is implicit in a Federal Rule and the corresponding state law abrogates that policy, the conflict is apparently, in the terms of the *Hanna* opinion, an indirect one. The *Hanna* case represents the direct and explicit conflict between a state statute and a Federal Rule that must be resolved in terms of the constitutional validity of the Rule. There-

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[7] Orenstein, *Erie Potpourri,* 38 Conn. B.J. 69, 90 (1964). "The responsibility for handling a fellow man's legal affairs is frightening enough in the normal course of events, but in the eerie area of *Erie* the dearth of objective standards by which the counsellor may guide himself and his clients is appalling."

[8] The Court indicates that unless the state statute and the Federal Rule unequivocally contradict each other, no question of the Rule's validity necessarily arises; however, the cases where no such direct contradiction exists can, and frequently do still present federal courts with issues of choice between applying or ignoring a state rule depending on whether it is substantive or procedural. According to *Hanna,* outcome differences are still relevant here, but outcome is not to be regarded as an exclusive or automatic *ratio decidendi* for choosing the appropriate law.

[9] "It is true that both the Enabling Act and the Erie rule say roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions." Hanna v. Plumer, 380 U.S. 460, 471 (1965). See Tunks, *Categorization and Federalism: "Substance" and "Procedure" After Erie Railroad v. Tompkins,* 34 Ill. L. Rev. 271 (1939).

fore, the discussion of other kinds of cases is dictum. But the Court's opinion, for the sake of clarity in future indirect conflicts between Federal Rules and state law, indicates that the outcome-determinative principle must guide the choice of federal or state law in these cases. Furthermore, federal judges who refer to that test must apply it while keeping in mind the two fundamental policy considerations of *Erie* that underly the outcome test: the avoidance of forum-shopping and equitable administration of the laws in all courts. Thus, if the federal law would clearly offer a substantial advantage to the plaintiff, recognizable before the litigation commenced, it would be conducive to forum-shopping and therefore contrary to the purpose of *Erie*. The outcome test would require application of the state law. On the other hand, if the variation between federal and state procedure would be unlikely to influence the plaintiff's choice of forum, then the defendant should not be allowed to insist on the application of state law under *Erie*. The Court points out that in the instant case the defendant's objection to Federal Rule 4(d)1 could hardly be more than an afterthought:

> Though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of a forum. Petitioner, in choosing her forum, was not presented with a situation where application of the state rule would wholly bar recovery; rather adherence to the state rule would have resulted only in altering the way in which process was served.[10]

There was no forum-shopping here because there is no reason to assume that the plaintiff would have allowed the state version of the procedure in question to go unheeded, had he sued in the state court. In such cases, the Court says, only a talismanic, unreasoning approach to the outcome rule would find the issue to be substantive. Thus, even if *Hanna* were a situation subject to the *Erie-Guaranty Trust Co.* rule of outcome-determination (which it is not, since it represents a direct conflict between a Federal Rule and a state law), the federal practice would likely prevail because service of process requirements would, in themselves, neither induce forum-shopping nor produce any significantly different result in the case.

The opinion further indicates that recent decisions in which the choice of federal or state law in diversity cases is determined by balancing state interests against federal "affirmative countervailing considerations," are valid incursions upon the strict outcome-de-

[10] Hanna v. Plumer, 380 U.S. 460, 469 (1965).

terminative test.[11] The first part of the *Hanna* opinion, then, may be viewed as a continuation, and perhaps a victorious termination, of the attack upon the mechanical, litmus-paper application of the *Erie* doctrine.

B. The Validity of the Federal Rule—The Hanna Test

Having dealt severely with the *Erie* rule, the Court proceeds to dismiss it entirely with the announcement:

> There is however, a more fundamental flaw in respondent's syllogism: the incorrect assumption that the rule of *Erie R. Co. v. Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure.[12]

To express this appropriate test, to be used whenever a state statute expressly contradicts a Federal Rule, as in *Hanna*, the opinion selects language from a 1940 Supreme Court decision, *Sibbach v. Wilson & Co.*:

> 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.[13]

In *Hanna* that language is cited as the established authority—indeed, as a silver anniversary black-letter principle—for distinguishing procedure from substantive law when a Federal Rule is put to constitutional test by a directly conflicting state statute.[14] It is at least questionable whether the Sibbach test has ever emanated sufficient light to be of aid in the gray area between substance and

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[11] Simler v. Conner, 372 U.S. 221 (1963); Byrd v. Blue Ridge Co-op., Inc., 356 U.S. 525 (1958); Lumberman's Mut. Cas. Co. v. Wright, 322 F.2d 759 (5th Cir. 1963); Monarch Ins. Co. of Ohio v. Spach, 281 F.2d 401 (5th Cir. 1960). Each of these cases is cited with approval in the *Hanna* opinion. Each of them represents a choice between state and federal law based on analysis, comparison, and balancing of federal and state interests and policy considerations, rather than through a strict "outcome" test. One of the paramount "countervailing federal considerations" discussed in these cases is the need for an independent federal judiciary, free from outmoded local procedural rules. See generally Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 Tul. L. Rev. 443 (1962).

[12] Hanna v. Plumer, 380 U.S. 460, 469-70 (1965).

[13] 312 U.S. 1, 14 (1940).

[14] "At the same time, in cases adjudicating the validity of Federal Rules, we have not applied the York rule or other refinements of Erie, but have to this day continued to decide questions concerning the scope of the Enabling Act and the constitutionality of specific Federal Rules in light of the distinction set forth in Sibbach." 380 U.S. 460, 470-71 (1965).

procedure. The distinction it offers hardly goes beyond a neatly circular relabelling, and it has been criticized for its vagueness.[15] Federal courts have frequently cited the case but without much conviction of its magic.[16] The *Hanna* opinion appears to use *Sibbach* partially in order to undercut the authority of the outcome-determinative rule by pointing up the earlier development of a separate test for Federal Rules cases. The broad language of *Sibbach* is conspicuously absent from the three 1949 decisions of the Supreme Court that seemed to rock the security of the whole body of Federal Rules.[17]

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[15] 70 HARV. L. REV. 1471, 1472 (1957).

[16] Sibbach v. Wilson & Co., 312 U.S. 1 (1941), held that Federal Rule 35(a) authorizing a physical examination in a personal injury action brought in a federal district court was not an invasion of substantive rights. The majority opinion in *Hanna* cites Schlagenhauf v. Holder, 379 U.S. 104 (1964), as a case decided in the light of *Sibbach's* distinction between substantive and procedural law. In the majority opinion in *Schlagenhauf*, however, the Court indicated that there had been little challenge to the procedural nature of the Federal Rule, which again was Rule 35(a) authorizing physical examination. The pivotal issue was whether or not it was available to both defendants and plaintiffs, and the Court found that the discovery provisions there provided were for the use of any party to the action. Two lower court decisions suggest the inadequacy of *Sibbach's* substantive-procedural distinction. Perry v. Allen, 239 F.2d 107 (5th Cir. 1956), invalidated Federal Rule 25(a) which provided for substitution in case of the death of a party, insofar as it acted through its two year time limitation as an invasion of substantive rights. In Downie v. Pritchard, 309 F.2d 634 (8th Cir. 1962), the same rule was held applicable despite a conflicting state law, on the ground that it was clearly a procedural control. Both of these cases were nondiversity actions, and both quoted the *Sibbach* language to the effect that procedure is the judicial process for enforcing substantive rights and duties. The rule of *Sibbach* apparently failed to prevent inconsistent conclusions.

[17] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Ragan v. Merchants Transfer Co., 337 U.S. 530 (1949). These three cases caused widespread fear for the life of the Federal Rules in diversity of citizenship cases. "Outcome" then seemed to threaten the whole body of federal procedural law. One jurist instrumental in the original formulation of the Rules described the situation: "As it happened, however, the announcement of the rather natural conclusion from the adopted premise that any procedure which 'significantly' affects the result of the litigation must be governed by the state practice has led directly—and particularly after the three cases in June 1949 enforcing the rule with drastic logic—to the present situation where hardly a one of the heralded Federal Rules can be considered safe from attack by shrewd lawyers and obedient lower tribunals." Clark, Book Review, 36 CORNELL L. Q. 181, 183 (1950). A more recent article notes: "As to the current state of the law, courts or commentators have expressed doubt concerning the validity, in certain applications, of the following Federal

The greater significance of the *Sibbach* opinion may be that language in it suggests the idea that a Congressional and Constitutional mandate buttresses the Federal Rules when they are attacked for abridging substantive rights.[18] While in *Sibbach* the argument about such a mandate is not pressed with much vigor, *Hanna* picks up the thread, makes whole cloth from it, and clothes the Federal Rules with near invulnerability. Because the congressionally authorized committee that drafted the Federal Rules, the Supreme Court which approved them before passage, and the Congress which enacted them into law all judged their validity at that time, a presumption protects them:

> [T]he 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.[19]

Furthermore, if the specific Rule in question is merely "rationally capable of classification as either" procedural or substantive, then it must be accepted as valid and applicable:

> 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.[20]

Justice Harlan, concurring on much narrower grounds, points out that if the men who formulated the Federal Rules were reasonable

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Rules: 1, 2, 3, 4 generally, 4(d), 6, 8, 13 generally, 13(a), 14, 15(c), 17(b), 18(b), 23 generally, 23(a)(3), 23(b), 25(a), 35, 38, 39, 41(a), 41(b), 53 generally, 4(a), 44, and 54(c), which as will be seen, represent approximately one third of the Federal Rules." Orenstein, *supra* note 7, at 89.

[18] Sibbach v. Wilson & Co., 312 U.S. 1, 14-16 (1940). The majority opinion, dealing with an argument that Congress did not intend that Rule 35(a) should so drastically influence a personal right, states: "Moreover, in accordance with the Act, the rules were submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature. . . . Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules. . . ." J. Frankfurter, in dissent, wrote: "Plainly the Rules are not acts of Congress and can not be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality." *Id.* at 18.

[19] Hanna v. Plumer, 380 U.S. 460, 471 (1965).

[20] *Id.* at 472.

men, ". . . it follows that the integrity of the Federal Rules is absolute."[21] The Court still does speak of "testing" the validity of Federal Rules, however, and it grudgingly pays slight lip service to the possibility of an unacceptably "outcome-determinative" Federal Rule: "[A] court . . . need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts. . . ."[22] From this nominal concession it is possible to infer that the Federal Rules are not quite immune to challenges on the ground of the procedural limitation. Certainly they will be hardy and resistant behind the shield of *Hanna v. Plumer*

In one sense, the Court's underwriting of the Federal Rules *en masse* because of the prima facie judgment of the creators of the Rules seems inappropriate. The opinion restates the familiar maxim that the line between substance and procedure shifts with the context.[23] In view of that fact, why should the first blessings of the formulators be so conclusive of the Rules' validity?[24] It is unlikely that all the possible conflicts between state laws and policies on the one hand, and the Federal Rules on the other, were contemplated and adjudged between 1934 and 1938 when the Rules were embryonic. Since particular contexts are not merely influential in deciding whether an issue be substantive or procedural, but are primary determinants, the "prima facie" opinion should not be a major obstacle to finding a particular Federal Rule in abridgment of a state substantive law. These specific conflicts are unlitigated—yet the Court in *Hanna* seems to hold that if it seemed in the

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[21] *Id.* at 476.

[22] *Id.* at 473.

[23] *Id.* at 471. See COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 154 (1942).

[24] The "blessings" of the Advisory Committee did not focus on any such overwhelming presumption of validity: "Two great steps in advance are assured by this proposal. The first is the adoption of the principle that rules of pleading and practice should be made by the courts and not by statute. The greatest fault of the code system has been that, fixed by statute, the rules were too rigid and inflexible and not subject to prompt readjustment by the courts as deficiencies develop." Mitchell, *Attitude of Advisory Committee—Events Leading to Proposal for Uniform Rules—Problems on Which Discussion Is Invited,* 22 A.B.A.J. 780, 781 (1936). It is worth noting that one signification of the continued reference to a test throughout the cases from *Sibbach* to *Hanna* is that the Rules have always been considered subject to full judicial review to determine whether or not they interfere with substantive rights. "The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency." Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444 (1946).

1930's that the Rule was partly procedural, then that Rule must be applied in 1965 despite any new discovery of substantive side effects within a particular state or context. As Justice Harlan in his concurring opinion comments, the true effect of this is to find "a grant of substantive legislative power in the constitutional provision for a federal court system (compare *Swift v. Tyson,* 16 Pet 1) and through it, setting up the Federal Rules as a body of law inviolate."[25] The reference to *Swift v. Tyson* is a deft criticism of the opinion of the Court, intimating that *Hanna* is a subtle aggrandizement of federal authority in a field where there was previously state authority because of the tenth amendment. Justice Harlan argues that the allocation of law-making functions between state and federal legislative processes is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this area. Apparently the majority opinion's reference to the "necessary and proper" clause is intended as an answer to this objection.[26] The Court sees it as an authorization of such incidental infringement on substantive state policy or law.

The impact of *Hanna* should reach beyond the narrow holding that Rule 4(d)1 is procedural despite Massachusetts' law and policy with respect to executors. The opinion acknowledges and then

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[25] Hanna v. Plumer, 380 U.S. 460, 475-76 (1965).

[26] *Id.* at 472. Of course the "necessary and proper" argument can apply only if a constitutional grant of authority may be found for it to complement. Justice Harlan's opinion in *Hanna* expresses doubt that the Article I provision for a federal court system may be extended, even by the "necessary and proper" clause, into a grant of substantive power. If *Hanna* does so extend the power, then it suggests the doctrine of the overruled Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) which held, inter alia, that the Rules of Decision Act permitted the application of "general commercial law" despite state court decisions contrary to that law, on the ground that the phrase in the Act, "laws of the several states," did not include mere court-made state laws. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938), expressly overruled *Swift's* recognition of a "federal general common law," with the pronouncement that "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts." Justice Reed's concurring opinion in *Erie,* however, strongly supports the rationale of *Hanna:* "If the opinion commits this Court to the position that the Congress is without power to declare what rules of substantive law shall govern the federal courts, that conclusion also seems questionable. The line between procedural and substantive law is hazy but no one doubts federal power over procedure. . . . The Judiciary Article and the 'necessary and proper' clause of Article One may fully authorize legislation, such as this section of the Judiciary Act." *Id.* at 91-92.

attacks the uncertainty with which federal courts have weighted the familiar arguments on the substantive-procedural issue. In order to minimize the "*ad hoc*" nature of *Erie* doctrine decisions,[27] *Hanna* offers evaluation of current court-made, statutory, and Constitutional tests of the applicability of procedural law in federal courts.

Where no Federal Rule precisely covers the situation at issue, the opinion in *Hanna* endorses the use of the outcome-determinative test, tempered by reference to the policy underlying the *Erie* and *Guaranty Trust Co.* cases. The whole line of cases represents not an unreasoned dogma, but a protective barrier against unjust differences in result in federal and state court disposition of the same legal controversy. In choosing between state and federal law, courts must also be prepared to balance state interests against countervailing federal policies.

The argument that the tenth amendment forbids federal procedural law to superimpose itself over substantive issues has been summarily rejected in *Hanna*. The *Erie* case stirred up a long-lived scholarly war over the constitutional basis of its restraint on federal power.[28] The two opinions written on the *Hanna* decision contain some remaining vestiges of that conflict,[29] but Chief Justice Warren's opinion for the Court concludes without diffidence that the Federal Rules, even though they may overlap substantive questions, are safely under the wing of the Article I provision for a federal court system "augmented by the Necessary and Proper clause" and therefore are not in conflict with the tenth amendment.[30] As the grant of authority for the Federal Rules is thereby confirmed, the tenth amendment, as is its wont, must step aside.

Another issue considered in *Hanna* is whether the Federal

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[27] Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711 (1950); Comment 56 NW. U.L. REV. 560 (1961).

[28] *E.g.*, COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 136-47 (1942); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L. J. 267, 278-80 (1946); Hill, *The Erie Doctrine and the Constitution* (pts. 1-2), 53 NW. U.L. REV. 427, 541 (1958).

[29] Chief Justice Warren's opinion for the Court refers to "the sort of equal protection problems to which the *Erie* opinion alluded." Hanna v. Plumer, 380 U.S. 460, 469 (1965). Justice Harlan states that the Court (in the *Hanna* case) has "misconceived the constitutional premises of *Erie*. . . ." *Id.* at 474. He expounds the *Erie* philosophy emphasizing the tenth amendment's allocation of powers between federal and state governments, and criticizes the majority's conception of *Erie* as merely an anti-forum-shopping rule.

[30] *Id.* at 472.

Rules have the full force of statute, and the corollary "mandate," or presumption of constitutional validity. The opinion indicates that such authority is a clear attribute of the Rules, notwithstanding their birth outside the Congress. Furthermore, the Court accepts as valid the overlapping of procedure into the province of substantive law so long as reasonable classification (upon the Rule's inception) could have placed the question in either category. This has every appearance of a signed *carte blanche* for the choice of federal law whenever a specific Federal Rule is found to be of sufficient scope to control the issue or situation.[31] The difficult and important question that remains for federal courts to answer, it appears, is "when does the Federal Rule directly cover the issue?"[32]

The import of the *Hanna* opinion in its entirety is that the Federal Rules of Civil Procedure have been accorded a new priority and certainty of application in future federal court diversity of citizenship cases.[33]

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[31] The opinion apparently concludes that Federal Rule 3 was subjugated to the state law of Kansas in *Ragan v. Merchants Transfer Co.*, 337 U.S. 530 (1949), because the Rule was of insufficient scope to cover the procedural situation there presented. This seems tenuous. In his concurring opinion, Justice Harlan states that *Ragan*, if good law, would require the opposite result in *Hanna*. It may be speculated that *Ragan* was not expressly overruled precisely because it applied the wrong test for the substantive-procedural distinction. To overrule it, even partially, under the test prescribed in *Hanna* would be, arguably, overruling by dictum. The Rules have been accorded a strong presumption of validity under this case, but they must still be subjected to the new standard as they are challenged in specific fact situations.

[32] There is a sense in which *Hanna* might be considered a precedent of extremely narrow application. The opinion of the Court insists that this is a case of first impression—that in no previous case did a Federal Rule collide so directly with a state law that the Rule's validity was at issue. Only in cases where the clash is absolutely irreconcilable, apparently, will the new array of "mandates" and "prima facie validity" and "rational classifications" come into the fray in support of the Federal Rule. In all other cases, the *Erie* line of cases will control. The scope of the *Hanna* decision was discussed in Kuchenig v. California Co., 350 F.2d 551 (5th Cir. 1965). The issue before the Court was whether Federal Rules 19 and 20 sufficiently "covered" the concept of indispensable parties to raise the issue of their validity in the face of a more specific Louisiana indispensable parties law. Judge Wisdom's opinion noted the *Hanna* distinction between direct and indirect conflicts, and decided that the issue was a "run-of-the-mine Erie problem," requiring the application of the familiar tests. *Id.* at 553-55.

[33] Judge Alexander Holtzoff, United States District Judge for the District of Columbia, welcomed the decision: "The vital importance of the *Hanna* case and its felicitous augury for the future is that it ascribes

an overriding force to the federal rules." Holtzoff, *A Landmark in Federal Procedural Reform,* 10 VILL. L. REV. 701, 707 (1965). The American Bar Association's Special Committee on the Federal Rules of Procedure sees great significance in the case from the point of view of those who draft amendments to the Federal Rules: "Rulemakers must, therefore, weigh, in much the same way as Congress might, the desirability of uniformity and efficiency in federal litigation against the desirability of permitting the states, wherever possible, to exercise power and enforce their own policy in areas normally regulated by the states." 38 F.R.D. 95, 103 (1965). The rulemakers will be among the first to feel the burden of responsibility that will accompany the heightened authority of the Federal Rules.