Vertical Choice of Law
***Erie/Hanna* Doctrine: State-Law Claims**
Civil Procedure—Gómez-Arostegui Fall 2023 v1.2

Erie stands for the principle that federal courts hearing state-law based claims must apply all state "substantive" law related to those claims, regardless of the source of the law. The state law can come from a state constitution, statute, regulation, or *common law* (*i.e.*, decision of a state court). Recall that many state-law claims were and are based on state common law (*e.g.*, tort, contract, and property claims). Before *Erie*, under *Swift v. Tyson*, federal courts could ignore state *common law* and make up their own general federal common law, particularly when they thought the legal issue affected commerce throughout the United States. *Erie* discarded that approach, but created a new, difficult question for federal courts hearing state-law claims: which state laws are "substantive" and which are "procedural"?

Fortunately, many recurring vertical choice-of-law issues are easy or have already been settled by the Supreme Court or other courts. So, we know, for example, that the elements of a claim or an affirmative defense are "substantive," so of course you must apply state law relating to those. We cannot, for example, have someone suing another person for negligence in Oregon federal court, under Oregon law, and the federal judge then saying that she is going to ignore Oregon law and make up her own elements for the tort of negligence. The *Erie* case itself dealt with an easy issue. It held that determining the duty owed under negligence law to land entrants (like trespassers and licensees) was substantive law, and so the law of Pennsylvania had to apply on that issue, alongside other Pennsylvania law relating to the negligence claim.

The Supreme Court has also told us that some state laws that feel "procedural" are nevertheless so closely related to matters of pure "substantive" law, that we must apply the state law on the matter. The state statute of limitations, for example, must be applied to a state-law claim. As must any state law indicating when an action commences for purposes of the limitations period. Moreover, the allocation of the burden of proof (*i.e.*, plaintiff vs. defendant) on state-law issues is determined by state law. As is the standard of proof (*e.g.*, preponderance of the evidence vs. clear and convincing evidence). And so are evidentiary presumptions. So, for example, if Oregon law says that the plaintiff must prove all the elements of an Oregon negligence claim by clear and convincing evidence, then a federal court hearing a negligence claim under Oregon law will have to apply that burden and standard of proof on the negligence claim. Additionally, the Supreme Court has told us that a federal court adjudicating a state-law claim must look to state horizontal choice-of-law rules to determine which state's law to apply—*e.g.*, California versus Oregon state law—as opposed to using its own federal choice-of-law rules to make that choice. The Supreme Court has gone one step further and also told us that a federal court should look to the state horizontal choice-of-law rules *of the forum state*.[1] So, for instance, a federal court in Washington State hearing a negligence action would look to Washington State's choice-of-law rules to determine whether to apply California or Oregon negligence law for a highway car accident that straddled the border between California and Oregon.[2]

The reason we all have to study and understand *Erie* is because there are still vertical choice-of-law issues that have yet to be resolved, and every year state legislatures and courts create new state laws where it really isn't clear if the state law is "substantive" enough to require a federal court to apply it alongside a related state-law claim or affirmative defense. For example, imagine a medical-malpractice claim brought under Oregon law. Undoubtedly, a federal court would look to Oregon law for the elements of the claim—just as the state court would—because those elements are pure substantive law. But what if the Oregon legislature enacted a statute stating that before a person can file a medical-malpractice claim under Oregon law, the plaintiff must first have the claim certified as non-frivolous by a board of medical experts, and, furthermore, that failure to do so requires

[1] Recall that transfer of venue can affect this rule.
[2] Recall that most other horizontal choice-of-law issues are easy and are never contested, either because it is clear which state's law applies or, even if unclear, it doesn't matter because the state law is essentially the same in the two eligible states.

a court to dismiss the claim. There is no question that the state statute would be applied in a malpractice lawsuit filed in Oregon *state* courts. But what if the plaintiff filed the claim in Oregon *federal* court instead, and without first obtaining such a certificate. Must the federal court apply that state statute and dismiss the claim? Or can the federal court simply disregard the state statute as merely "procedural" and therefore not "substantive" enough to require application, and thereby allow the suit to proceed?

It is these hard cases that require some test beyond simply calling something "procedural" or "substantive." Those terms are conclusions, not methods of analysis. Indeed, the Court has sometimes shunned the labels. *Erie* did not have to grapple with a difficult question of whether the state law at issue in that case was substantive or procedural. The duty owed to trespassers under Pennsylvania law was clearly substantive. So *Erie* is largely useless in this respect. It has instead fallen to other Supreme Court decisions to provide a framework for resolving cases where it is not crystal clear whether a state law is substantive or procedural.

This brings me to my next point. The source of the federal law can change how we do the vertical choice-of-law analysis. The federal law can stem from the U.S. Constitution, a statute, the FRCP, district-wide local rules (*i.e.*, judge-made law adopted by the majority of the judges in a district),[3] or federal common law (*i.e.*, judge-made law coming solely from court orders/opinions). If the federal law comes from the U.S. Constitution, a federal statute, or the Federal Rules of Civil Procedure then this is where *Hanna* comes in. *Hanna* created a new important, pro-federal, analytical framework when there is a conflict between a state law, on the one hand, and the FRCP, a federal statute, or the U.S. Constitution, on the other. The new *Hanna* rule does not apply when the conflicting federal law comes from local district court rules or common law, in that case you will do the older *Erie* analysis. What can be confusing is that *Hanna* does two things. One is new, and one is old. The old thing it does is an *Erie* analysis *arguendo*, *i.e.*, for the sake of argument; that's because the parties argued the case assuming that an *Erie* analysis applied to all vertical choice-of-law decisions, regardless of the source of the federal law. But the Court in *Hanna* then went on to say that an *Erie* analysis does not actually apply when the conflicting federal law comes from the FRCP, and that a different analysis must apply instead. This was new. Later cases, then clarified that the new rule applied to federal statutes too.

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The outline on the remaining pages suggests how to analyze vertical choice of law in federal court. It starts with the rules of *Hanna* (and its progeny) and then turns to *Erie* (and its progeny). Everything below assumes that there is some state law—one that is neither obviously substantive, nor obviously procedural—that a party wants applied to the case alongside some state-law based claim or affirmative defense.

[3] *E.g.*, District of Oregon Local Rules, https://ord.uscourts.gov/index.php/rules-orders-and-notices/local-rules.

A. Hanna (*and its progeny*):

1. Ask whether an **FRCP** rule "covers" the point in dispute. By this, we mean, is there a "direct collision" or clash between an FRCP provision and the state law?[*]

    a. If yes, apply the FRCP, and ignore the conflicting state law, so long as the FRCP rule (i) falls within the scope of the Rules Enabling Act and (ii) is constitutional. The valid federal law trumps the state law because of the Supremacy Clause.[†]

        i. Validity under the REA requires that the FRCP rule relate to "practice or procedure" and "not abridge, enlarge, or modify any substantive right." The test is whether it "really regulates procedure." We don't know much about what this test entails or how it should apply because the Supreme Court has never invalidated an FRCP rule under this analysis. This is not surprising given that the Court approves all FRCPs before they go into effect. Moreover, its most recent case on the subject resulted in fractured opinions. If the FRCP rule is invalid, it cannot be applied.

        ii. Constitutionality in this context means the FRCP rule must be rationally classifiable as procedural.[+] Even if the rule falls within the uncertain area between substance and procedure, it is constitutional so long as it is rationally capable of classification as either. If the FRCP rule is unconstitutional, it cannot be applied.

2. Ask whether a **federal statute** covers the point in dispute.[4] By this, we mean, is there a direct collision or clash between a federal statute and the state law?[*]

    a. If yes, apply the federal statute, and ignore the state law, so long as the federal statute is constitutional. The valid federal law trumps the state law because of the Supremacy Clause.[†] Constitutionality in this context means the statute must be rationally classifiable as procedural.[+] Even if the statute falls within the uncertain area between substance and procedure, it is constitutional so long as it is rationally capable of classification as either. If the federal statute is unconstitutional, it cannot be applied.

3. Ask whether a provision of the **U.S. Constitution** covers the point in dispute. By this, we mean, is there a direct collision or clash between the Constitution and the state law?[*]

    a. If yes, apply the federal constitutional provision, and ignore the state law. By definition, a federal constitutional provision is always valid. The U.S. Constitution trumps the state law because of the Supremacy Clause.[†]

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[*] "Covers" can do a lot of work here, as can "direct." It is possible to interpret an FRCP rule, a federal statute, or the U.S. Constitution, and conclude that it does not cover the issue in question and that therefore there is no direct collision or clash between state law and federal law. Courts sometimes also interpret an FRCP or federal statute quite broadly to create a conflict.

[†] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

[+] There could be other grounds for finding a federal statute or FRCP rule unconstitutional, but they are unlikely to arise. Imagine, for example, that a statute or rule called for different practices depending on the race or gender of a litigant.

[4] Note that *Hanna* did not involve a federal statute, but later Supreme Court cases made clear that the deferential *Hanna* analysis also applies when the conflicting federal law comes from a federal statute. Applying it to the U.S. Constitution followed too.

4. If there is an FRCP rule, federal statute, or U.S. Constitutional provision, but it does *not* conflict with the state law, then we still need to determine if the federal court is *required* to apply the state law. Likewise, if there is an FRCP rule or federal statute that would conflict with state law, but that federal law is *invalid*,[5] then, once again, we need to determine whether the federal court is *required* to apply the state law. Either way, federal law is inapplicable and no obstacle to applying the state law. But that does not mean we must apply the state law. According to *Erie*, only "substantive" state law must be applied; merely "procedural" state law is not applied. Moreover, in the absence of any applicable federal procedural law on the issue, a federal judge might want to create some, *i.e.* create some federal common law. In any case, to determine whether the state law is "substantive," and applicable, or merely "procedural," and inapplicable, we must do an *Erie* analysis.

B. Erie (*and its progeny*):

5. We use the "relatively unguided" (understatement of the year) *Erie* analysis, as laid out by its progeny, to determine whether to apply the state law in two scenarios.

   a. First, as discussed in § 4 *supra*, where a federal constitutional, statutory, or FRCP provision does *not actually* conflict with the state law—either because there is no collision or any collision disappears because the federal law is invalid. *Erie*'s progeny will tell us whether to apply the state law or whether to simply ignore it.

   b. Second, we use the *Erie* analysis when there is a conflict between the state law and a federal local rule or federal common law. When federal law comes from the aforesaid sources—as opposed to coming from the U.S. Constitution, a federal statute, or an FRCP rule—it does not receive the very deferential pro-federal review under *Hanna*, which is why we skip *Hanna* altogether when dealing with federal local rules or federal common law. Here, *Erie*'s progeny will tell us whether to (1) apply the state law, and ignore the federal law as improperly encroaching on state substantive law; or (2) apply the federal law, and ignore the state law as improperly encroaching on federal procedural law.

6. As I mentioned previously, Supreme Court cases after *Erie* are the ones that have really developed what is known as the *Erie* framework of analysis. There are two main approaches, **but you only need to remember the *Hanna* on *Erie* approach**:

   ***Byrd* (on *Erie*) approach:**[6]

   a. A state law is substantive and must be applied if it:

      i. creates rights or obligations; or

         (a). *e.g.*, the elements of a claim or affirmative defense.

      ii. is "bound up" with state-created rights or obligations; *i.e.*, it is closely related to matters of pure substance.

         (a). *e.g.*, horizontal choice-of-law rules, burdens, standards, and presumptions of proof.

[5] I don't also state "or U.S. Constitutional provision" here because those are always valid.
[6] This stems in part from *York*, a case we did not read but that was incorporated into the *Byrd* decision.

b. A state law is procedural and need not be applied if it defines a form and mode of enforcing the substantive right or obligation, but be sure to consider and balance:

i. Whether litigation would "substantially" come out one way in federal court and another way in state court (the "outcome determination" test) if the state law is not used in federal court, in which case we should probably use the state law; and

(a). The thinking here is that if the difference in law is likely to change the outcome of litigation, then the state law at issue feels more substantive than procedural. And so we should use the state law in state court *and* federal court (so there is no outcome difference). Of course, a wooden application of this outcome test could lead one to conclude that a purely *procedural* state rule should be applied as well. So this test has problems too.

ii. Whether there may be important countervailing federal interests or policies that nonetheless, even in the face of potentially different outcomes, suggest that we should ignore the state law (and possibly apply some federal common law or some federal local rule instead).

***Hanna* (on *Erie*) approach:**[7]

a. Consider whether, *ex ante*, application of the state law would implicate the "twin aims" of *Erie* (this is a modified "outcome determination" test). In other words, would not applying the state law in federal court:

i. Encourage a plaintiff to file in federal court (forum shop); and/or

(a). Diversity/supplemental jurisdiction is not intended to give litigants the opportunity to shop for a forum that will apply a more favorable body of law. This could happen if in state court we get the state law, but in federal court we do not (and might even get some federal common law or use some federal local rule instead).

ii. Lead to the inequitable administration of the laws.

(a). We are concerned here about affording certain litigants (who can make out div/suppl jurisdiction) access to a distinct, more favorable body of law, that other litigants (who cannot make out div/suppl jurisdiction) cannot access.

(b). In other words, if there is to be forum shopping due to a difference in applicable law, it should be available to everyone.

b. If neither concern (i. or ii.) applies, then ignore the state law. If these concerns are implicated, then you will probably apply the state law in federal court, but you should still consider whether there are any important countervailing federal interests that would nonetheless suggest ignoring the state law (and possibly applying some federal common law or federal local rule instead).

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[7] Apart from developing the *Hanna* prong for certain federal directives, *see* § A *supra*, *Hanna* also took a crack at applying the *Erie* prong in its decision. Technically, its discussion of how to apply *Erie* was dicta, given that the FRCP rule at issue in *Hanna* was on point and valid, but subsequent Supreme Court cases have cited *Hanna* for its take on how to do *Erie*.