the Supreme Court. The conclusive presumption of use of inside information under section 16(b) should not be extended to cover an initial purchase of a ten percent interest, since at the time of that purchase, the individual did not enjoy the relationship with the issuer which, under the statute's terms, would facilitate access to such information. Finally, it is suggested that the courts should leave any expansion of section 16(b) coverage to Congress and that the role of the courts should be confined to effectuating the plain language of the statute in its present form.

JOSEPH PIZZURRO

Civil Procedure—Diversity Actions—Conflict Between Federal Rule and State Law with Direct Substantive Effect—*Marshall v. Mulrenin.* [1]—Plaintiffs, Mr. and Mrs. Marshall, brought suit for personal injuries in the United States District Court for the District of Massachusetts on grounds of diversity. Named as defendants in the suit were Mr. and Mrs. Kirk, who at the time of the accident were the record owners of the property on which the injury occurred. Shortly after the applicable Massachusetts statute of limitations had expired,[2] plaintiffs learned that Mr. and Mrs. Mulrenin, rather than the Kirks, had actually been the owners of the property at the time of accident. Upon learning this fact, plaintiffs moved to amend their complaint by replacing the Kirks with the Mulrenins as the named defendants. However, since the Mulrenins had not been notified of the suit until after the statute had run, the district court held that the amendment was impermissible.[3] The grounds for the court's holding were that the requirements set forth in Federal Rule of Civil Procedure 15(c)[4] for the relation back of amendments had

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[1] 508 F.2d 39 (lst Cir. 1974).

[2] In diversity actions, since federal courts must apply state substantive law, the same statute of limitations must be applied that would be applied if the case were being tried in state court because a statute of limitations has a direct substantive effect. Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945).

[3] 508 F.2d at 40-41. According to the certificate on file in the appropriate town hall, Mr. and Mrs. Kirk were the owners of the business premises upon which the plaintiff-wife fell. In fact, however, the Kirks had sold the premises to Mr. and Mrs. Mulrenin several years before the accident occurred but had neglected to file, in violation of Massachusetts law, a notice of discontinuance. Mass. Gen. Laws ch. 110, § 5 (Supp. 1975). When plaintiffs instituted their suit, one month before the statute of limitations was due to expire, they relied upon the certificate in naming the Kirks as defendants. Not until after the statute had run did the plaintiffs learn that the Mulrenins had actually been the owners at the time of the accident. 508 F.2d at 41.

[4] Fed. R. Civ. P. 15(c) provides in pertinent part:

> An amendment changing the party against whom a claim is asserted relates back if . . . within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. . . .

not been met.[5] According to the court,[6] it was bound to apply Rule 15(c), rather than the Massachusetts statute on relation back of amendments (section 51),[7] because of the Supreme Court's decision in *Hanna v. Plumer.*[8]

The United States Court of Appeals for the First Circuit reversed the district court's decision and HELD: State procedural laws which have a direct substantive effect prevail over Federal Rules of Civil Procedure when the two appear to be in conflict.[9] Thus, the court held that since section 51 has a direct substantive effect, it, rather than Rule 15(c), is controlling on the issue of the permissibility of the amendment.[10] In reaching this decision, the court of appeals rejected the district court's conclusion that *Hanna* required the Federal Rule to be applied. The court of appeals interpreted *Hanna* as stating that in a diversity action, when a Federal Rule of Civil Procedure conflicts on its face with a state law, the Federal Rule prevails, *except* when the state law, "although cast in procedural terms, has a direct substantive effect."[11] The Federal Rule should "not . . . be applied to the extent, if any, that it would defeat rights arising from state substantive law as distinguished from state procedure."[12] Section 51 has a "direct substantive effect,"[13] according to the court of appeals, because that section determines when an action is commenced for the purpose of tolling the statute of limitations when the wrong defendant has been named in the original complaint.[14] The court reasoned that section 51 is an integral part of the statute of limitations, and therefore, a substantive law for purposes of diversity suits.[15] It was on the basis of this conclusion—that section 51 has a direct substantive effect—that the court in *Marshall* decided that the state law, rather than Rule 15(c), should prevail.

In the first of a series of cases in which the Supreme Court has attempted to establish guidelines for the use of the federal courts in

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[5] 508 F.2d at 40-41.

[6] Id. at 41.

[7] At the time in question Mass. Gen. Laws ch. 231, § 51 (Tercentenary ed. 1932) provided in part:

> The court may, at any time before final judgment . . . allow amendments introducing a necessary party [or] discontinuing as to a party . . . and may allow any other amendment in matter of form or substance in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought . . . .

Rev. Laws of 1902, ch. 173, § 48. With some exceptions not relevant here, § 51 had been replaced by Mass. R. Civ. P. 15(c), which retains its content, though not its exact language.

[8] 380 U.S. 460 (1965). See text at notes 35-42 infra.

[9] 508 F.2d at 44.

[10] Id. at 44-45.

[11] Id. at 44.

[12] Id.

[13] Id.

[14] Id.

[15] Id. See note 2 supra.

diversity actions in determining which law should prevail in federal law-state law conflicts, the Court in *Erie R.R. v. Tompkins*[16] held that the substantive law to be applied in diversity actions is state law, except in matters governed by the Federal Constitution or by acts of Congress.[17] The holding was based on the Court's reinterpretation of section 34 of the Federal Judiciary Act.[18] Under the original interpretation, federal courts were bound to apply state statutory law but not state common law in diversity actions.[19] Consequently, the federal courts had exercised independent judgment as to what the substantive state law was, or should have been, when a state statute did not cover the particular issue before the federal courts.[20] The Court found that the original construction of section 34 was unconstitutional on the grounds that it permitted federal courts to infringe on the exclusive right of the states to determine state law.[21] The fact that, under the original construction, federal courts were not bound to apply the same common law as the state courts, led to forum shopping between the state and federal courts located within the same state.[22] Furthermore, this led to discrimination between noncitizens and citizens of a particular state, since common law rights varied according to whether enforcement was sought in state or federal court, and the privilege of selecting the court in which to seek enforcement was conferred on the noncitizen.[23] Accordingly, the Court in *Erie* also criticized the original construction of section 34 because of the forum shopping and inequitable administration of the law caused by this construction.

Erie was followed by *Guaranty Trust Co. v. York*[24] in which the Court held that the determination of whether a federal court in a diversity action was bound to apply a particular state law should not hinge on traditional characterizations of the state law as substantive or procedural but on the result of the outcome-determination test.[25] According to the outcome-determination test, a federal court is bound to apply a state law when the outcome of a suit would be significantly different depending on whether state or federal law is applied.[26] In *Guaranty Trust* the court also reaffirmed its position against forum shopping, inequitable administration of

[16] 304 U.S. 64 (1938).

[17] Id. at 78.

[18] Federal Judiciary Act of Sept. 24, 1789, ch. 20 § 34, 1 Stat. 92.

[19] E.g., Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842). Leading cases which adhered to the Court's original interpretation of section 34 are collected in Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 530-31 (1928).

[20] E.g., Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928) (obligations under contracts entered into and to be performed within a state); Lake Shore & M.S. Ry. v. Prentice, 147 U.S. 101 (1893) (right to punitive damages).

[21] 304 U.S. at 79-80.

[22] Id. at 73-74.

[23] Id. at 74-75.

[24] 326 U.S. 99 (1945).

[25] Id. at 110.

[26] Id. at 109.

the law, and encroachment of the states' constitutional rights by the federal courts.[27]

In *Byrd v. Blue Ridge Electric Cooperative, Inc.*,[28] the Court held that the result of the outcome-determination test should not be the sole criterion for determining whether a federal court in a diversity action is bound to apply a state law.[29] State and federal policies behind the conflicting laws must also be considered.[30] In this case the federal law involved was grounded on a constitutional amendment,[31] while the state law involved was merely grounded on custom and convenience.[32] Therefore, despite the possibility that application of the federal law might have led to a significantly different outcome than if the state law had been applied,[33] the Court ruled that the federal law prevailed because of the importance of the policy behind it.[34]

In *Hanna,* the issue was whether in a diversity action service of process should be made in the manner prescribed by Massachusetts law (section 9)[35] or in the manner set forth in Federal Rule of Civil Procedure 4(d)(1).[36] The plaintiff had served the defendant by leaving copies of the summons and complaint with the defendant's wife at his residence, in compliance with the Federal Rule, but not with section 9.[37] In resolving the issue the Supreme Court differentiated between the procedures to be used to resolve federal law-state law conflicts involving a federal common law and those involving a Federal Rule of Civil Procedure. The Court explained that to resolve conflicts involving a federal common law the outcome-determination test is to be used in conjunction with a consideration of the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[38] When the conflict involves a Federal Rule, however, the Federal Rule is to prevail if it is valid.[39] A Federal Rule is valid if it is within the scope of the Rules Enabling Act[40] and constitutional restrictions.[41] The Court held that since Federal Rule 4(d)(1) is

27 Id. at 110-112.
28 356 U.S. 525 (1958).
29 Id. at 537.
30 Id. at 538.
31 In *Byrd,* the issue was whether certain questions of fact should be determined by a judge or a jury. State law, requiring determination by a judge, was in conflict with the right to a jury trial protected in federal courts by the Seventh Amendment.
32 356 U.S. at 536, 539.
33 Id. at 537.
34 Id. at 538.
35 Mass. Gen. Laws ch. 197 § 9 (1958).
36 380 U.S. at 461.
37 Id. at 461-62.
38 Id. at 468.
39 Id. at 471.
40 28 U.S.C. § 2072 (1970).
41 Neither Congress nor the federal courts can devise rules which are not supported by a grant of federal authority contained in Article I (The Congress), Article III (The Judiciary), or

valid, it is the standard against which the district court should have measured the adequacy of service.[42]

The Rules Enabling Act laid the foundation for the promulgation of the Federal Rules of Civil Procedure. The Act states that the Supreme Court has the power to prescribe procedural rules to be used in the federal district courts as long as the rules do not "abridge, enlarge or modify" substantive rights.[43] Since the Court's decision in *Hanna,* a debate has arisen concerning the kinds of Federal Rule-state law conflicts to which the holding applies. Some courts and commentators claim that the Supreme Court intends its holding to be applied to all Federal Rule-state law conflicts in diversity actions.[44] Others claim that the Supreme Court intends its holding to be limited to conflicts in which the state law involved does not have a direct substantive effect.[45]

The First Circuit considered its decision in *Marshall* to be in harmony with *Hanna.*[46] It viewed section 9 as having a direct substantive effect[47] and reasoned that the Supreme Court in *Hanna* had mistakenly viewed section 9 as being solely procedural in effect.[48] Furthermore, the court in *Marshall* concluded that the Supreme Court had intended the holding in *Hanna,* that valid Federal Rules prevail over conflicting state laws, to be applied only to situations like the one which the Court had before it.[49] That is, the court construed the holding in *Hanna* to mean that in those diversity suits in which the conflict is between a Federal Rule and a "strictly procedural"[50] state law, the controlling factor should be the validity of the Federal Rule. Validity does not become the controlling factor, however, until it is first determined that the state law is "strictly procedural."

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some other section of the Constitution. Powers not delegated to the federal government by the Constitution, nor prohibited by it to the states, are reserved to the states by the Tenth Amendment. 380 U.S. at 470-72.

[42] Id. at 463-64.

[43] 28 U.S.C. § 2072 (1970).

[44] E.g., Welch v. Louisiana Power & Light Co., 446 F.2d 1344, 1345 (5th Cir. 1972); McCoid, *Hanna v. Plumer:* The *Erie* Doctrine Changes Shape, 51 Va. L. Rev. 884, 887 (1965). See notes 82, 97-99 infra and accompanying text.

[45] E.g., Prashar v. Volkswagen of America, Inc., 480 F.2d 947, 950-54 (8th Cir. 1973); Siegel, The Federal Rules in Diversity Cases: *Erie* Implemented, Not Retarded, 54 A.B.A.J. 172, 176 (1968). See notes 85-96, 100 infra and accompanying text.

[46] 508 F.2d at 44-45. The First Circuit was the court of appeals which had decided *Hanna* and whose decision was subsequently overturned by a unanimous Supreme Court. Hanna v. Plumer, 331 F.2d 157 (1st Cir. 1964), rev'd, 380 U.S. 460 (1965).

[47] 508 F.2d at 42-43. Section 9 (Mass. Gen. Laws ch. 197, § 9 (1958)) is the state law which was in conflict with Federal Rule 4(d)(1) in *Hanna.* See notes 35-37 infra and accompanying text.

[48] Id. at 41-42. Professor Chayes also thinks that the *Hanna* Court was incorrect in viewing section 9 to be solely procedural in effect. Chayes, Some Further Last Words on Erie—The Bead Game, 87 Harv. L. Rev. 741, 752 (1974).

[49] 508 F.2d at 43.

[50] Id. at 44.

The court's conclusion in *Marshall,* that the Supreme Court in *Hanna* viewed section 9 as being "strictly procedural," was based on two statements made by the Supreme Court in *Hanna*. One was the Supreme Court's rejection of the defendant's contention that section 9 "embrace[d] substantive goals."[51] The other was the statement that only the part of section 9 that dealt with the manner in which service should be made was involved in the conflict before it.[52] The fact that the holding in *Hanna* was "contained in [a] disclaimer of an intent to effect substantive consequences,"[53] led the court in *Marshall* to its other conclusion, that the holding in *Hanna* must be limited to conflicts between two "strictly procedural" rules. This conclusion was also based on the court's finding that "[n]othing in the language of the [*Hanna*] opinion suggests" that the Federal Rules are to be given "so broad a scope that every state statute which . . . could be thought to conflict therewith could not survive, regardless of its substance."[54]

It is not clear whether the First Circuit in *Marshall* has correctly interpreted *Hanna* because the Supreme Court did not expressly indicate whether it considered the conflict before it to be between two strictly procedural rules. It is submitted, however, that *Hanna* can correctly be construed as supporting the First Circuit's decision. On its face, the holding in *Hanna,* that if a Federal Rule is valid, the Federal Rule, rather than a conflicting state rule, is controlling,[55] appears to provide support for the position, contrary to the one taken in *Marshall,* that the validity of a Federal Rule should be the sole consideration in Federal Rule-state law conflicts. However, when this holding is considered in conjunction with other statements in *Hanna,* which indicate that the Supreme Court viewed section 9 as being a purely procedural regulation,[56] it can be reasonably argued that the Supreme Court intended the validity of

[51] Id. at 43-44, citing 380 U.S. at 462-63, 465.

[52] 508 F.2d at 42 & n.3, citing 380 U.S. at 462-63 n.1. The Supreme Court had previously noted that section 9 consisted of two parts, a manner of service provision and a statute of limitations. 380 U.S. at 462-63 n.1.

[53] 508 F.2d at 44. The "disclaimer" to which the *Marshall* court was referring was the Supreme Court's statement in *Hanna* that "[p]etitioner, in choosing her forum, was not presented with a situation where application of the state rule would wholly bar recovery; rather, . . . [it] would have resulted only in altering the way in which process was served." Id. at 44 n.8, quoting 380 U.S. at 469.

[54] 508 F.2d at 43.

[55] 380 U.S. at 463-64.

[56] The following statements from *Hanna* indicate that the Supreme Court viewed the part of § 9 before it to be merely procedural: (1) "Section 9 is in part a statute of limitations . . . . This part of the statute . . . is not involved in this case. . . . Section 9 also provides for the manner of service. . . . [T]his part of the statute . . . *is* involved here." Id. at 462-63, n.1; (2) "[A]dherence to the state rule [in this case] would have resulted only in altering the *way* in which process was served." Id. at 469 (emphasis added); (3) "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the *mode* of enforcing state-created rights would be to disembowel the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." Id. at 473-74 (emphasis added).

the Federal Rule to be the controlling factor only when the conflicting state law did not have a substantive effect. Furthermore, it is significant that in *Hanna* the Supreme Court distinguished, rather than overruled, its prior cases involving Federal Rule-state law conflicts in which it had held that the state law prevailed.[57] The Court explained that these cases were distinguishable from *Hanna* because in these cases it had been determined that the Federal Rule did not cover "the point in dispute."[58] The fact that these cases were distinguished provides support for the First Circuit's interpretation of *Hanna* for the following reason. In two of these cases the Federal Rule was found to not cover "the point in dispute" because the state law had a substantive effect.[59] These two cases were *Ragan v. Merchants Transfer Co.*[60] and *Cohen v. Beneficial Loan Corp.*[61]

In *Ragan*, the plaintiff contended that his action was timely because he had filed his complaint, and thereby commenced the action according to Federal Rule 3, before the statute of limitations had run.[62] The defendant noted, however, that according to state law an action was not commenced until the defendant was served with process. Therefore, he claimed that since he had not been served until after the statute had run, the suit was time-barred.[63] The Supreme Court held that the issue of whether the suit had been commenced before the statute of limitations had expired was to be determined by state law, not Federal Rule 3.[64] The Court based its holding in part on the outcome-determination test[65] and in part on the basis that the court of appeals had found the state law to be an integral part of the statute of limitations,[66] a substantive law for

[57] Id. at 470. The cases distinguished were: Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), Ragan v. Merchants Transfer Co., 337 U.S. 530 (1949), and Palmer v. Hoffman, 318 U.S. 109 (1943). In *Palmer* the Court found that Federal Rule and state law were not in conflict because the Federal Rule dealt with pleading contributory negligence, while the state law dealt with proving it. Id. at 116-18. This case does not support the decision in *Marshall* since, unlike *Marshall*, the Federal Rule did not appear on its face to conflict with the state law.

[58] 380 U.S. at 470.

[59] *Cohen*, 337 U.S. at 555-56; *Ragan*, 337 U.S. at 533-34.

[60] 337 U.S. 530 (1949). While many courts have continued to apply *Ragan*, see cases cited in C. Wright, Law of Federal Courts § 59, at 246 n.40 (2d ed. 1970), other courts interpret *Hanna* as having overruled *Ragan*. See cases cited in id. n.38. Professor Wright concludes that the former line of cases represents the correct interpretation of *Hanna:*

> The majority opinion in Hanna was at pains, at two separate places, to distinguish Ragan from Hanna. . . . [W]hen the Court has not overruled Ragan, and has gone to great lengths to indicate why Hanna is not inconsistent with Ragan, it seems the safer course to assume that the Ragan decision is still authoritative.

Id. at 246 (footnotes omitted).

[61] 337 U.S. 541 (1949).

[62] 337 U.S. at 531.

[63] Id.

[64] Id. at 532-34.

[65] Id. at 532.

[66] Id. at 534.

purposes of diversity jurisdiction.[67] In regard to this finding, the Supreme Court stated: "We cannot give it [the right which the federal court was asked to enforce] longer life in the federal court than it would have had in the state court without adding something to the cause of action. We may not do that consistently with *Erie* . . . ."[68] In *Ragan,* then, the fact that the state law in conflict with Federal Rule 3 was integrally-related to the statute of limitations was a major reason for the Court's decision that the state law prevailed. The fact that the substantive effect of the state law involved in *Ragan* influenced the Court to hold that the state law, rather than the conflicting Federal Rule, prevailed, supports the contention of the First Circuit in *Marshall,* that the Court intended its holding in *Hanna* to be applied only to conflicts in which the state law does not have a direct substantive effect.

Cohen v. Beneficial Loan Corp.[69] was the other case distinguished by the Court in *Hanna*[70] in which the fact that the state law had a substantive effect influenced the Court's decision. The issue was whether the district court in a diversity action was bound to apply the state law concerning the procedure for bringing stockholders' derivative suits.[71] According to this law, the plaintiff, if unsuccessful, was liable for the defendant's expenses, and the corporate defendant was entitled to require security for this payment before the case could be tried on its merits.[72] The plaintiff urged that Federal Rule 23, which at that time also covered the procedure for bringing derivative suits but which did not contain these particular provisions, should govern.[73] Justice Douglas would have found for the plaintiff because he thought that the state law merely regulated procedure, and therefore, that the Federal Rule should be applied.[74] The majority held, however, that the state law must be followed, since it had a substantive, as well as a procedural, effect.[75] The Court explained that the state law was procedural in the sense that

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[67] Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945).

[68] 337 U.S. at 533-34. In Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the Court held that federal courts in diversity actions must apply state substantive law. Id. at 78-79.

[69] 337 U.S. 541 (1949).

[70] 380 U.S. at 470 & n.12.

[71] 337 U.S. at 543.

[72] Id.

[73] Id. at 556.

[74] Id. at 557 (dissenting opinion).

[75] Id. at 555-57. The Court stated:

> Even if we were to agree that the [state] statute is procedural, it would not determine that it is not applicable. Rules which lawyers call procedural do not always exhaust their effect by regulating procedure. But this statute is not merely a regulation of procedure. . . . [I]t creates a new liability . . . [in addition to prescribing] a procedure . . . by which the liability is insured . . . . We do not think a statute which so conditions the stockholder's action can be disregarded by the federal court as a mere procedural device.

Id. at 555-56.

it prescribed a method by which the defendant-corporation could be indemnified for the cost of its defense, if the judgment was in its favor.[76] However, the Court stated that the law was also substantive, since it subjected the plaintiff-shareholder to a liability that he had not been subjected to at common law.[77] Since the holding of the First Circuit in *Marshall* is consistent with the Supreme Court's decisions in *Cohen* and *Ragan*, it is significant that *Cohen* and *Ragan* are both distinguished, rather than overruled, in *Hanna*. The treatment of these cases in *Hanna* supports the interpretation of *Hanna* in *Marshall*.

From some of the language in *Hanna*, however, it can be inferred that the Supreme Court would not approve the holding in *Marshall*. For example, while describing the constitutional basis and scope of Congress' power to promulgate Federal Rules of Civil Procedure, the *Hanna* Court stated that this power includes the right "to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."[78] Furthermore, the Court quotes approvingly in *Hanna* a statement by the Fifth Circuit that " '[t]he purpose of the Erie doctrine . . . was never to bottle up federal courts with 'outcome-determinative' and 'integral-relations' stoppers—when there are 'affirmative countervailing [federal] considerations' and when there is a Congressional mandate (the Rules) supported by constitutional authority.' "[79] It is submitted, however, that such statements should not be considered to represent the essence of *Hanna*. There is language in *Hanna* which would support the *Marshall* interpretation.[80] Moreover, the statement in *Hanna*, that only the part of the state law dealing with service of process was at issue,[81] indicates that the Court did not intend to hold that Federal Rules prevail over those state laws which, although cast in procedural terms, have a direct substantive effect.

Justice Harlan, however, would not agree. In his concurring opinion in *Hanna*, he stated that "[s]o long as a reasonable man could characterize any duly adopted federal rule as 'procedural;' the Court, unless I misapprehend what is said, would have it apply no matter how seriously it frustrated a state's substantive regulation . . . ."[82] Therefore, although it has been submitted that the interpretation of *Hanna* by the First Circuit in *Marshall*—that Federal Rules are to prevail only over strictly procedural conflicting state laws—is reasonable, it is conceded that this is not the only reason-

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[76] Id. at 556.

[77] Id. at 555-56.

[78] 380 U.S. at 472.

[79] Id. at 473, quoting Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963).

[80] See notes 51-61 infra and accompanying text.

[81] 380 U.S. at 462-63 n.1.

[82] Id. at 476 (concurring opinion).

able interpretation. *Hanna* is not so clear that only one reasonable interpretation of the opinion is possible.

In the two Supreme Court decisions subsequent to *Hanna* in which *Hanna* is mentioned, the Court refers to *Hanna* as a case dealing with "mere 'houskeeping rules' "[83] and "no more than 'procedural' rules."[84] Although neither of these opinions contains an extensive analysis of *Hanna,* these two statements do indicate, if anything, support for the *Marshall* court's position—that valid Federal Rules prevail over state laws only when the latter are strictly procedural.

Moreover, *Hanna* has not received a uniform interpretation among the United States courts of appeals. The interpretations of *Hanna* by the Second and Eighth Circuits are similar to the First Circuit's interpretation in *Marshall,* but the Fifth Circuit's interpretation is similar to Justice Harlan's. In *Prashar v. Volkswagen of America, Inc.,*[85] the issue before the Eighth Circuit was whether the state statute governing commencement of actions or Federal Rule 3, which also defines when an action is commenced, should be applied for the purpose of determining if the suit was timely. The court indicated, after analyzing *Hanna,*[86] that an important factor in resolving the issue was whether the state commencement of action statute was an integral part of the statute of limitations.[87]

Since *Ragan* had been distinguished, rather than overruled in *Hanna,* the court in *Prashar* stated that the standard set out in *Ragan* for resolving Federal Rule 3-state law conflicts must not be ignored.[88] According to that standard, if a state commencement of an action statute is intimately bound up with the rights and obligations created by the state statute of limitations, the state law must govern under the principles of *Erie.*[89] In regard to how this standard should be applied, the court stated:

> [A] determination must be made in every case as to whether the state has taken a rule of practice and substantially intertwined that rule with the basic right to recovery. When this is so, the rule cannot be viewed as affecting only the mode of relief, and the "countervailing considerations" of a desired uniform practice in a federal court must yield to "the policy of uniform enforcement of state-created rights and obligations."[90]

The court in *Prashar* determined whether the state statute governing commencement of actions was an integral part of the statute of

[83] Chevron Oil Co. v. Huson, 404 U.S. 97, 103 n.6 (1971).
[84] Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 67 (1966).
[85] 480 F.2d 947 (8th Cir. 1973).
[86] Id. at 950-52.
[87] Id. at 953.
[88] Id. at 950.
[89] Id. at 951.
[90] Id. at 954 n.14.

limitations by noting, first, that the statute did not refer to the limitations statute.[91] Secondly, the court noted the holding of the highest state court that the statute governing commencement of actions was a general statute, which affected other statutes, as well as the statute of limitations.[92] On these grounds the court in *Prashar* held that the state commencement of an action statute was not intimately related to state-created rights and obligations, and therefore, that Federal Rule 3 prevailed.[93]

Faced with a similar issue in *Sylvestri v. Warner & Swasey Co.*,[94] the Second Circuit also considered the substantive effect of the state law to be an important factor, on the basis of *Hanna*, in determining which law should be applied.[95] The fact that the highest state court had defined the state commencement of an action statute to be a procedural one which did not abridge or enlarge a cause of action influenced the Second Circuit, as it had the Eighth, in its decision that the state law did not have a direct substantive effect, and that therefore the Federal Rule prevailed.[96]

In contrast to the First, Second, and Eighth Circuits' interpretation, that *Hanna* does not require the application of a Federal Rule when the conflicting state rule has a substantive effect, is the Fifth Circuit's view that *Hanna* established a "strong presumption" that the Federal Rules, rather than state law, should govern in matters that are "arguably" procedural.[97]

Commentators' interpretations of *Hanna*, in regard to whether the Court intended Federal Rules to displace state laws which have a direct substantive effect, are conflicting themselves. Interpreting *Hanna* as requiring that Federal Rules prevail over all conflicting state laws, one commentator, critical of the Court's decision, has stated:

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[91] Id. at 951.

[92] Id.

[93] Id. at 954.

[94] 398 F.2d 598 (2d Cir. 1968).

[95] Id. at 606.

[96] Id.

[97] Welch v. Louisiana Power & Light Co., 446 F.2d 1344, 1345 (5th Cir. 1972). The other circuits have not expressly stated how they interpret *Hanna* in regard to this issue. In Simmons v. Fenton, 480 F.2d 133 (7th Cir. 1973), which involved an issue similar to the one in *Marshall*, the Seventh Circuit applied Federal Rule 15(c) without giving any reasons for doing so and without even noting that there was a state law that also covered the matter. Smith-Hurd Ill. Ann. Stat. ch. 110, § 46(1) (1968). The Third Circuit, in Loudens Lager v. Teeple, 466 F.2d 249 (3rd Cir. 1972), held that Rule 15(C) prevailed because otherwise the Rule's policy of facilitating decisions on the merits would be frustrated. The court cited 3 J. Moore, Federal Practice § 15.15(2), at 1023 (2d ed. 1968) as authority, while making no mention of *Hanna*. 466 F.2d at 250. In Chappell v. Rouch, 448 F.2d 446 (10th Cir. 1971), the Tenth Circuit applied *Hanna* but stated that it did not have to deal with the problem of whether *Hanna* required application of a Federal Rule when a conflicting state law had a substantive effect, since the state law before it was "purely procedural in nature." Id. at 449-50.

> If the majority opinion in *Hanna* is taken literally, the Court has: . . .
> (2) ignored, by failing to inquire whether the state rule is substantive, the Enabling Act restriction that the federal rules are not to modify substantive rights; and
> (3) found in the Constitution an affirmative grant of congressional power, appropriately delegated to the Court to make rules of procedure which impair substantive state law . . . .[98]

This commentator has in effect taken the position of Justice Harlan, that, according to the majority in *Hanna,* if a Federal Rule and a state law cover the same matter, the Federal Rule prevails, regardless of the state law's effect.[99] The interpretations of *Hanna* by other commentators, however, resemble that of the First Circuit in *Marshall,* that Federal Rules only govern when in conflict with purely procedural state laws.[100]

An argument has been advanced by two authors[101] that to apply a Federal Rule rather than a conflicting state law which has a direct substantive effect would be a violation of the Rules Enabling Act,[102] which grants to the Supreme Court the power to prescribe procedural rules for federal courts. The second provision of the Rules Enabling Act states that "[s]uch rules shall not abridge, enlarge or modify any substantive right."[103] According to these commentators, whether a Federal Rule "abridge[s], enlarge[s] or modif[ies] [a] substantive right" can be determined only by analyzing the conflicting state law to see if it has a substantive effect.[104] Therefore, application of the Federal Rule, rather than the state law, is in accord with this provision only if no such direct substantive effect is found.[105] The Court in *Hanna* did not engage in an extensive analysis of the second provision of the Enabling Act, but it did note that the "broad command" of the Enabling Act was that "federal courts are to apply state substantive law and federal procedural

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[98] McCoid, *Hanna v. Plumer*: The *Erie* Doctrine Changes Shape, 51 Va. L. Rev. 884, 887 (1965).

[99] See text at note 82 supra.

[100] "The Court's observation that *Hanna* was the first case involving a 'direct collision' seems to indicate the Court's reluctance to give a broad interpretation to the federal rules if such an interpretation would result in displacement of a state right which at least is arguably substantive." Note, 73 W. Va. L. Rev. 289, 297-98 (1971). See Siegel, The Federal Rules in Diversity Cases: *Erie* Implemented, Not Retarded, 54 A.B.A.J. 172, 176 (1968).

[101] Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 726-27 (1974); McCoid, supra note 98, at 901-03.

[102] 28 U.S.C. § 2072 (1970).

[103] Id.

[104] Ely, supra note 101, at 722; McCoid, supra note 98, at 901-02.

[105] Ely, supra note 101, at 726-27; McCoid, supra note 98, at 902.

law."[106] This statement could be interpreted as supporting the position of these commentators, and of the court in *Marshall*, that the substantive effect of a state law appearing on its face to be procedural must be a controlling factor in resolving Federal Rule-state law conflicts.

The approach taken by the First Circuit in *Marshall*—determining whether a state law, procedural on its face and in conflict with a Federal Rule of Civil Procedure, has a direct substantive effect, and therefore should prevail over the Federal Rule—is in harmony with the interpretation of *Hanna* by some commentators[107] and federal courts[108] and with the approach taken by the Supreme Court prior to *Hanna* in *Ragan*[109] and *Cohen*.[110] However, since the Court in *Hanna* did not expressly state whether it considered the state law involved to be strictly procedural, and since contradictory implications can be drawn from the opinion, it appears that another Supreme Court decision will be necessary before a uniform approach among federal courts in resolving Federal Rule-state law conflicts can be achieved.

Whether the Supreme Court should adopt the method of analysis taken in *Marshall* depends upon the ease with which the method can be applied and the effect its application will have on the policies at stake in Federal Rule-state law conflicts. In regard to ease of application, the court in *Marshall* itself conceded that the line between strictly procedural state laws and those which have a substantive effect, though drawn in procedural terms, will "not always be easy to draw."[111] The Second and Eighth Circuits looked to the state courts' interpretations of the particular state laws involved to aid them in their determinations of whether these state laws were strictly procedural.[112] In contrast to the application of the *Marshall* approach, the method of analysis adopted by the Fifth Circuit, that Federal Rules prevail in all "arguably procedural matters,"[113] would be significantly easier to apply, since whenever a Federal Rule covers the same subject matter as a state law, the state law could conceivably always be reasonably characterized as arguably procedural.

Therefore, resolving Federal Rule-state law conflicts by determining whether the state law has a direct substantive effect does not appear to be the easiest, or even an easy, method of resolving these

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[106] 380 U.S. at 465.

[107] E.g., Siegel, supra note 100. See note 100 supra and accompanying text.

[108] E.g., Prashar v. Volkswagen of America, Inc., 480 F.2d 947 (8th Cir. 1973). See notes 85-96 supra and accompanying text.

[109] 337 U.S. 530 (1949). See notes 62-68 supra and accompanying text.

[110] 337 U.S. 541 (1949). See notes 69-77 supra and accompanying text.

[111] 508 F.2d at 44.

[112] Prashar v. Volkswagen of America, Inc., 480 F.2d 947, 951 (8th Cir. 1973); Sylvestri v. Warner & Swasey Co., 398 F.2d 598, 606 (2d Cir. 1968).

[113] Welch v. Louisiana Power & Light Co., 446 F.2d 1344, 1345 (5th Cir. 1972).

conflicts. It is submitted, however, that this method—determining the effect of the state law—is no more difficult to apply than other methods already used by federal courts to resolve other kinds of issues. For example, federal courts in diversity actions must decide whether they are bound to apply state law, rather than conflicting federal common law, by making three separate determinations.[114] These determinations are whether application of the federal law will lead to (1) forum shopping between the federal and state courts in the state, (2) inequitable administration of the law within the state, and (3) an outcome substantially different from the one which would result if the state law had been applied.[115] It would seem that making these three determinations, which federal courts already make, could not be easier than making the determination of whether a state law has a direct substantive effect. For this reason it is submitted that if the Supreme Court adopted the method used in *Marshall* to resolve Federal Rule-state law conflicts, the application of this method would not be impractical.

The effect that the application of the *Marshall* rule will have on the policies involved in Federal Rule-state law conflicts should also be considered in regard to whether the Supreme Court should adopt the *Marshall* rule. The policies that have traditionally been considered in the resolution of federal law-state law conflicts in diversity actions are uniformity and predictability of procedural law within the federal court system,[116] uniformity and predictability of substantive law within a state,[117] and the policy reflected by the doctrine of federalism.[118] It is submitted that application of the *Marshall* rule to the resolution of Federal Rule-state law conflicts will adversely effect the uniformity and predictability of procedural law within the federal court system.

Whenever a state law with a direct substantive effect conflicts with a Federal Rule, a federal court in a diversity action must apply the state law, according to the *Marshall* rule. Consequently, Federal Rules will not always be adhered to by federal courts. Furthermore, to predict whether a Federal Rule will be controlling in a particular case will be difficult, if the *Marshall* rule is applied, because the conflicting state law will generally have to be analyzed before a court can determine the effect of the state law. Therefore, if the only goal in the resolution of Federal Rule-state law conflicts were to achieve uniformity and predictability of procedural law within the federal court system, a mechanical formula, that valid Federal

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[114] *Hanna*, 380 U.S. at 468.

[115] Id.

[116] Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963). The reason that the Supreme Court granted certiorari in *Hanna* was because of "the threat to the goal of uniformity of federal procedure posed" by the holding of the court of appeals, that state law prevailed over the Federal Rule involved in the case. 380 U.S. at 463.

[117] Erie R.R. v. Tompkins, 304 U.S. 64, 74 (1938).

[118] Id. at 78-80.

Rules always prevail over conflicting state laws, would be a more appropriate rule for the Supreme Court to adopt.

Application of the *Marshall* rule should, however, promote uniformity and predictability of substantive law within a state. The *Marshall* rule will ensure that even when a state law with a direct substantive effect is cast in procedural terms, the state substantive law will be adhered to by the federal court, since that state law must prevail. Alternatively, if the formula, that valid Federal Rules prevail in all arguably procedural matters, was used to resolve Federal Rule-state law conflicts, an individual's substantive rights might vary depending upon whether a suit was tried in state or federal court. Since application of the *Marshall* rule promotes uniformity of the substantive law within a state, its application will prevent forum shopping or inequitable administration of the law.

It is submitted that federalism will also be promoted if the *Marshall* rule is adopted. Application of the rule will ensure that state-created rights will not be encroached on by federal courts, even when these state-created rights derive from a law which appears to be procedural. In contrast, if Federal Rules prevailed over arguably procedural state laws, state-created rights would be encroached on whenever a Federal Rule, rather than a conflicting state law with a direct substantive effect, was applied.

In the resolution of Federal-state law conflicts in which the state law has a direct substantive effect, either the policy of federalism or that of uniformity and predictability of procedural law within the federal court system must give way. It is submitted that federalism should prevail. While uniformity and predictability of procedural law within the federal court system is important and is a constitutionally-permissible goal,[119] even the language of the Rules Enabling Act makes it clear that this goal is not to be achieved at the expense of federalism.[120] The Rules Enabling Act states that while the Supreme Court has the power to prescribe procedural rules for federal courts, these rules must not "abridge, enlarge or modify" state substantive law.[121] Moreover, in *Erie,* the Supreme Court has already given priority to the doctrine of federalism over the policy of uniformity and predictability of procedural law within the federal court system.[122]

Furthermore, *Marshall* is consistent with the rationale of the Court in *Erie,* which was reaffirmed in *Hanna*: that federal courts are to apply state substantive law and federal procedural law in diversity actions.[123] The Court in *Erie* also endeavored to prevent forum shopping and inequitable administration of the law.[124] *Mar-*

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119 *Hanna,* 380 U.S. at 472-73.
120 28 U.S.C. § 2072 (1970).
121 Id.
122 304 U.S. at 75.
123 Id. at 78; accord, *Hanna,* 380 U.S. at 465, 471.
124 304 U.S. at 73-77.

shall, like *Erie,* will have these same desirable effects. Finally, even though *Marshall* appears to be inconsistent with some of the language in *Hanna,* it would seem to be the proper interpretation in light of *Hanna's* reaffirmation of the holding in *Erie,* that federal courts must apply state substantive law.[125] Thus, since application of the *Marshall* rule is consistent with *Erie* and promotes federalism, it is submitted that the Supreme Court should adopt the *Marshall* rule for the resolution of Federal Rule-state law conflicts.

LUCY WEST BEHYMER

Constitutional Law—Public Utilities—State Action—*Jackson v. Metropolitan Edison Co.*[1]—Petitioner Catherine Jackson was a residential customer of respondent Metropolitan Edison Company (Metropolitan),[2] receiving electric service at her home in York, Pennsylvania under an account in her name. Metropolitan terminated Jackson's account in September 1970 because of an asserted delinquency in payments;[3] however, service to the residence was restored under a new account in the name of a cooccupant, James Dodson. Dodson left the residence in August 1971, and while electrical power continued to be provided after his departure, no subsequent payments were made for this service.[4] On October 6, 1971, two employees of Metropolitan visited the Jackson home in an unsuccessful attempt to locate Dodson and collect the arrearages. Another employee arrived on the following day, and upon investigation, informed Jackson that the meter had been tampered with so as to prevent registration of the electricity consumed.[5] Disclaiming any knowledge of this situation, Jackson attempted to have electrical

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[125] 380 U.S. at 465, 471.

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[1] — U.S. —, 95 S. Ct. 449 (1974).

[2] Metropolitan Edison is a "privately owned and operated" utility holding a certificate of public convenience issued by the Pennsylvania Public Utilities Commission (Pa. Pub. Util. Comm'n). Metropolitan is the sole distributor of electric power to a service area that includes York, Pa. 95 S. Ct. at 451, 459.

[3] The termination of service in September 1970 was not directly in issue in *Jackson,* however, a reading of the lower court opinions in this case suggests that Metropolitan's record of the outstanding balance was a factor in the subsequent termination of service in October 1971. See Jackson v. Metropolitan Edison Co., 483 F.2d 754, 755-56 (3d Cir. 1973); Jackson v. Metropolitan Edison Co., 348 F. Supp. 954, 955-56 (M.D. Pa. 1972).

[4] 95 S. Ct. at 451.

[5] Id. at 452. Although Metropolitan's tariff provided the right to discontinue service for "fraud or tampering" with the meter, the company did not choose to assert this ground as a basis for the termination. Id. at 451 n.1. See note 7 infra. Furthermore, the certificate of public convenience conferred upon Metropolitan certain rights of eminent domain, Pa. Stat. Ann. tit., 66, § 1124 (Supp. 1974), as well as the right of entry to a customer's property for maintenance and inspection of equipment. Pa. Pub. Util. Comm'n Elec. Reg., Rule 14D [hereinafter cited as Rule 14D], cited in *Jackson,* 95 S. Ct. at 462 n.1. See notes 32, 33, 47 infra.