Vertical Choice of Law
Erie/Hanna Doctrine: State-Law Claims
Civil Procedure—Gómez-Arostegui Fall 2026

Erie (1938) 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 to replace it, particularly when those federal judges thought the legal issue affected commerce throughout the United States. *Erie* discarded that approach, but it created a new, difficult question for federal courts hearing state-law claims: which state laws are "substantive" and which are "procedural"? If a state law is substantive, it must be applied as part of the state-law claim in federal court; but if it is "procedural" the federal court can ignore *that* state law.

Fortunately, many recurring "vertical choice-of-law" issues (that is what we call this) are easy or have already been **settled** by the Supreme Court or the unanimity of lower courts. So, we know, for example, that the elements of a prima-facie claim or of 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 federal court in Oregon, 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/licensees) was substantive law, and so Pennsylvania law had to apply on that issue, alongside other Pennsylvania law on the prima-facie elements of a negligence claim.

The Supreme Court has also told us that some tag-along 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. So if I sue you in a Washington State federal court, bringing an Oregon state-law negligence claim, the state statute of limitations for negligence applies too. 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 told us that a federal court must look to the state horizontal choice-of-law rules *of the forum state*.[1] What are horizontal choice-of-law rules? Recall that

[1] Recall that transfer of venue can affect this rule. CB 363, 458–59. Recall also that the "forum" state is simply the state where the lawsuit was filed. So if I sue you in federal court in Wisconsin, then Wisconsin is the forum state.

horizontal choice-of-law issues arise because when a plaintiff sues for a violation of state law, a plaintiff does not have the final word on *which* state's law applies in a dispute. Imagine, for example, a car accident that straddles the border between California and Oregon. The plaintiff sues in federal court in Washington State, making Washington the forum state, and asserts that California law on negligence applies. The federal court would look to Washington State's choice-of-law rules to determine whether to apply California, Oregon, or some other state's negligence law.[2]

The reason we all have to 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 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 state law for the elements of the claim—just as a 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 med-mal 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 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 instead filed the claim in an Oregon *federal* court, and without first obtaining such a certificate. Must the federal court apply the state statute and dismiss the claim? Or can the federal court simply disregard the state statute as merely "procedural" and not "substantive" enough to require application, and thereby allow the suit to proceed under the usual federal procedures?

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 Supreme 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 the *Erie* case itself is largely useless in setting out a framework of analysis. 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. Stated another way, when you are doing an "*Erie* analysis" you are actually relying on *later* Supreme Court cases that lay out the framework for how to do an *Erie* analysis—because *Erie* doesn't tell you how.

There is more. Sometimes, to decide vertical choice-of-law questions we don't conduct a traditional *Erie* analysis at all. There is a different line of cases from the Supreme Court (starting in 1965) that lays out a second framework. Think of this as a **fork in the road.** Some vertical choice-of-law issues require you to turn right, and use one method of analysis, while other vertical choice-of-law issues require you to turn left and apply a different analysis. And sometimes when you take the road to the right, you hit a dead end, have to back up, and take the road the left. So which road to take?

The *source* of the *federal law* (that appears to conflict with some state law) and *not* the source of the *state law* tells us whether to turn right or left. As you know, federal law can come from the U.S. Constitution, a federal statute, the FRCP, district-wide local rules (*i.e.*, judge-made law adopted by

[2] Most 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 candidate states.

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 FRCP, then we must turn right, and use what is known as the *Hanna* analysis. (See my graphic chart). Below, in § A, I call this pathway the "*Hanna* (on *Hanna*)" approach and suggest you always start there. But if the federal law comes from a local rule, federal common law, or there is no federal law on point at all, you will turn left and use the *Erie* analysis as described in post-*Erie* cases. Below, in § B, I call this path the "*Erie*" approach, with one version called the "*Hanna* (on *Erie*)" approach.

So what did *Hanna* do?

Decided in 1965, about 30 years after *Erie*, *Hanna v. Plumer* did two things. First, because the parties in the case argued the vertical choice-of-law issue under the *Erie* analysis, which was all the parties knew how to do at the time, the Court in *Hanna* applied an *Erie* analysis *arguendo*, *i.e.*, for the sake of argument. This is why I call its discussion of the *Erie* analysis "*Hanna* (on *Erie*)." That is to say, this is *Hanna* telling us how to do an *Erie* analysis. Second, and most importantly, the Court created a second framework, something no one had ever seen before. Instead of simply calling this second path-way the *Hanna* approach, which is a bit ambiguous, I've decided for the sake of consistency to call it the "*Hanna* (on *Hanna*)" approach, *i.e.*, this is *Hanna* telling us how to do the new *Hanna* analysis.

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The outline below suggests how to analyze vertical choice of law in federal court. It starts with the *Hanna* (on *Hanna*) analysis and then turns to the *Erie* analysis. On the latter, I describe two versions of the *Erie* analysis, including what I call *Hanna* (on *Erie*). Everything below assumes that there is some tag-along 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.

I would not ask you to *apply* these tests to issues that are already settled, like statutes of limitation, burdens, etc. But I do expect you to know the settled issues that I identified above in this memo.

A. Hanna (on Hanna):[4]

1. Ask whether an **FRCP** rule "covers" the point in dispute. By this, we mean, is there a "direct collision" between an FRCP provision and the tag-along 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

[3] *E.g.*, District of Oregon Local Rules, https://ord.uscourts.gov/index.php/rules-orders-and-notices/local-rules.
[4] Courts sometimes also call this the *Shady Grove* analysis, which is a later case from the Supreme Court (see next footnote) that applied the *Hanna* (on *Hanna*) approach. Probably best to just call it *Hanna* (on *Hanna*) in our course.
[*] "Covers" can do a lot of work here, as can "direct." In a later case, the Supreme Court asked a similar question: Does the FRCP provision "answer[] the question in dispute"? Shady Grove Orth. Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010). 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 therefore there is no direct clash between state law and federal law. Conversely, courts sometimes interpret an FRCP or federal statute quite broadly to *create* a conflict.

valid FRCP as 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. But if the FRCP rule is invalid under the REA, 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*. Stated another way—"ties" mean it is constitutional. If the FRCP rule is unconstitutional, it cannot be applied.[+]

2. Ask whether a **federal statute** "covers" the point in dispute.[5] By this, we mean, is there a direct collision between a federal statute and the tag-along state law?

   a. If yes, apply the federal statute, and ignore the conflicting 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*. So again, a "tie" means it is constitutional. 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 between the Constitution and the tag-along 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.

[†] "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." US Const. Art. VI, § 2. Although the Supremacy Clause might also seem to require that federal *common law* always trump state law, courts have not read it that way, at least in the context of vertical choice of law.

[+] 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.

[5] Note that *Hanna* did not involve a federal statute, but later cases made clear that the deferential *Hanna* analysis also applies when the conflicting federal law comes from a federal statute. Applying the *Hanna* approach to the U.S. Constitution is also an obvious consequence of this approach. If you have a Constitutional right to something in federal court, on the very point at issue, of course that trumps any state law.

4. This is key: if *Hanna* (on *Hanna*) provides the answer, you are done. The FRCP, federal statute, or U.S. Constitutional provision displaces contrary state law, *even if the state law would qualify as "substantive"* under the traditional *Erie* approach (described below).

5. Sometimes *Hanna* does not provide the answer, however. If there is an FRCP, federal statute, or U.S. Constitutional provision, but it does *not* conflict with the tag-along state law, then we still need to determine if the federal court is *required* to apply that state law. Likewise, if there is an FRCP or federal statute that would seem to conflict with the tag-along state law, but that federal law is *invalid*,[6] then, once again, we need to determine whether the federal court is nevertheless *required* to apply that tag-along state law. In both scenarios, the FRCP, federal statute, or U.S. Constitutional provision is inapplicable and no obstacle to applying the tag-along state law. But that does not mean we must apply the tag-along state law. According to the basic *Erie* principle, only "substantive" state law must be applied; merely "procedural" state law is not applied in federal court. So what has happened here is essentially the following. We drove down the *Hanna* (on *Hanna*) road, hit a dead end, because it did not definitively tell us to ignore the tag-along state law, and so now we are backing up and are going to drive down the *Erie* road to get our answer. (See graphic).

B. Erie:

6. To repeat, in a slightly different way so that it might land better than what you read above, we use the "relatively unguided" *Erie* analysis, as the Supreme Court calls it, to determine whether to apply the tag-along state law in federal court in these scenarios:

   a. First, cases where *no* identified federal Constitutional, statutory, or FRCP provision conflicts with the state law. A litigant picked some provisions that they thought conflicted with the state law, but they were wrong. The *Erie* analysis (as set out in later cases) will tell us whether to apply the tag-along state law or simply ignore it.

   b. Second, cases where an identified federal statute or FRCP conflicts with the state law, but the federal statute is unconstitutional, or the FRCP is invalid under the REA or unconstitutional. The *Erie* analysis (as set out in later cases) will tell us whether to apply the tag-along state law or ignore it. Recall that the odds of this happening in real life are unlikely. So this is the *least likely* way you will have to do an *Erie* analysis.

   c. Third, cases where a valid[7] federal local rule or federal common law conflicts with the state law. The *Erie* analysis (as set out in later cases) will tell us whether to apply the tag-along state law and ignore the federal law as wrongly encroaching on substantive law, or ignore the tag-along state law as wrongly encroaching on federal procedure.

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[6] I don't also state "or U.S. Constitutional provision" here because those are always valid.

[7] Strictly speaking, local rules can sometimes be invalid, such as where they conflict with an FRCP, federal statute, or the Constitution. Federal common law can also be invalid if it conflicts with a local rule, the FRCP, a federal statute, or the Constitution. *See* FRCP 83 (talking about these types of conflicts). But I'm not testing you on this.

d. Fourth, cases where there is no federal law of any kind on the point, meaning no Constitutional, statutory, FRCP, local rule, or federal common law on the issue. You might think there is no conflict then, but think of it this way. If there is a tag-along state law that says you must do X, and federal law is silent on the matter, we can nevertheless infer that federal law does not require that you do X. And if a state law says you must not do X, and federal law is silent on the matter, we can nevertheless infer that federal law allows you to do X. So there is, at least in the choice-of-law analysis, a conflict. Besides, a federal judge might want to *create* some federal *common law*. So we still need to learn whether to apply the tag-along state law or ignore it.

7. As I mentioned previously, Supreme Court cases <u>after</u> *Erie* are the ones that have really developed what is known as the *Erie* analysis. There are two main versions of doing this analysis, **but you only need to remember the *Hanna* (on *Erie*) way**. I'm including the first version as well because it is discussed in the *Byrd* case you read and because it will help you understand the *Hanna* (on *Erie*) way.

***Byrd* (on *Erie*) approach:**[8]

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 of proof, standards of proof, and presumptions of proof.

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 so that there is no difference of outcome; 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).

[8] This stems in part from *York*, a case we did not read but that was incorporated into the *Byrd* decision.

(b). Of course, a wooden application of this test could lead one to conclude that even a purely *procedural* state rule must be applied in federal court as well. Some procedural rules can affect the outcome, particularly when you view them in litigation *ex post*, *i.e.*, after someone has *already* violated the procedural rule, and therefore the outcome has *already* come out one way. 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).

(a). *Byrd* identified one important countervailing federal interest—the bedrock principle that judges decide the law and juries decide the facts. This principle effectively exists as federal common law.

(b). NOTE: Although *Byrd* mentioned the Seventh Amendment in its analysis, it merely said that the Amendment *influenced* its thinking here. The Court did not analyze this as a Seventh Amendment question. That is to say, the Court did not analyze whether there was or was not a constitutional right to a jury trial under the Seventh Amendment on whether X was a statutory employee/employer. In a footnote omitted from our casebook, the Court had this to say about the Seventh Amendment: "Our conclusion [under the *Erie* analysis] makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action." Later in this course we will learn how to do a Seventh Amendment analysis.

***Hanna* (on *Erie*) approach:**[9]

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

[9] To repeat something I said above, apart from developing the *Hanna* (on *Hanna*) analysis for certain federal directives, *see* § A *supra*, *Hanna* also took a crack at applying the *Erie* analysis in its decision. Technically, its discussion of how to apply *Erie* was unnecessary, 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*.

(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). Stated another way, is the difference in law substantial enough that it would lead a plaintiff, when considering the matter *ex ante*, before they even file their lawsuit, to choose one court system over the other?

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). Recall that your ability to get into federal court on diversity is often a matter of chance. If the defendant who crashed into you in the parking lot happens to be from your state, then there will be no diversity. But if they are domiciled elsewhere, there will be.

b. If these concerns are implicated, then you will probably apply the state law in federal court, but (like in *Byrd*) 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).