

## HAS THE *ERIE* DOCTRINE BEEN REPEALED BY CONGRESS?

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### INTRODUCTION

The enactment of the Class Action Fairness Act of 2005 (CAFA)<sup>1</sup> is a congressional pronouncement implying that the *Erie* Doctrine is seriously erroneous. In broad terms, CAFA allows class actions that have been filed in state courts and that are based on state substantive law to be removed to federal court if they involve out-of-state defendants and more than five million dollars in claimed damages.<sup>2</sup> The legislation is very complex and in many respects ambiguous.

The Act, however, can be interpreted as the most recent legislative affirmation that federal procedure is appropriate for the enforcement of state law rights. This affirmation should be taken seriously by the judiciary, even if legislators are regarded as relatively untutored in the interaction of federal and state law. Put in positive terms, CAFA asserts that, in certain types of cases, the judicious administration of state law is better entrusted to federal courts.

This statement contradicts two pronouncements, themselves conflicting, by the Supreme Court concerning the relationship between state substantive law and federal procedure. On the one hand, the Court famously said in *Guaranty Trust Co. v. York* that a federal court, in adjudicating state law, is “only another court of the State.”<sup>3</sup> On the other hand, the Court notably held in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.* that “[t]he federal system is an independent system for administering justice.”<sup>4</sup> More recently, in *Gasperini v. Center for Humanities, Inc.* the Court quoted from *Guaranty* and *Byrd*,<sup>5</sup> while acknowledging that dealing with both is a “challenging endeavor.”<sup>6</sup>

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<sup>1</sup> Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

<sup>2</sup> CAFA § 4(a), 28 U.S.C. § 1332(d)(2) (Supp. V 2005).

<sup>3</sup> 326 U.S. 99, 108 (1945).

<sup>4</sup> 356 U.S. 525, 537 (1958).

<sup>5</sup> 518 U.S. 415, 427-28, 431-32 (1996).

<sup>6</sup> *Id.* at 427.

Rather than the *Erie* Doctrine, perhaps a better formulation of the relationship between state and federal law would be something like this: State law is the substantive basis of the American legal system, displaced only selectively by federal substantive law. The federal court system, however, provides the premier American model of the judiciary and, as such, is called upon to administer its form of justice in legal disputes. This jurisdiction extends to any subject matter within the power of Congress to regulate and that Congress determines, under the Constitution, to require such attention.<sup>7</sup>

The distinctive character of federal justice begins, first and foremost, with the provision in Article III that federal judges hold office “during good behavior.”<sup>8</sup> According to Chief Justice Rehnquist’s study of the impeachment proceeding against Justice Chase, “good behavior” translates into life tenure.<sup>9</sup> That proceeding, shortly after adoption of the constitutional regime, established that only very bad behavior—serious criminality, probably—can result in a federal judge’s dismissal from office.<sup>10</sup>

The federal courts are also seen as distinct since the subordinate rules of federal procedure seem to be generally less vulnerable to interest group pressures.<sup>11</sup> There is a case for the proposition that all rules of federal procedure, specifically those such as the Federal Rules of Civil Procedure and others promulgated through the federal rule-

<sup>7</sup> Cf. Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 872-82 (1995) (explaining the *Erie* tension in the context of mass tort reform).

<sup>8</sup> U.S. CONST. art. III, § 1.

<sup>9</sup> See WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 114 (1992) (hailing Justice Chase’s acquittal as an important victory for judicial independence).

<sup>10</sup> See generally *id.* at 114-34 (discussing the importance of Justice Chase’s acquittal and concluding that it “has come to stand for the proposition that impeachment is not a proper weapon for Congress . . . to employ in these confrontations”). This strong tenure provision has become of additional significance now that state court judicial offices, under *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), are subject to constitutionally protected politicization. See, e.g., AM. JUDICATURE SOC’Y, DEVELOPMENTS FOLLOWING *REPUBLICAN PARTY OF MINNESOTA V. WHITE*, 536 U.S. 765 (2002), at 1 (2008), <http://www.ajs.org/ethics/pdfs/DevelopmentsAfterWhite.pdf> (noting that the Supreme Court’s decision in *White* held that a provision preventing judicial candidates from expressing political views was unconstitutional).

<sup>11</sup> But cf. John Leubsdorf, *The Myth of Civil Procedure Reform*, in CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE 53, 60-63 (Adrian A.S. Zuckerman ed., 1999) (arguing that lawyers’ self-interest may have helped in the adoption of the Rules Enabling Act of 1934 and the Federal Rules of Civil Procedure).

making process, should be given effect in deference to congressional policy. The following analysis may be a step in that direction.

## I. ERIE DECISION AND ERIE DOCTRINE

### A. Erie Railroad Co. v. Tompkins

*Erie's*<sup>12</sup> actual holding is limited and perhaps too easily forgotten. Addressing the rule in *Swift*,<sup>13</sup> the *Erie* Court pivotally states: “*Swift v. Tyson* introduced grave discrimination by . . . [making] rights . . . vary according to whether enforcement was sought in the state or in the federal court . . . Thus, the doctrine rendered impossible equal protection of the law.”<sup>14</sup>

The key terms are “rights” and “impossible.” In *Erie*, Justice Brandeis had prefaced this proposition by referring to *Black & White Taxicab*,<sup>15</sup> which clearly involved a question of “rights.”<sup>16</sup> Prior to the *Black & White Taxicab* litigation, one of the parties strategically created federal diversity jurisdiction by incorporating out of state.<sup>17</sup> That was followed by the initiation of litigation in federal court, which fulfilled the anticipated result of applying a federal decisional rule concerning contract validity. Under this federal rule, exclusive-dealing contracts were valid, though they would not have been under the applicable state law.<sup>18</sup>

Thus, by example as well as statement of the rule, the *Erie* decision addressed a problem of “rights,” which in context translates into substantive law. Importantly, there was nothing in the decision concerning procedure or quasiprocedural rules such as statutes of limitation.

Furthermore, the improper effect that Justice Brandeis identified was that different versions of “rights” would “render[] impossible equal protection of the law.”<sup>19</sup> That effect is virtually axiomatic: if substantive legal rules that are significantly different are applied in two otherwise identical cases, and the cases proceed to the merits, it

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<sup>12</sup> 304 U.S. 64 (1938).

<sup>13</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>14</sup> 304 U.S. at 74-75.

<sup>15</sup> *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

<sup>16</sup> *Erie*, at 73-74.

<sup>17</sup> 276 U.S. at 523-24.

<sup>18</sup> *Id.* at 530-31.

<sup>19</sup> *Erie*, 304 U.S. at 74-75.

would be solely coincidental if equal protection of the law were afforded.

There has been illuminating argument that even the concept of “rights” as used in *Erie* was overbroad. Professor (now Judge) Fletcher has explained that there was a cogent concept of “general law” under *Swift v. Tyson*, even if the federal courts thereafter erroneously inflated the concept.<sup>20</sup> There has also been criticism of Justice Brandeis’s suggestion that Congress could not enact law on the subjects involved in the *Erie* case, or for that matter those implicated by *Black & White Taxicab*.<sup>21</sup> Under now-established concepts of federal authority, Congress could, of course, enact law on those subjects. Indeed, it could enact substantive law on at least most of the subjects involved in the litigation addressed by CAFA.

However, there seems little ground for dissent from the following propositions: first, that the decision in *Erie* involved a rule that was unequivocally substantive in the substance/procedure dichotomy; and second, that a broad panoply of distinctive substantive rules of “federal common law” in diversity litigation would “render[] impossible equal protection” in those cases.<sup>22</sup> But this second proposition does not entail the further proposition that federal courts were required to forego other rules, concerning something less than “substance,” which could result in different outcomes in cases tried in a federal court and state court. Outcomes in litigation depend on many factors apart from the rules of substantive law that are applied, and perhaps are affected most particularly by rules governing the composition and procedure of the forum.

### B. *Erie Doctrine*

*Erie v. Tompkins* is one thing; the *Erie Doctrine* is something else. It was in decisions subsequent to *Erie* that the *Erie Doctrine* emerged. The basic sequence is familiar, with *Klaxon* applying the *Erie Doctrine*

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<sup>20</sup> William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517-27 (1984).

<sup>21</sup> Justice Brandeis said that “Congress has no power to declare substantive rules of common law,” *Erie*, 304 U.S. at 78, which is perhaps true in the strictest sense of “common law.” But surely Congress now has, and I would think then had, the power to regulate the railroad-transportation relationships involved.

<sup>22</sup> *Id.* at 74-75.

to choice of law rules,<sup>23</sup> while *Cities Service Oil Co. v. Dunlap* and *Palmer v. Hoffman* applied it, respectively, to issues of burden of proof<sup>24</sup> and the allocation of the burden of pleading contributory negligence between the plaintiff's claim and the defendant's answer.<sup>25</sup> The now orthodox formulation of *Erie* Doctrine came from the decision in *Guaranty*, which pronounced the "outcome" test: "[T]he intent of [*Erie v. Tompkins*] was to insure that . . . the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."<sup>26</sup>

The *Erie* Doctrine was the basis of subsequent refusals in diversity cases to apply federal law or the Federal Rules of Civil Procedure.<sup>27</sup> But then came *Byrd*.<sup>28</sup> That case presented the issue of whether the Seventh Amendment right to a jury trial applied to an issue in a diversity case where that issue would be tried by a state court without a jury.<sup>29</sup> It seems clear that the issue was properly classified as one of "fact" under established Seventh Amendment jurisprudence, and hence was jury triable under federal law. It also seems clear that, under the state's jurisprudence, the issue was one whose allocation to the court rather than jury was a matter of constitutional stature.<sup>30</sup> By the

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<sup>23</sup> See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941) ("[T]he proper function of the . . . federal court is to ascertain what the state law is, not what it ought to be").

<sup>24</sup> *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208, 210-12 (1939).

<sup>25</sup> *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943).

<sup>26</sup> *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

<sup>27</sup> See, e.g., *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202-05 (1956) (requiring that state law determine the enforceability of an arbitration clause); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555-56 (1949) (finding that Federal Rule 23 does not provide the exclusive form of control over class suits, but rather controls only the procedural aspects, leaving states free to impose additional substantive requirements); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532-33 (1949) (enforcing a state rule that filing or service of summons constituted commencement of the suit under the statute of limitations, rather than the Federal Rules' definition of the commencement of the suit).

<sup>28</sup> *Byrd v. Blue Ridge Elec. Coop., Inc.*, 356 U.S. 525 (1958).

<sup>29</sup> *Id.* at 537-39.

<sup>30</sup> As so often is done in such cases, the Court disparaged the significance of the matter to the law of the state, in this instance South Carolina:

The conclusion is inescapable that the [South Carolina rule] is grounded in the practical consideration that . . . the courts [of the state] had become accustomed to deciding the factual issue . . . without the aid of juries. . . . Thus the requirement appears to be merely a form and mode of enforcing the [state's rule involving the factual issue].

time *Byrd* arrived before the Court, the *Erie* Doctrine had become solidified to the point of nearly constitutional status: "It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts."<sup>31</sup> Hence, *Byrd* can be described as presenting the issue of whether it is a violation of the constitutional "distribution of judicial power between State and federal courts" to apply in federal court a rule of procedure set forth in the Constitution.

It would be absurd to say that applying a constitutional rule is unconstitutional, but that was the implication of the *Erie* Doctrine as it would apply in *Byrd*. The Court in *Byrd* properly held that a constitutional rule of procedure—the Seventh Amendment—could be applied,<sup>32</sup> but it equivocated, obviously in deference to the *Erie* Doctrine. Having cited *Erie*, Justice Brennan said, "[a]n essential characteristic of [the federal] system is the manner in which . . . it distributes trial functions between judge and jury . . . under the influence—if not the command—of the Seventh Amendment."<sup>33</sup>

Surely the Seventh Amendment is a "command," not merely an influence. However, so strong has been the pull of the *Erie* Doctrine that not only has it produced such waffling as in *Byrd*, but it has also induced the further conclusions that (1) the text of Federal Rule of Civil Procedure 3, in application to the relationship between filing the complaint and tolling a statute of limitations, has differential force in diversity and federal-claim cases,<sup>34</sup> and (2) although a state rule governing service of process in relation to a statute of limitations preempts Rule 3 because it is "part and parcel" of the statute of limitations in one state law structure (that of Oklahoma and Kansas), it does not preempt Rule 4 in another state's construction (Massachusetts),<sup>35</sup> even though the provisions regarding service of process in the latter instance were in the very same statutory section.<sup>36</sup>

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*Id.* at 536. To the contrary, the evolution of the South Carolina rule indicates that it reflected that State's concept of the separation of powers.

<sup>31</sup> *Guaranty*, 326 U.S. at 109.

<sup>32</sup> *Byrd*, 356 U.S. at 537-39.

<sup>33</sup> *Id.* at 537 (footnote omitted).

<sup>34</sup> Compare *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-51 (1980) (holding that Rule 3 is not operative in diversity cases), with *West v. Conrail*, 481 U.S. 35, 38-39 (1987) (finding that Rule 3 controls in federal claim cases).

<sup>35</sup> *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965).

<sup>36</sup> The Massachusetts statute said, in one sentence, "an executor . . . shall not be held to answer . . . unless . . . the writ . . . has been served by delivery in hand." *Id.* at

The *Erie* Doctrine, moreover, is a key premise from which the bizarre result was reached in *Ferens v. John Deere Co.*<sup>37</sup> There, a claim for personal injury occurring entirely in Pennsylvania was held to be validly maintained in the federal court in Pennsylvania, even though the same claim could not have been brought in Pennsylvania state court because it was barred by the Pennsylvania statute of limitations.<sup>38</sup> The claim in *Ferens* was originally filed in federal court in Mississippi, which, under the *Erie* Doctrine as applied in *Klaxon*, looked to Mississippi law to determine that the Pennsylvania statute of limitations was not applicable, and then transferred the case through 28 U.S.C. § 1404(a) to Pennsylvania, where, so the Supreme Court decided, the law of the transferor court (Mississippi) had to be applied under *Van Dusen v. Barrack*.<sup>39</sup>

The result in *Ferens* has the same surreal quality as that in *Black & White Taxicab*, and the same characterization could be made of the application of the *Erie* Doctrine in *Ferens* as Justice Brandeis made of *Swift v. Tyson* in *Erie*: “The injustice and confusion incident to the doctrine . . . have been repeatedly urged as reasons for abolishing or limiting [its predicate].”<sup>40</sup>

### C. Gasperini: *Confusion Compounded*

A more recent, yet equally pitiful, attempt to apply the *Erie* doctrine was made in *Gasperini*.<sup>41</sup> That case centered around an attempt to accommodate the Seventh Amendment’s provisions on jury trials with a New York mechanism for controlling excessive verdicts in jury trials.<sup>42</sup> Indeed, *Gasperini* involved not one but two constitutional rules of the Seventh Amendment.

At issue in *Gasperini* was whether and how the Seventh Amendment should be followed, first, regarding trial court review of whether a jury verdict was excessive, and second, regarding the Court of Ap-

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462 (quoting MASS. GEN. LAWS ANN., ch. 197, § 9 (West 1958)). In *Walker*, however, the Oklahoma provisions were in separate statutory sections. 446 U.S. at 742-43.

<sup>37</sup> 494 U.S. 516 (1990).

<sup>38</sup> *Id.* at 531-33.

<sup>39</sup> *Id.* at 518-21. In *Van Dusen*, 376 U.S. 612, 638 (1964), the Court stated that a party should not be permitted “to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed.” The term “result” is of course from the *Erie* Doctrine rather than the *Erie* decision.

<sup>40</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77 (1938).

<sup>41</sup> *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996).

<sup>42</sup> *Id.* at 418.

peals' review of the trial judge's analysis of the verdict.<sup>43</sup> The diversity case was tried in the Southern District of New York.<sup>44</sup> New York legislation had provisions that empowered New York state court trial judges to set aside jury verdicts in specified situations, and allowed the state's Appellate Division to exercise a measure of special authority in reviewing such decisions by trial judges.<sup>45</sup> The plaintiff in *Gasperini* received a verdict that the Circuit Court thought was unjustifiably high.<sup>46</sup> The problem, then, was whether and how the judges should handle a verdict they considered to be excessive.

The Seventh Amendment, speaking to the subject of judicial review of jury verdicts, provides, "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."<sup>47</sup> There are many difficult technical and historical problems in applying this provision to jury verdicts in contemporary trials in federal court. For one thing, with due apology to Justice Scalia who holds otherwise,<sup>48</sup> I believe that a proper historical analysis would conclude that, assuming English practice is what was meant by the "rules of the common law," this was not fully settled in 1792 at the time of the adoption of the Seventh Amendment.<sup>49</sup> That question was fully considered by the Supreme Court in *Galloway v. United States*, in which the Court suggested that the right to a jury trial was in fact quite limited.<sup>50</sup> The opinions in that case can perhaps be regarded as dicta, although they certainly were carefully considered dicta. However, if *Galloway* is taken as a precedent and if precedent is to be honored, that decision could resolve the question.

Furthermore, I believe it is reasonably arguable that the term "rules of common law" in the Seventh Amendment refers to state practice instead of, or in addition to, English practice. I recognize

<sup>43</sup> *Id.* at 434-36, 438-39.

<sup>44</sup> *Id.* at 419.

<sup>45</sup> *Id.* at 420.

<sup>46</sup> *Id.*

<sup>47</sup> U.S. CONST. amend. VII.

<sup>48</sup> See *Gasperini*, 518 U.S. at 451-58 (Scalia, J., dissenting) (using a review of English common law to find a Seventh Amendment bar to appellate review of jury determinations).

<sup>49</sup> See the extensive discussion in *Gibson v. Hunter*, (1793) 126 Eng. Rep. 499 (H.L.), which is quoted in the dissent of Justice Hughes in *Slocum v. New York Life Insurance Co.*, 228 U.S. 364, 409-415 (1913) (Hughes, J., dissenting).

<sup>50</sup> 319 U.S. 372, 390-92 (1943).

that Justice Story said otherwise in *United States v. Wonson*,<sup>51</sup> but that was well after the adoption of the Seventh Amendment and much constitutional and political turmoil had occurred in between. In any event, it is common ground that state practice concerning jury verdicts in 1792 was various and in some cases indeterminable.<sup>52</sup>

It is also common ground that the right to a jury trial is essentially to be preserved under the Seventh Amendment. The essence of the jury-trial right is that in jury-tried cases, judges decide issues of law, juries decide issues of “fact,” and judges decide which normative issues arising from essentially undisputed evidence are to be considered issues of “fact.” The procedural apparatus to implement this principle has varied over time in the federal courts, and, under comparable state constitutional guarantees, from state to state.

I believe, more specifically, that it is reasonably arguable that the term “rules of the common law,” as used in the Seventh Amendment, should be interpreted to refer to the practice prescribed for the federal district courts as they are at any historic point in time, so long as the substance of the jury trial is preserved. The substance can be preserved with different mechanisms, so long as they differentiate between “law” (for the court) and “fact” (for the jury). Further, the mechanisms can be prescribed by statute or rule; since Congress is authorized to make provisions in this regard under the Necessary and Proper Clause,<sup>53</sup> it may delegate that authority to the Supreme Court or a Rules Committee.

Within that framework, the Court in *Gasperini* could have straightforwardly applied the Seventh Amendment procedures with certain modernizations authorized by Congress. Accordingly, I think Justice Scalia in dissent was quite right in saying, the “Court commits the classic *Erie* mistake of regarding whatever changes the outcome as substantive.”<sup>54</sup> He states further:

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<sup>51</sup> 28 F. Cas. 745, 748 (C.C.D. Mass. 1812) (No. 16,750) (prefacing his determination of jury rights on an examination of English law).

<sup>52</sup> See THE FEDERALIST NO. 83, at 501-03 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing the jury provisions state by state before the adoption of the Constitution); see also *Galloway*, 319 U.S. at 391-92 (noting that “[i]n 1791 this process [of the continual evolution of jury trial rights] already had resulted in widely divergent common-law rules on procedural matters among the states, and between them and England”).

<sup>53</sup> U.S. CONST. art. 1, § 8, cl. 18.

<sup>54</sup> *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 465 (1996) (Scalia, J., dissenting) (citation omitted).

It is simply not possible to give controlling effect both to the federal standard and the state standard in reviewing the jury's award. That being so, the [lower] court has no choice but to apply the Federal Rule, which is an exercise of . . . Congress's power to regulate matters . . . within the uncertain area between substance and procedure.<sup>55</sup>

It also seems clear, as Justice Scalia observed, that the result that would be reached by using federal procedure in *Gasperini* would have been substantially in line with the result if it had been tried in the state court under New York procedure.<sup>56</sup>

However, it seems to me that Justice Scalia was wrong in another proposition he advanced, namely that the procedure required in federal court was that codified in the Seventh Amendment in 1792. In Justice Scalia's view, both the trial judge and the Court of Appeals were confined by the "rules of the common law" as he supposed those rules stood in 1792.<sup>57</sup> Justice Scalia's stark alternative may well have driven the majority in *Gasperini* to rely on the *Erie* Doctrine to cobble together its strange mix of federal and state law. That mix, governing how a federal jury verdict is to be "examined" by the courts, would not be the federal standard that a verdict may be set aside when it "shocks the conscience" of the court, but the New York statutory standard that the verdict "deviates materially from what would be reasonable."<sup>58</sup>

As indicated above, there is strong reason to doubt that the English common law rule as of 1792 was clear and stable. Under that rule, which had been evolving from practice as late as 1670, a jury could be condemned if it reached an erroneous verdict,<sup>59</sup> and in 1793 an English decision equivocated on the proper practice for addressing an unsupported verdict.<sup>60</sup> If the lower courts in *Gasperini* had proceeded as authorized by federal procedural law today, unconstrained by the procedure of 1792, the trial court should have granted a remittitur and the Court of Appeals acted properly in reversing the trial judge for not having done so.

<sup>55</sup> *Id.* at 468.

<sup>56</sup> *Gasperini*, 518 U.S. at 465-67.

<sup>57</sup> *Id.* at 451-58.

<sup>58</sup> *Id.* at 439-40.

<sup>59</sup> *Bushell's Case*, (1670) 124 Eng. Rep. 1006, 1011 (C.P.) (finding that while a jury can disagree with a judge on the proper verdict and still avoid any punishment, this may not be true if it returns a "false verdict" in, for example, a capital case).

<sup>60</sup> *See Gibson v. Hunter*, (1793) 126 Eng. Rep. 499, 510 (H.L.) (granting a new trial due to jury irregularities such that the defendant, "in effect [had] not been tried").

## II. CONGRESSIONAL POLICY

The conclusion that federal procedural law today should have governed in *Gasperini* is based on the following propositions:

1. The Seventh Amendment does not preclude refashioning federal procedure concerning jury verdicts, so long as the verdict as to “facts” is faithfully honored when founded on legally sufficient evidence.
2. Within the foregoing constraint and other constitutional constraints, Congress has the authority to refashion federal procedure.
3. Congress has, from time to time, refashioned federal procedure within that constraint, in the interest of improving federal justice. It has most recently done so in CAFA, and the courts should proceed accordingly rather than accept Seventh Amendment challenges to this new procedure.

### A. *The Appropriateness of Distinct Federal Procedures*

There is a long history of interaction between state and federal courts in which different procedures have applied and in which federal procedure has often trumped that of the state. While the *Byrd* Court said, as noted above, that “[t]he federal system is an independent system for administering justice,”<sup>61</sup> that dictum is confusing hyperbole. The federal court system is interdependent with state government and always has been. Indeed, the federal court system presupposes the existence of the states as the primary authority in legal regulation and policy in our diverse communities.<sup>62</sup> It further presupposes that there are state court systems with their own various practices and procedures. On the other hand, the system has always reflected the recognition that state courts can be vulnerable to bias against economic and social interests uncongenial to local sentiment.<sup>63</sup> From the beginning of the constitutional regime, therefore, federal law and practice have functioned to complement the state court system.

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<sup>61</sup> *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958).

<sup>62</sup> The classic scholarly formulation of this statement is found in Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

<sup>63</sup> Madison raised this concern at the Constitutional Convention when discussing the proper scope for federal court jurisdiction. See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 8 (5th ed. 2003).

Article III of the Constitution provided for diversity jurisdiction, as Hamilton asserted, in cases “in which the State tribunals cannot be supposed to be impartial.”<sup>64</sup> The importance of this concern is shown by the fact that the Judiciary Act of 1789 authorized federal court jurisdiction in diversity cases, but did not authorize jurisdiction in claims arising under federal law.<sup>65</sup> The Conformity Act of 1872 and the Process Act of 1789 conveniently provided that a federal district court should, for cases at law, generally follow the procedure of the state in which the court sat in these diversity cases.<sup>66</sup> This policy allowed federal judges and lawyers to employ locally familiar practice.

Even the emphasis on state procedure in diversity cases, however, did not lead to complete uniformity. The Process Act was interpreted to mean “static” conformity, only requiring federal practice to conform to state practice as it was at the time of the statute’s enactment in 1789–1790.<sup>67</sup> This gradually resulted in different procedure in federal courts than in the courts of the local state, and was considered very inconvenient. However, it should be noted that the difference in procedure resulting from “static conformity” reflected a Congressional policy that lasted nearly a century.<sup>68</sup>

Unsurprisingly, many states modified their procedures over the course of time, particularly after 1848 through wide adoption of the New York Field Code system.<sup>69</sup> Under “static conformity” this made for increased technicality, esoteric procedure lore, and confusion. In 1848, for example, a federal court in New York would supposedly follow New York common law procedure of 1789, while the state courts used code pleading as prescribed and periodically revised by the New York

<sup>64</sup> THE FEDERALIST NO. 80, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>65</sup> Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78-79. The present diversity jurisdiction grant is provided by 28 U.S.C. § 1332 (Supp. V 2005).

<sup>66</sup> Conformity Act of 1872, ch. 255, § 6, 17 Stat. 196, 197; Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93. However, Congress prescribed a separate and procedurally uniform system for federal equity jurisdiction. Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276.

<sup>67</sup> See *Gagliardi v. Flint*, 564 F.2d 112, 125 n.25 (3d Cir. 1977) (noting that the Process Acts of 1792, 1793, and 1828 all required static conformity to state law in cases at law).

<sup>68</sup> See *id.* (“In the Conformity Act of 1872, Congress amended the Process Acts by providing for dynamic conformity to the state law of remedies on the law side.”).

<sup>69</sup> Cf. Mary Margaret Penrose & Dace A. Caldwell, *A Short and Plain Solution to the Medical Malpractice Crisis: Why Charles E. Clark Remains Prophetically Correct About Special Pleading and the Big Case*, 39 GA. L. REV. 971, 1001-02 (2005) (noting the impact of the Field Code in moving from “common law” to “code pleading,” especially over the merger into a single form of action with simplified pleading).

legislature. This problem was solved when Congress enacted the Conformity Act of 1872 to provide for “dynamic” conformity; under that policy, the federal courts on the “law side” would use the procedure prescribed by current state law, not as it existed in 1789.<sup>70</sup> This change allowed federal courts from then on to use the current state procedure on the “law side,” but the federal courts continued to have separate and nationally uniform federal procedure for actions in equity.<sup>71</sup>

State procedural law, however, still continued to differ thereafter from one state to another. The differences were a salient consideration in Congress’s decision to provide for uniform federal civil procedure in the Rules Enabling Act of 1934.<sup>72</sup> This Act surely expresses a congressional policy that the federal courts should have their own procedure. That procedure would necessarily be distinctive and would necessarily require “refashioning,” given the established variations in state procedural law.

### B. *The Seventh Amendment and the Refashioning of Federal Procedure*

Not the least of the state procedural changes were provisions governing jury decision making. These included the motion for new trial of broadened scope, the motion for nonsuit having the effect of a decision (not merely opportunity for the plaintiff to try again), the directed verdict, and the motion for judgment notwithstanding the verdict—all of which “examined” facts tried by a jury. For example, in the 1930s, the California Code of Civil Procedure had the following provision that was substantially equal to what was originally adopted in that state’s Code of Civil Procedure of 1872: “An action may be dismissed, or a judgment of nonsuit entered . . . by the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury.”<sup>73</sup>

By 1930, the California Code of Civil Procedure also had the following provision:

When a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the

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<sup>70</sup> Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197 (1872).

<sup>71</sup> See *Gagliardi*, 564 F.2d at 125 n.25 (emphasizing the distinction between law and equity procedure).

<sup>72</sup> See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (discussing the antecedent considerations leading to the passage of the Act).

<sup>73</sup> CAL. CIV. PROC. CODE § 581 (Deering 1931).

court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict.<sup>74</sup>

How a federal court should handle such provisions, in the era prior to the adoption of the Federal Rules of Civil Procedure, presented recurring issues that required accommodation of state law to the Seventh Amendment. The history is long and sinuous and was comprehensively addressed in *Galloway v. United States*, referred to above.<sup>75</sup> It perhaps will be sufficient for present purposes to reexamine two cases that can be cited for the proposition advanced by Justice Scalia in *Gasperini*: that an “original” meaning of the Seventh Amendment is required, under which the only legitimate procedure for setting aside a verdict is the motion for new trial and that such a motion is in the exclusive province of the trial judge.<sup>76</sup>

The first of these cases is *Slocum v. New York Life Insurance Co.*,<sup>77</sup> in which the plaintiff sued on an insurance policy. At the conclusion of all the evidence, the defendant moved for a directed verdict on the ground of insufficiency of the evidence.<sup>78</sup> The judge denied the motion, a verdict was returned for the plaintiff, and a judgment entered accordingly.<sup>79</sup> The defendant pursued appellate review. The Court of Appeals concluded that the plaintiff’s evidence was insufficient and, on that basis, ordered judgment notwithstanding the verdict (JNOV) for the defendant.<sup>80</sup> The plaintiff then brought the case to the Supreme Court, which stated, “The questions now to be considered are, first, whether the Circuit Court of Appeals erred in reversing the judgment and, second, . . . whether it should have awarded a new trial instead of directing a judgment for the defendant.”<sup>81</sup> At the very outset of its opinion the Court said that “when, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence . . . does not constitute a sufficient basis for a verdict . . . the

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<sup>74</sup> *Id.* § 629 (Deering 1923). The similarity between this provision and Federal Rule of Civil Procedure 50(a) and (b) is evident. These provisions allow for a renewed motion for judgment as a matter of law following a jury verdict if “the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.” FED. R. CIV. P. 50(a)(1), (b).

<sup>75</sup> See *supra* notes 50-51 and accompanying text.

<sup>76</sup> *Supra* notes 54-56.

<sup>77</sup> 228 U.S. 364 (1913).

<sup>78</sup> *Id.* at 368.

<sup>79</sup> *Id.* at 369.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

court may and should direct a verdict.”<sup>82</sup> After reviewing the evidence, the Court found that the plaintiff’s evidence was insufficient, and that the Circuit Court was therefore proper in reversing the trial court’s decision.<sup>83</sup>

The Supreme Court then addressed the second issue, which was whether the court should have directed a new trial instead of granting JNOV. It began by observing that the JNOV procedure “conform[ed] to a statute of Pennsylvania, the State in which the [case was tried].”<sup>84</sup> The Court quoted the statute, which was essentially the same as California Code of Civil Procedure section 629 quoted above.<sup>85</sup> The Court, however, held that the Seventh Amendment prescribed the exclusive mechanism by which a court could address a verdict, and this was to award a new trial.<sup>86</sup> At the new trial, as the Court implicitly recognized, if the evidence were the same a verdict could then be directed against the plaintiff.<sup>87</sup> The Court went on to say, about awarding a new trial, what has often been repeated since: “[T]his procedure was regarded as of real value, because . . . it afforded an opportunity for adducing further evidence.”<sup>88</sup>

The decision in *Slocum* was five to four. The dissent was by Justice (later Chief Justice) Hughes and was concurred in by three others including Justice Holmes.<sup>89</sup> In its address of the issue, the dissent is as long and as strong in citation as the majority opinion. It contains the following:

Can it be doubted that it would be competent for Congress . . . to provide that thereupon the [trial] court should decide the question of law and enter judgment accordingly? . . . Could it not now provide, when the testimony is recorded stenographically, that the record so made . . . should constitute the record of the evidence for the purpose of determining the question of law thus raised?<sup>90</sup>

Justice Hughes concluded by stating:

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 375.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 375-76 (quoting 1905 Pa. Laws 286); see *supra* note 74 and accompanying text.

<sup>86</sup> *Slocum*, 228 U.S. at 399.

<sup>87</sup> *Id.* at 380.

<sup>88</sup> *Id.* at 380.

<sup>89</sup> *Id.* at 400 (Hughes, J., dissenting).

<sup>90</sup> *Id.* at 418-19.

Of course, in any case, where there are questions of fact for the jury, the court cannot undertake to decide them unless a jury trial is waived. But, it would seem to be an entire misapprehension to say that trial by jury, in its constitutional aspect, requires the submission to the jury of evidence which presents no question for their decision.<sup>91</sup>

It should be noted that the lower federal court's use of the state procedure, held to be improper in *Slocum*, was responsive to the "default" rule prescribed in the Conformity Act: federal courts were to use state law unless there was some specific federal rule, constitutional or otherwise. As Justice Hughes suggests, it would be something else if the modification of the old procedure was a more deliberate congressional choice, as in the Enabling Act and now CAFA.

There had also been a major change in prevailing procedure between 1792 and the date of *Slocum* in 1913: the documentary context in which a jury verdict would be examined. In 1792, the "record" on which a writ of error would proceed was, as Justice Hughes noted, the pleading file, augmented under some procedures by a bill of exceptions. In that era there was no record of the trial testimony, nor of the oral instructions to the jury, as now is provided in stenographic transcripts. With the benefit of a verbatim transcript, as Justice Hughes suggested, a trial judge's assessment of a jury verdict can be much more careful, and so also in subsequent appellate review is there much better information available as to what happened in the trial court. After that, and since 1938 under the Federal Rules of Civil Procedure, the record can also be readily augmented by the products of pretrial discovery—documents and depositions. These provide still more information about the evidence presented at trial as well as what was available for trial.

Pretrial discovery in turn has generated two important procedural differences concerning jury trial from that in 1792 or in *Slocum*'s time. First, given the broad opportunity for discovery, a party suffering a directed verdict would have a high hurdle to overcome to show that a better case might be marshaled upon a new trial.<sup>92</sup> The inevitable response to such a request would be "why didn't you find that out before?" Accordingly, the opportunity for a new trial in order to present

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<sup>91</sup> *Id.* at 427-28.

<sup>92</sup> *See* FED. R. CIV. P. 60(b)(2) (allowing relief from final judgment in the event of "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial").

additional evidence now has little or no “real value,” as the majority said in *Slocum*.<sup>93</sup>

Second, comprehensive pretrial discovery has enabled summary judgment practice to be significant, indeed modal, in contemporary federal practice. Under the federal rules, summary judgment is granted or denied according to whether there is a “genuine issue as to any material fact.”<sup>94</sup> In a case that would be presented to a jury, the term “genuine issue” means jury triable, and that in turn means that there is competent evidence sufficient for a jury reasonably to find against the movant.<sup>95</sup> The summary judgment procedure at pretrial is, in effect, a preview of the directed verdict procedure at trial. Its functional proximity to the motion for directed verdict has indeed led one scholar to suggest that summary judgment is unconstitutional,<sup>96</sup> although one may suppose that no current Supreme Court Justice would share that view.

The other case often cited for the proposition at issue in *Gasperini*—that 1792 writ-of-error procedure is the only way a jury verdict can be examined—is *Dimick v. Schiedt*.<sup>97</sup> That case, also decided before the Federal Rules, addressed whether a trial court could grant additur, that is, refuse to grant a new trial sought by the plaintiff if the defendant would consent to a specified increase in the amount awarded by the jury’s verdict. The Court held that remittitur had long been recognized—although it considered the grounds for doing so to be historically dubious<sup>98</sup>—but it refused to countenance additur.

The *Dimick* decision also was five to four, with Justice Stone dissenting in an opinion joined by Chief Justice Hughes and Justices Brandeis and Cardozo. Justice Stone said,

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<sup>93</sup> *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 380 (1913).

<sup>94</sup> FED. R. CIV. P. 56(c).

<sup>95</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (noting the similarities between the summary judgment standard and judgment as a matter of law’s “reasonable jury” standard, and claiming that the appropriate inquiry is on “whether the evidence presents a sufficient disagreement to require submission to a jury”); see also *Celotex Inc. v. Catrett*, 477 U.S. 317, 322-23 (1986) (requiring that a party show sufficient evidence on each element for which it will bear the burden of proof at trial to avoid summary judgment under Rule 56(c)).

<sup>96</sup> Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) (arguing that summary judgment infringes on the Seventh Amendment right to a trial by jury).

<sup>97</sup> 293 U.S. 474 (1935).

<sup>98</sup> *Id.* at 482-83.

[T]he Seventh Amendment guarantees . . . trial of issues of fact by a jury, but it does not prescribe any particular procedure by which these benefits shall be obtained, or forbid any which does not curtail the function of the jury to decide questions of fact . . . It does not restrict the court's control . . . to the particular forms of trial practice in vogue in 1791.<sup>99</sup>

More than this, after reviewing several other federal deviations from 1792 practice, Justice Stone observed “[i]n fact, the very practice, so firmly imbedded in federal procedure, of making a motion for a new trial directly to the trial judge, instead of to the court *en banc*, was never adopted by the common law.”<sup>100</sup> To this Justice Stone appended the following footnote: “In England, before the adoption of the Seventh Amendment, the motion was made not to the trial judge but to the court sitting *en banc*.”<sup>101</sup> And, more generally, Justice Stone said,

When the Constitution was adopted, the common law was something more than a miscellaneous collection of precedents. It was a system, then a growth of some five centuries, to guide judicial decision. One of its principles . . . was its capacity for growth and development, and its adaptability to every new situation to which it might be needful to apply it.<sup>102</sup>

This adaptability, however, is especially relevant when Congress has spoken on the issue, and the common law should yield to the legislative policy of Congress, within constraints clearly ordained in the Constitution. While the concept of needing sufficient evidence to support a verdict is clearly ordained in the Seventh Amendment, the procedure used to carry out such a review does not seem so ordained. In light of the significant changes since these two cases and the expressed congressional policy, provisions allowing for a directed verdict or JNOV should not be seen as exceptional, or necessarily violative of the Seventh Amendment.

### C. Appellate Review of the Trial Judge

The other issue addressed in *Gasperini* was whether the Court of Appeals could properly reverse the trial judge's determination that a new trial should be awarded if the verdict was unsupported in the evidence. As to this, the majority said that the issue had not previously been decided by the Supreme Court, although it had often been addressed in the Courts of Appeals. Writing for the Court, Justice Gins-

<sup>99</sup> *Id.* at 491 (Stone, J., dissenting).

<sup>100</sup> *Id.* at 491-92.

<sup>101</sup> *Id.* at 492 n.2.

<sup>102</sup> *Id.* at 495-96.

burg cited Justice Potter Stewart's earlier dissenting opinion in holding that, "[w]e now approve this line of decisions."<sup>103</sup> Justice Scalia liked that proposition no more than the one concerning the standard for granting new trial.<sup>104</sup>

However, in support of Justice Ginsburg on this point, the following may be observed: First, the Courts of Appeals are a creation of congressional policy and, as such, can be empowered and constrained in the scope of their review more or less as Congress might determine. Congress has acquiesced in the exercise of the appellate authority involved in *Gasperini*, for whatever that is worth. Second, the federal courts never adopted an exact replica of the 1792 English common law procedure. That procedure, as Justice Stone noted in *Dimick v. Schiedt*, required referencing the new-trial question to the corps of judges of Common Bench en banc, not to a decision of the single judge who presided at the trial.<sup>105</sup> Given the dispersal of the federal district courts in 1792, it would have been very burdensome, if not impossible, to faithfully follow the original English model. In any event, the supposedly hallowed constitutional model was never practiced. By default the matter was left open for later improvisation, an improvisation that, from the beginning, involved having the trial judge rather than the trial bench en banc, decide the issue in the first instance. The remaining issue was what further improvisation might be made concerning subsequent consideration of the trial judge's ruling. That is, if not referral to the trial bench en banc, what other kind of "examination" might be consistent with the basic scheme of the Seventh Amendment? The third observation in support of Justice Ginsburg's position is this: subjecting the trial judge's decision concerning new trial to appellate review in the Court of Appeals, as the Court in *Gasperini* held to be proper, is a substantial approximation of the en banc consideration under the writ-of-error practice in the English model. She was, therefore, on solid ground in her assertion that it was consistent with the Seventh Amendment to allow appellate review of rulings on motions for a new trial.

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<sup>103</sup> *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 436 (1996) (citing *Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156, 164 (1968) (Stewart, J., dissenting)).

<sup>104</sup> See *id.* at 460-61 (Scalia, J., dissenting) (arguing strenuously that such a practice constitutes a reexamination of facts found by a jury in violation of the Seventh Amendment).

<sup>105</sup> 293 U.S. 474, 492 n.2 (1935).

## CONCLUSION

CAFA can be understood as one more of a long series of congressional enactments that provide federal civil justice to various categories of litigants. Sometimes federal civil justice is provided in conjunction with federally created substantive rights and rights of private action, such as in the Civil Rights Acts or the rights under the securities laws. The federally created rights in many of these statutes are skeletal and require amplification by the courts or reference to state law for basic concepts. Federal justice in such cases is partly substantive but also partly “protective.”<sup>106</sup> However, under the federal claim jurisdictional statute,<sup>107</sup> federal litigants are afforded the procedural justice of the federal courts.

At other times, federal civil justice has been provided to litigants that Congress has regarded as being deserving of, and as sufficiently protected by, the quality of justice afforded in the federal courts, but without creation of federal substantive rights. These categories include: (1) citizens of different states;<sup>108</sup> (2) aliens in some circumstances;<sup>109</sup> (3) a foreign state in some circumstances;<sup>110</sup> (4) corporations in diversity jurisdiction;<sup>111</sup> (5) corporations incorporated under federal law;<sup>112</sup> (6) stakeholders needing interstate service of process for interpleader;<sup>113</sup> and (7) those in the midst of bankruptcy proceedings.<sup>114</sup> In this light CAFA is hardly revolutionary, and its enactment might invite reconsideration of various applications of the *Erie* Doctrine in light of congressional policy.

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<sup>106</sup> See FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, *CIVIL PROCEDURE* 139 (5th ed. 2001) (describing the process of “protective jurisdiction,” whereby the federal courts would protect the parties from supposed unfairness or incompetence at the hands of state courts”).

<sup>107</sup> 28 U.S.C. § 1331 (2000).

<sup>108</sup> *Id.* § 1332(a)(1).

<sup>109</sup> *Id.* § 1332(a)(2).

<sup>110</sup> *Id.* § 1332(a)(4).

<sup>111</sup> *Id.* § 1332(c).

<sup>112</sup> *Am. Nat’l Red Cross v. S.G.*, 505 U.S. 247, 248 (1992).

<sup>113</sup> 28 U.S.C. § 1335 (2000).

<sup>114</sup> *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (plurality opinion).