March 2, 2009

The Effect Of State Law On The Judge-Jury Relationship In Federal Court

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“After the decisions handed down by the Supreme Court in the line of cases discussed above, the complete dominance of federal law in the area of jury trial rights clearly had been established.” 9 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2303 (3d ed. 2008).

“[A] federal test controls the sufficiency of the evidence on a Rule 50 motion for judgment as a matter of law.” Id. § 2525.

Rules governing the relationship between judge and jury are some of the most important in any piece of litigation. The allocation of issues to judge or jury determines who will ultimately decide the case, while rules relating to sufficiency of the evidence determine whether the case will even go to the jury. And as the quotes from Wright and Miller demonstrate, commentators have long maintained that judge-jury rules are solely matters of federal law, even in cases where state law provides the rule of decision. This view relies not on the Seventh Amendment, but instead on a single old Supreme Court case, Byrd v. Blue Ridge Rural Electric Cooperative, Inc., which purportedly establishes an enclave of federal law around the judge-jury relationship.1

In this Article, I challenge that conventional wisdom, and show that under standard Erie principles, state law should exert meaningful influence in the judge-jury area. In a relatively recent decision—Gasperini v. Center for Humanities, Inc.—the Supreme Court held that the standard for granting a new trial on the ground of excessive compensatory damages is provided by state law.2 Because the Court held that this crucial judge-jury issue is governed by state law, it is no longer possible to assert that federal law has a monopoly in the judge-jury field.

Yet courts and commentators have to this point failed to integrate Gasperini into theories of the judge-jury relationship in diversity cases.3 In the first Part of this Article, I rectify this deficiency in the literature, by showing how Gasperini proves that courts should normally apply the standard Hanna twin aims test to determine whether a state judge-jury rule should control in federal court. Under that test, the state rule applies whenever a divergent federal rule would induce forum shopping or result in the inequitable administration of the law. I read Byrd as, at most, a constitutional avoidance opinion, warranting use of a federal rule that violates the twin aims of Erie only if the state rule would be constitutionally problematic in federal court. My

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3 Throughout this Article I use “diversity” as a shorthand for all heads of federal jurisdiction where state law provides the rule of decision and Erie principles govern, including, for example, supplemental jurisdiction.
approach harmonizes Byrd and Gasperini, and provides a workable test for courts to use when they encounter judge-jury issues in cases governed by state law.

In Parts II and III, I apply this framework to two practical problems: sufficiency of the evidence and issue allocation. Part II shows that federal courts must normally adhere to state court decisions on sufficiency of the evidence: sometimes as a matter of federal constitutional law, and in many other cases under Hanna’s twin aims test. Part III then shows that state law should often control the allocation of issues to judge or jury. Though the Seventh Amendment obviously requires trial by jury where it applies, the Amendment leaves plenty of ground uncovered, and there state law should play a meaningful role under standard Erie principles.

In both of these practical Parts, I demonstrate that many federal appellate decisions have already given state law binding force in the judge-jury arena. The existence of these cases demonstrates that the supposed hegemony of federal law is not only theoretically unsound: it is also an inaccurate description of current practice.

In short, I aim to show that contrary to received wisdom, judge-jury rules are not immune from Erie principles that prevail everywhere else. Not only is this effort theoretically interesting: it is also essential if important state policies are to receive the full measure of protection that the Erie doctrine promises. The state rule in Gasperini was part of a tort reform effort in New York state. If similar efforts are to be fully successful, the federal courts must shed their instinctive resistance to the influence of state law in this area.
I. *Erie, Gasperini, and the Judge-Jury Relationship*

A. *The standard Erie framework*

To understand state law’s proper role in the judge-jury field, we must first take a short tour through the hallowed halls of the *Erie* doctrine. As John Hart Ely recognized long ago, the “*Erie* doctrine” is really a collection of rules, all pertaining to the law applied in federal cases governed by state law.⁴ These rules have three main sources: the Constitution, the Rules of Decision Act, and the Rules Enabling Act.

*Erie* itself relied on the Constitution. For a century before *Erie*, the Court’s decision in *Swift v. Tyson* had allowed federal courts to reach independent decisions on issues of state common law. Federal judges used this power to elaborate a field of “general common law” that applied only in federal diversity cases. The *Swift* doctrine may have been motivated in part by hopes for a uniform national common law. But by 1938, it was clear that this hope was ill-founded: state courts persisted in adhering to rules that diverged from general common law.⁵ In the opening pages of *Erie*, the Court noted that the persistence of two systems of substantive law within single states had created considerable inequity: “*Swift v. Tyson* introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten ‘general law’ vary according to whether enforcement was sought in the state or in the federal court, and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen.”⁶

The facts of *Erie* potentially provided an example of such inequity. Mr. Tompkins, while walking along a rail bed, had been hit by a hook protruding from a train. He brought suit in federal court, where he contended that the railroad was liable for negligence under the general common law, rendering consultation of Pennsylvania law unnecessary. The railroad countered by arguing that under applicable state law, it only had a duty to avoid willful and wanton behavior toward Mr. Tompkins. The lower courts had accepted Mr. Tompkins’ position on

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⁵ One of the most notorious instances of a promulgation of general law in the years before *Erie* was, ironically, Justice Holmes’s own opinion in *Baltimore & Ohio Railroad Co. v. Goodman*, 275 U.S. 66 (1927), where he held that a driver was contributorily negligent as a matter of law if he did not stop his car, get out, look, and listen at a railroad crossing. *Id. at 69-70*. Holmes’s attempt to reify negligence law at the railroad crossing met with no success in the state courts, and was limited to its facts in less than a decade (before *Erie*) in an opinion written by Justice Cardozo. *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 106 (1934).

general common law grounds, but the Supreme Court reversed, holding that the elaboration of rules of conduct in disregard of state cases was error of constitutional magnitude.

The constitutional holding was essential to the judgment, because the Court expressed reluctance to overturn a century-old decision on any other basis. But the reasoning was admittedly cryptic. Many lawyers erroneously believe that the constitutional holding relied on equal protection. Yet the statement that Swift had “rendered impossible equal protection of the law” was contained in the earlier discussion of the inequities produced by that decision (what later became known in Hanna as the “policy” of Erie), not in the section explicating the constitutional holding. The constitutional holding was more structural than textual, and focused principally on whether Congress could have abrogated the Pennsylvania rule at issue. The Court gave a negative answer:

Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. . . . Thus the doctrine of Swift v. Tyson is, as Mr. Justice Holmes said, ‘an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct. . . . [I]n applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.’

Did the Court simply mean that a Congress of enumerated powers has no power at all to displace certain rules of state substantive law, and therefore the courts do not have that authority either? It is obviously true that Congress does not have plenary regulatory power; that much is clear from the Court’s recent Commerce Clause decisions, which indicate that meaningful constraints on Congress’ general regulatory authority still exist, even after the unprecedented

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7 For example, the Court declined to characterize its decision as a different interpretation of the Rules of Decision Act (part of the Judiciary Act of 1789), because it was unwilling to overrule Swift merely on a difference of statutory interpretation. See id. at 77.

8 See id. at 74-77.

9 See Laurence H. Tribe, American Constitutional Law § 1-13 (3d ed. 2000) (defining the Constitution’s structure as “that which the text shows but does not directly say”) (emphasis in original).

10 Erie, 304 U.S. at 77-9 (emphasis added).
expansion of that authority in the 1930s. But this reading is ultimately unsatisfactory. The areas where Congress cannot regulate at all are still quite limited, and Congress undoubtedly has the power to displace many fields currently covered by state common law. If *Erie* only imposed a constitutional restraint on the federal courts where Congress could not legislate at all, it was a weak decision indeed. This reading would potentially leave the federal courts with substantial authority to elaborate general common law, contrary to *Erie*’s sweeping statement that “[t]here is no federal general common law.”

The better reading is that *Erie* is a prohibition on half-measures: Congress may not abrogate state substantive law with rules that apply *only in the federal courts*. Instead, if Congress wishes to legislate substantive rules, it must create *federal* legislation that applies in both state and federal court, rather than purported *state* legislation that applies in diversity cases but does not bind the state courts. Such “halfway” rules produce the glaring inequities set out in the opening pages of the *Erie* opinion: a second system of law that applies only to cases in the federal courts because of the accident of diverse citizenship. Federal general common law decisions had in fact produced such inequities. Nor could such divergence be necessary or proper to the functioning of an independent federal diversity forum. This “half measures” reading of *Erie* is the better one because it explains why there is no “federal general common law.” The Constitution prohibits substantive lawmaking that applies only in cases that find their way into the federal courts, and because federal courts can only make law in federal cases, there can be no general federal common law.

Subsequent cases have continued to recognize this domain of state rules that not even Congress may selectively abrogate: namely, “substantive” rules and rules “bound up with” state

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12 One might rejoin that the federal courts do not have the authority to make common law wherever Congress has the power to regulate, as a matter of separation of powers. But while that may be true, that is not how Justice Brandeis framed the reasoning in *Erie*, so it is an unsatisfactory explanation of his statement that “there is no federal general common law.” Brandeis instead focused on Congress’ power, and treated the limitation on federal court authority as deriving from the limitation on Congress. The “halfway rules” reading of *Erie* thus better explains the Court’s statement that there is no general common law.
13 See *Erie*, 304 U.S. at 75 (“[T]he doctrine [of Swift v. Tyson] rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.”).
substance. One of these cases is *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*—the case most often cited to support the view that federal law is supreme in the judge-jury area. We thus arrive at the first reason to doubt that federal law has a monopoly over judge-jury rules. If a state judge-jury rule is “substantive” or “bound up with” state substance, then even *Byrd* recognizes it must control as a matter of federal constitutional law. We will soon see that some state judge-jury rules fall within this category.

Despite *Erie*’s constitutional holding, Congress has undoubted power to regulate practice and procedure in diversity cases, derived from its Article III power to establish the lower federal courts as well as the Necessary and Proper Clause. The line between this power and *Erie*’s constitutional prohibition was implicated by the Rules Enabling Act (“REA”), where Congress authorized the Supreme Court to “prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.” The Court has used this authority, most notably by promulgating the Federal Rules of Civil Procedure. Inevitably, the Court had to consider whether, in a diversity case, a Federal Rule authorized by the REA should trump contrary state procedure.


The constitutional holding applies most obviously to traditional substance: rules of conduct and the like. A traditional substantive rule is “a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.” *Ely, supra* note 4, at 725. A traditional procedural rule is one “designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes.” *Id.* at 724. As discussed *infra*, *Erie* substance extends beyond traditional substance because of the Rules of Decision Act.

16 See *Byrd*, 356 U.S. at 536; see also Richard D. Freer, *Some Thoughts on the State of Erie After Gasperini*, 76 TEX. L. REV. 1637, 1647 (1998) (arguing that *Byrd* “leaves no doubt” that *Erie* “requires the federal court to adhere” to rules that define rights and obligations or that are “bound up” with such rules; “In this area, there is no consideration of outcome determination, no assessment of federal interests, and no balancing.”).

17 The difference between “substantive” rules and rules “bound up with” state substance has never been made completely clear. The chief candidates for rights bound up with substance are those procedural rights intimately related to the rights given by the state’s primary law, including the state’s burden of proof and choice of law rules. *See* Palmer v. Hoffman, 318 U.S. 109, 117 (1943), *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). This does raise the possibility of a clash of the titans between the Seventh Amendment and *Erie*’s constitutional holding, where the state allocates a question to the judge, the allocation is bound up with substantive rights, but the Seventh Amendment arguably requires jury trial. I address and attempt to resolve this concern in Part III *infra*.

18 *See Hanna*, 380 U.S. at 472 (“[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.”).

*Hanna v. Plumer* involved a conflict between the state service of process rule and Federal Rule 4: the plaintiff had complied with Rule 4 but not with the state rule.\(^{21}\) The Court upheld the Federal Rule, and in the course of so holding, recognized substantial Congressional power over practice and procedure in diversity cases. The Court held that a Federal Rule prevails whenever authorized by the REA, and a Rule is authorized whenever it covers “matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.”\(^{22}\)

Of course, Congress could not, by enacting the REA, infringe on the domain of state rules protected by *Erie*’s constitutional holding. Both the REA and *Hanna* recognized this. The REA states that the Federal Rules “shall not abridge, enlarge or modify any substantive right.”\(^{23}\) And *Hanna* recognized that when a question is “‘substantive’ in every traditional sense,” “neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution.”\(^{24}\) Accordingly, after *Hanna*, it is still the case that neither Congress nor the courts may selectively displace core state substance, or rules “bound up with” state substance. But a statute or Federal Rule may displace state procedural rules essentially at will.

With state law plainly ascendant within *Erie*’s constitutional zone, and federal law almost always ascendant within the REA zone, the interesting *Erie* questions now arise with state rules not classifiable as traditional substance, but also not covered by any statute or Federal Rule. Here Congress could hypothetically authorize a federal rule that diverges from state law (because the state rule would be “rationally classifiable” as procedure) but has chosen not to, and no Federal Rule covering the issue has been promulgated. Federal courts might conceivably have

\(^{21}\) *Hanna*, 380 U.S. at 461.

\(^{22}\) *Id.* at 472. John Hart Ely, who clerked for Warren at the time he wrote *Hanna*, argued that a statute can be justified by the merest procedural rationale. For example, Congress would have the authority to enact no-fault liability instead of negligence liability for case management reasons, or could adopt a clear and convincing standard instead of a preponderance standard to prevent jury confusion. *Ely, supra* note 4, at 706 n.77. Ely argued that these modifications could still not be accomplished by Federal Rule because of the substantive rights limitation in the REA. *Id.* In my view, Ely’s argument proves too much, because it would allow Congress to abrogate the rule at issue in *Erie* (say, for case management reasons), which is inconsistent with the holding of that case. *See infra* Part III.

\(^{23}\) 28 U.S.C. § 2072. The substantive rights limitation may or may not be coextensive with the constitutional holding of *Erie*. If it is more expansive than *Erie*’s constitutional holding, then Congress has not delegated the entirety of its rulemaking authority in the REA. This dispute is largely immaterial to the issues treated in this Article, and I will not discuss it further.

\(^{24}\) *Hanna*, 380 U.S. at 471.
the authority to elaborate divergent federal procedural common law on their own, if there were no statute instructing otherwise. But there is such a statute. In the Rules of Decision Act, Congress provided that “The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”  

The RDA means that, rather than having free reign to adopt the procedures that seem best to them, the federal courts must ask: how much conformity with state practice does the RDA require, and how much room does it leave for federal courts to elaborate rules that conflict with state law? This is at root a question of statutory interpretation.

The Court’s original answer to the RDA riddle was the “outcome determination” test of Guaranty Trust Co. of New York v. York.  

Under this test, the state rule controlled whenever use of the federal rule would produce a significantly different outcome. This test, if applied uncritically, would have meant that state practice would nearly always control in the RDA zone, because any difference in rules at the time of application may affect the outcome of the litigation. For example, even a deadline for filing a brief is outcome determinative at the time of application if the federal deadline is shorter. The Court soon came to believe that this test was too crude and broad because it protected state practice in situations that did not implicate the policies embodied in Erie and the RDA.

Accordingly, in Hanna, the Court adopted the reading of the RDA that still prevails today. The Court concluded that state practice controls in the RDA zone whenever divergence would implicate the inequities discussed in the first, “policy” section of Erie:

The Erie rule is rooted in part in a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in a federal court. . . . Not only are nonsubstantial, or trivial, variations not likely to raise the sort of equal protection problems which troubled the Court in Erie; they are also unlikely to influence the choice of a forum. The ‘outcome-determination’ test therefore cannot be read without reference to the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.

Hanna thus announced the “twin aims” test for RDA questions. If federal and state practice differ, the federal rule wins only if it will not violate the “twin aims” of Erie, which Hanna

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27 Id. at 108.
identified as discouraging vertical forum shopping and ensuring the equitable administration of the laws.\(^{28}\) By contrast, if the divergence is not significant enough to implicate the twin aims, then federal courts may follow federal practice.

\textit{Hanna}'s twin aims test extends beyond \textit{Erie}'s constitutional holding because it requires conformity in areas where Congress could legislate a different rule for the federal courts. But the test does not extend as far as \textit{York}, because it does not require federal courts to conform to insignificant aspects of state practice, where significance is judged from the perspective of a litigant choosing a forum.\(^{29}\) As a result, \textit{Erie} and \textit{Hanna} marked out at least four kinds of state rules: those that bind as a matter of constitutional law, those that are validly displaced by an on-point Federal Rule, those that implicate twin aims and trump a contrary federal rule, and those that do not implicate twin aims, leaving the federal courts free to adopt a contrary rule.

\textbf{B. Byrd}

Where do judge-jury rules fit within this standard \textit{Erie} framework? Federal Rules cover some of the ground: for example, in Rules 50 and 56. The Seventh Amendment controls within its sphere (except perhaps where that would conflict with \textit{Erie}'s constitutional holding). On the other hand, if a judge-jury rule is substantive or bound up with state substance, then it controls under \textit{Erie}'s constitutional holding.

Most questions in this area, however, likely fall within the RDA zone because they are neither traditionally substantive nor covered by a statute or Federal Rule. An example, treated in detail in Part II, is the sufficiency of the evidence going to a historical fact such as causation. And in this RDA zone, the \textit{Hanna} twin aims test would frequently indicate use of the state rule.

\(^{28}\) Arguably, the twin aims test was simply a modified version of the outcome determination test, with the focus of the analysis shifted from the time the rule is applied to the commencement of the lawsuit, focusing on whether a reasonable litigant would perceive a material difference between the forums. See Ely, \textit{supra} note 4, at 714 (stating the \textit{Hanna} test as “a federal court may adhere to its own rules in diversity cases insofar, but only insofar, as they are neither materially more or less difficult for the burdened party to comply with than their state counterparts, nor likely to generate an outcome different from that which would result were the case litigated in the state court system and the state rules followed”); Freer, \textit{supra} note 16, at 1652 (arguing that \textit{Hanna}'s innovation on outcome determination was to shift focus to outset of the case, away from the time the rule is applied, and that it did this by focusing on forum selection decision and inequitable administration of the laws).

\(^{29}\) Because \textit{Hanna} ultimately relied on the REA, the RDA discussion was, strictly speaking, dicta. But \textit{Hanna}'s RDA test has been followed in every Supreme Court RDA case since then, and has thus achieved the status of holding. See Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 437 (1996); Chambers v. NASCO, Inc., 501 U.S. 32, 34 (1991); Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 27 n.6 (1988); see also Sun Oil Co. v. Wortman, 486 U.S. 717, 726-27 (1988) (citing \textit{Hanna}, not \textit{Byrd}, in describing RDA test).
because divergence in such important strategic areas would most often cause forum-shopping and inequity. But the analysis is complicated by a case that predates Hanna, Byrd v. Blue Ridge Electrical Cooperative, Inc.\(^{30}\) 

In Byrd, the plaintiff—an electric line worker injured on the job—sued the electric company for negligence. The electric company argued that it was the worker’s “statutory employer,” which meant he should be required to seek exclusive redress from the worker’s compensation system.\(^{31}\) In South Carolina, the judge decided the “statutory employer” issue, as well as disputed historical facts relevant to that issue.

The lower federal courts, applying York’s outcome determination test, had followed state practice and decided the statutory employer issue, as well as disputed historical facts, without a jury.\(^{32}\) The Supreme Court held that this was error.\(^{33}\) The Court first observed that the state practice was not “substantive” or “bound up with” state substance, but was “merely a form and mode of enforcing the immunity,” and therefore did not fall within Erie’s constitutional holding.\(^{34}\) The Court seemed to think that the state’s allocation was purely accidental: because the issue normally came up on appeal from the administrative agency, the state courts treated “statutory employer” and related facts as a jurisdictional issue for the court, to be decided without a jury.\(^{35}\)

The Court next acknowledged that the York test (then the prevailing one for RDA questions) pointed toward use of the state rule, because outcomes may differ, all things being equal, if the state courts use a judge and the federal courts use a jury.\(^{36}\) The Court nonetheless held that the outcome determination test was not dispositive:

> [T]here are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the


\(^{31}\) Id. at 527.

\(^{32}\) Id. at 527-29.

\(^{33}\) The Court’s opinion did not make clear whether the lower courts erred only by deciding the disputed factual issues, or whether they also erred by applying the “statutory employer” standard to the facts of the case. In fact, after Byrd, the Fourth Circuit continued to hold that the court was to apply “statutory employer” to the facts, consistent with state practice. See Corollo v. S.S. Kresge Co., 456 F.2d 306, 313 (4th Cir. 1972); Walker v. U.S. Gypsum Co., 270 F.2d 857, 860 (4th Cir. 1959)

\(^{34}\) Byrd, 356 U.S. at 536.

\(^{35}\) Id.

\(^{36}\) Id. at 537.
Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.\textsuperscript{37} The Court disclaimed reliance on the Seventh Amendment itself.\textsuperscript{38} Instead, it held that “there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts,” a policy sufficient to overcome the potential outcome disparity produced by following the federal rule.\textsuperscript{39} At the close of the analysis, the Court took pains to downplay the potential for outcome disparity, noting that it was mitigated by federal jury control practices, including directed verdict, new trial, and the federal judge’s ability to comment on the evidence.\textsuperscript{40}

How does one harmonize the RDA analysis in Byrd with the test later announced in Hanna? It is possible (perhaps even likely) that they do not conflict at all: that is, Byrd might simply represent an early example of twin aims analysis in the specific context of the judge-jury relationship. Like Hanna, Byrd acknowledged that York-style outcome determination was too crude and was insufficiently attentive to the policies behind Erie or the RDA. Byrd also spent considerable effort downplaying the potential for outcome disparity by noting that jury control devices in federal court would minimize disparity: “[C]learly there is not present here the certainty that a different result would follow . . . or even the strong possibility that this would be the case.”\textsuperscript{41} Arguably Byrd was simply recognizing that allocation of the “statutory employer” issue to the jury rather than the judge would not violate twin aims, because the limited disparity (much of it unpredictable) on this threshold issue would not affect the forum decision or produce any inequity. Viewed in this light, the language about the “independent” federal system and the “strong federal policy against allowing state rules to disrupt the judge-jury relationship” were simply restating, in the specific context of a judge-jury rule, what Hanna later held as a general matter: the federal courts are an independent system for administering justice whose procedural rules are normally supported by good and substantial reasons, and those rules should not be quickly discarded in the absence of forum shopping or inequity.

On this reading, Byrd was simply Hanna writ small, a tentative step away from York and toward the full-fledged twin aims test that just happened to take place in the judge-jury field.

\textsuperscript{37} Id. at 537.
\textsuperscript{38} Id. at 537 n.10.
\textsuperscript{39} Id. at 538.
\textsuperscript{40} Id. at 539-40.
\textsuperscript{41} Id.
The analysis was arguably consistent with twin aims analysis, because disregarding the state rule likely did not induce forum shopping or cause real inequity. Support for this interpretation is found in *Hanna* itself. *Hanna* purported to establish a comprehensive RDA test, applicable to all questions in the RDA zone, including, presumably, judge-jury questions. In the course of establishing this comprehensive test, it folded *Byrd* into the justification, citing *Byrd* for the proposition that “[o]utcome determination analysis was never intended to serve as a talisman. . . . Indeed, the message of *York* itself is that choices between state and federal law are to be made not by application of any automatic, ‘litmus paper’ criterion, but rather by reference to the policies underlying the *Erie* rule.”42 This identification of *Byrd* with “the policies underlying the *Erie* rule” indicates that the *Hanna* majority did consider *Byrd* to be simply a more particular instance of the twin aims test set forth in *Hanna*. Further, there is no indication in the *Hanna* opinion that *Byrd* supplied a competing RDA test.

Perhaps surprisingly, *Byrd* has not traditionally been understood as an early application of twin aims. Instead of folding *Byrd* into *Hanna*, most commentators have read *Byrd* to provide a competing test. They believe *Byrd* shows that a federal procedural common law rule may sometimes prevail over a contrary state rule, even if that divergence violates twin aims. They commonly characterize the *Byrd* alternative as a balancing test, which calls upon a federal court to weigh the federal interest against the state interest and the potential for outcome disparity.

This “balancing” interpretation of *Byrd* is no more or less plausible than the “*Byrd* as a subset of *Hanna*” interpretation. The key fact—whether or not the limited outcome disparity produced by following the federal rule in *Byrd* would have violated twin aims—is missing. Because *Byrd* preceded *Hanna*, the *Byrd* Court did not answer the question.

There are, however, good theoretical and practical reasons to resist the “balancing” interpretation of *Byrd*. In the first place, how can there be two simultaneously existing, competing interpretations of a single federal statute, the RDA? The later-decided *Hanna* announced the definitive interpretation, which has been followed in every Supreme Court RDA case since.43 If that is the proper interpretation of the RDA, then how can an “important” or even “essential” federal interest identified by a federal court outweigh Congress’ command to follow the state rule where divergence would violate twin aims?

43 *See supra*, note 29.
This theoretical concern is equally present in the judge-jury area. Recall that *Byrd* is relevant only in the RDA zone, where no constitutional provision or federal statute (other than the RDA) applies. The “federal interest” behind the judge-jury rule can therefore only be a product of federal common law. But how can a federal common law rule trump a twin aims violation, when Congress has mandated conformity in twin aims situations? Because judge-jury rules are so important, state rules in this area will often implicate twin aims, raising this difficulty again and again.

In addition to this theoretical difficulty, there is the practical problem of determining when a federal interest is “important” enough to potentially trump a twin aims violation. One answer appeals to the language of *Byrd*, and says that any “essential characteristic” of the federal system triggers application of *Byrd*’s alternative test. Of course, labeling a characteristic as “essential” does not solve the theoretical difficulty: how, if twin aims are violated, a purportedly “essential” characteristic identified by a federal court can trump Congress’ will.

But further, essentialism is unsatisfactory as a practical trigger for the *Byrd* test. What are the “essential” characteristics of a federal court that distinguish it from a state court, apart from constitutionally mandated features such as life tenure for judges and the Seventh Amendment right to jury trial, and statutory features mandated by Congress? A state court is certainly no less of a “court” than a federal court. In fact, state courts are arguably just as much “federal” courts as federal courts are. They have the full authority to hear federal claims (and sometimes are the only courts that have such authority, when federal jurisdiction is lacking). In addition, under the Madisonian compromise, state courts would have been the only lower federal courts if Congress had chosen not to establish an independent federal judiciary. It is therefore extremely hard to identify characteristics of less than constitutional or statutory magnitude that would destroy a federal court’s “federal” character if imported from state court in diversity cases. To put the question concretely, why are non-constitutional, non-statutory judge-jury rules any more “essential” than the countless other procedural rules that federal courts must borrow from state courts under *Hanna*? Federal courts must follow the Seventh Amendment, but beyond that, how does borrowing judge-jury rules from state court to avoid a twin aims violation offend the “essential character” of a federal court?

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Because of the inherent plasticity of essentialism as a limiting principle on *Byrd* balancing, there is the constant risk that the invocation of *Byrd* is just a screen for disregarding twin aims in important areas of diversity practice. This implicates the theoretical concern once more: it is possible that federal procedural common law is being used haphazardly, under *Byrd*, to trump Congress’ will as expressed in the RDA (interpreted by *Hanna*). These thorny theoretical and practical difficulties provide good reasons to prefer the equally plausible “*Byrd* as a subset of *Hanna*” reading developed above.

Finally, even if *Byrd* does provide a separate test, and even if a free-floating federal interest may sometimes be sufficient to trump a twin aims violation, how should the *Byrd* test be applied? The opinion itself does not specify how the balancing test should be conducted (another strike against reading it as embodying a dramatically different test). But the opinion can be read to indicate that the federal interest should be weighed against the state interest as well as the potential for outcome disparity.

Notably, the test does not ensure that the federal rule will win. In *Byrd* itself, the federal rule carried the day because the state interest was minimal (simply an accident of the state’s worker’s compensation scheme) and the possibility of outcome disparity was low, while the federal interest was an important one. Even within *Byrd*’s (possible) sphere, if the state interest is more intense than it was in *Byrd*, or when outcome disparity is more likely to be a problem, then by *Byrd*’s own terms the balance could favor the state rule. We thus come to the second major exception to the supposed federal hegemony in the judge-jury area: even if *Byrd* provides an alternative RDA test, then a state judge-jury rule might still prevail over a federal rule if the state interest is sufficiently intense or the possibility of outcome disparity is sufficiently high.

No doubt in part because of the theoretical and practical complexities, *Byrd*’s ambit in the years since *Hanna* has been fairly limited. It was not discussed in a Supreme Court case for almost forty years, until 1996 in *Gasperini*. *Hanna*’s twin aims test clearly became the prevailing one at the Supreme Court and in the lower courts. This in itself casts doubt on the “*Byrd* as a separate test” interpretation, for despite the fact that many of the federal rules in these

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45 One might argue that the Court should have been more sensitive to potential state interests supporting the allocation to the judge. But for our purposes, all that matters is that the Court thought the state had no important interest.

46 Some have questioned whether the three-legged *Byrd* balancing even makes sense. I do not agree with this criticism: like any balancing test, it simply calls for a nuanced, context-sensitive judgment in the individual case. My dispute is instead with the use of a separate *Byrd* balancing test, in willful derogation of *Hanna*’s twin aims test.

cases implicated important federal interests, the cases never suggested that those interests could outweigh a potential twin aims violation.\footnote{See supra, note 43.}

\textit{Byrd} has, however, enjoyed a great deal of influence in the lower courts in the area of judge-jury rules.\footnote{See Thomas D. Rowe, Jr., \textit{Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in its Erie-Hanna Jurisprudence?}, 73 NOTRE DAME L. REV. 963, 1007-08 (1998) (noting that if \textit{Byrd} is invoked anywhere it will be “in the Seventh Amendment-shadowed area of allocation of decisionmaking authority among federal juries, trial judges, and appellate courts”).} In fact, many federal courts have taken a position more extreme than \textit{Byrd} itself, by holding not only that judge-jury rules necessarily trigger use of an alternative \textit{Byrd} test, but also that the federal rule necessarily \textit{wins} in the weighing supposedly contemplated by \textit{Byrd}.

The exemplar here is the Fifth Circuit’s decision in \textit{Boeing Co. v. Shipman}, which involved the question of whether federal courts in diversity cases should follow a state sufficiency standard that was more jury-favorable than the federal “reasonable jury” standard. The Fifth Circuit did not ask whether the stricter federal standard would produce a twin aims violation. It did not even find that the \textit{Byrd} test applied and then conduct a nuanced weighing of the state and federal interests. Instead, it rejected the state rule solely because it involved the judge-jury relationship:

Federal courts must be able to control the fact-finding processes by which the rights of litigants are determined in order to preserve ‘the essential character’ of the federal judicial system. Of course, we do not contend that this control will not affect state-created substantive rights in some cases. Ultimately, however, the integrity of our factfinding processes must outweigh considerations of uniformity.\footnote{Boeing Co. v. Shipman, 411 F.2d 365, 369-70 (5th Cir. 1969).}

This was a thin \textit{Erie} analysis indeed. Inexplicably, though it relied on \textit{Byrd}, the court did not even engage in \textit{Byrd} balancing, instead using the vague “integrity of our factfinding processes” as an \textit{Erie} trump card. If the court had balanced, the state rule certainly should have won out. Unlike the rule in \textit{Byrd}, which gave a jury issue to the judge, the more jury-favorable sufficiency standard in \textit{Boeing was consistent with} the federal policy in favor of “assign[ing] the decisions of disputed questions of fact to the jury.”\footnote{\textit{Byrd}, 356 U.S. at 537.} The state pro-jury policy and the federal pro-jury policy should have pointed the same way, and been reinforced by any outcome disparity that divergence might have produced.
Boeing was therefore an extreme decision. It essentially eschewed all Erie analysis, including Byrd balancing, simply because the rule involved the judge-jury relationship. It is, unfortunately, characteristic of many lower court decisions in this area. These decisions erect a federal enclave around the judge-jury relationship, immune from all influence that state law might have under normal Erie principles. I will refer to the theory espoused by Boeing and similar cases as the “enclave theory” of judge-jury relations throughout the remainder of this Article. 52

We have already seen in this section that the enclave theory cannot be correct, for three separate reasons. First, when a state judge-jury rule is bound up with state substantive rights, then even Byrd recognizes that Erie’s constitutional holding requires a federal court to use the state rule. Second, there are substantial theoretical reasons to doubt that Byrd presents an alternative to the Hanna twin aims test, even in the area of judge-jury relations. Finally, even if Byrd does create a separate test for some judge-jury problems, it does not necessarily indicate use of the federal rule. If the state interests are sufficiently strong, the possibility of outcome disparity is sufficiently likely, or the state rule serves the important federal policy, then even a Byrd balancing test could point toward the state rule.

C. Gasperini

Any theory of the influence Byrd may or may not have in the judge-jury area must now also take into account the Court’s decision in Gasperini v. Center for Humanities, Inc. 53 The case resulted from a tort reform effort in New York state, in which the state had adopted a more liberal standard for new trial on the basis of excessive compensatory damages. The new standard required state trial and appellate courts to order a new trial if they determined that an award “deviates materially from what would be reasonable compensation.” “Deviates materially” was easier for a defendant to meet—and more threatening to the jury’s verdict—than the federal “shocks the conscience” standard, and was meant to produce a tighter range of compensatory damages awards in New York. The Second Circuit in Gasperini had applied the state standard instead of the federal standard and ordered a new trial.

In the first part of its decision, the Supreme Court agreed with the Second Circuit that the state "deviates materially" standard did provide the proper standard for new trial in federal diversity cases. But the Court then held that the state practice allowing appellate judges to apply the standard and grant new trials under it did not control in federal court. Federal district judges, not federal appellate judges, should apply that standard, and federal appellate judges must restrict themselves to reviewing district court decisions for abuse of discretion.

The reasoning behind these separate holdings (which I will refer to as "Gasperini (I)" and "Gasperini (II)") potentially illustrates a great deal about the effect of state law on judge-jury rules in diversity cases. In Gasperini (I), the Court first determined that Federal Rule 59—which simply allows for new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court"—does not itself provide a standard for new trial. This meant the "shocks the conscience" standard is a rule of federal procedural common law, and shifts the Erie analysis into the RDA zone. The Court then applied Hanna, not Byrd, to determine that state-federal divergence would violate twin aims: "We . . . agree with the Second Circuit that New York’s check on excessive damages implicates what we have called Erie’s ‘twin aims.’ . . . Erie precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court."

The result of the Hanna analysis is not surprising: the availability of relatively unconstrained compensatory damages in federal court could be a significant inducement to forum shopping and would cause the kind of inequity contemplated by Erie. The holding is instead significant because the Court followed the state judge-jury rule, and in doing so, did not even cite Byrd. In fact, not only did the Court rely exclusively on Hanna: it did not even mention Byrd in its obligatory recitation of the history of the RDA test, instead skipping directly from York to Hanna.

Gasperini (I) is a powerful sign that Byrd—if construed as a test distinct from Hanna twin aims—does not even extend to all judge-jury rules in the RDA zone. The rule at issue in Gasperini vitally affected the judge-jury relationship by making it easier for a judge to grant a new trial, and thus making it less likely that a jury verdict would stand. Moreover, like the state

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54 Id. at 429-30.
55 Id. at 437.
56 Id. at 430-31.
57 See id. at 428.
rule in *Byrd*, the New York rule transferred power from the jury to the judge, in apparent
derogation of the strong federal policy in favor of jury decision. Yet this portion of the opinion
did not even cite *Byrd*, and exclusively relied on the *Hanna* twin aims test instead.

*Gasperini* thus definitively disproved the “enclave theory” of judge-jury rules once and
for all, because it showed that state law *can* have an influence on judge-jury rules in federal
court. Moreover, it undermined the theory that *Byrd* provides an independent test distinct from
*Hanna* twin aims. Here was the first *Erie* case as the Supreme Court in forty years involving a
judge-jury rule—the purported wheelhouse of the separate *Byrd* test—yet the reasoning did not
even mention *Byrd*. If this kind of rule does not trigger a separate *Byrd* test, then what could?\(^{58}\)

A few pages later, however, the Court introduced a wrinkle. *Gasperini* (II) did contain
the first substantive discussion of *Byrd* in a Supreme Court opinion in decades. In this part of the
opinion, the Court found that although New York allowed both trial and appellate judges to
apply “deviates materially,” federal appellate courts should *not* apply it, and instead should only
review district judges’ decisions under the standard for abuse of discretion. The Court reasoned
that “[w]ithin the federal system, practical reasons combine with Seventh Amendment
constraints to lodge in the district court, not the court of appeals, primary responsibility for
application of § 5501(c)’s ‘deviates materially’ check.”\(^{59}\) The practical reason was the federal
trial judge’s “unique opportunity to consider the evidence in the living courtroom context.”\(^{60}\)
The Seventh Amendment constraint was the Reexamination Clause, which prohibits federal
appellate courts from reexamining any fact found by a jury. Yet as in *Byrd*, the Court declined to
rely expressly on the Seventh Amendment, and stopped short of holding that the Amendment
prohibits a federal appellate court from applying “deviates materially.”

The analysis in this portion of the opinion was not pellucid, but the Court appears to have
recognized a new “essential characteristic”: the relationship between federal trial and appellate
courts. The Court cited *Byrd*, though it did not really conduct any *Byrd* balancing, and thus
revealed little about how that balancing should operate in practice. One might argue, however,
that *Gasperini* (II) preserves some hope that *Byrd* still contains a separate test for RDA
questions.

\(^{58}\) See Freer, supra note 16, at 1655 (“It is difficult to imagine an issue better calculated to incline the Court to
address *Byrd*.”).

\(^{59}\) Gasperini, 518 U.S. at 438.

\(^{60}\) Id.
But then how does one reconcile the two holdings in *Gasperini*? On the one hand, *Gasperini* (I) involved a judge-jury rule, but did not even cite *Byrd*, much less its language about the judge-jury relationship being an “essential characteristic” of the federal system. It instead relied on the standard *Hanna* test, indicating both that state law has a role in the judge-jury area and that some judge-jury rules are immune from *Byrd* balancing. Then, in *Gasperini* (II), the Court seemed to do an about face, identifying a new essential characteristic—the trial-appellate relationship—and citing *Byrd* to hold that state practice was not controlling. *Gasperini* seemed to demonstrate a simultaneous contraction and expansion of what *Byrd* had commonly been thought to mean.

One route to harmony is to say that *Gasperini* simply confirmed that *Byrd* analysis is a mere subset of *Hanna* twin aims analysis. On this reading, part one did not need to cite *Byrd* because *Hanna* is an identical test, so citation of one is equivalent to citation of the other. Part two’s citation of *Byrd* was equally insignificant: it merely repeated the writ-small “twin aims” analysis found in *Byrd*. No-one could seriously contend that the application of “deviates materially” by federal trial rather than appellate courts has any real impact on forum selection or promises any substantial inequity between state and federal litigants: the standard is what matters, not whether litigants get two bites at the apple or just one. Arguably, then, the reasoning about “essential characteristic” in the second part of *Gasperini* served the same function it did in *Byrd*, if *Byrd* is read as a subset of *Hanna*: it simply acknowledged that where twin aims are not implicated, important federal interests should be respected. Supporting this “*Byrd* as a subset of *Hanna*” reading, the Court found that not applying “deviates materially” at all would introduce “substantial variations between state and federal money judgments,” implicating twin aims.61 But it noted no such concern with respect to the trial-appellate allocation of authority: to the contrary, it said that “New York’s dominant interest can be respected, without disrupting the federal system, once it is recognized that the federal district court is capable of performing the checking function.”62

If *Byrd* is instead conceived as an alternative RDA test, then it is more difficult to explain the Court’s use of the test in part two but not in part one. Essentialism is difficult enough already. But *Gasperini* (I) indicates that not even “the judge-jury relationship” is sufficient to

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61 Id. at 430.
62 Id. at 437.
capture an “essential characteristic” of the federal system! And if judge-jury rules are not a limiting principle, then what is?

Though Gasperini does not say so explicitly (it says few things explicitly), it may be capable of supporting a practically and theoretically workable limiting principle for a distinct Byrd test. That principle is constitutional avoidance. Simply put, the RDA is a statute, and under standard principles of statutory interpretation, the Court may interpret a statute so as to avoid substantial constitutional questions.63 A distinct Byrd test may simply be an alternative interpretation of the RDA, employed when a state rule would raise substantial constitutional issues if applied in federal court. It would allow a federal court to balance away a twin aims violation when the state rule raises serious constitutional issues.

This constitutional avoidance interpretation seems to explain the existing cases, and also provides a workable test for “essential characteristics” that may trigger a distinct Byrd test for RDA problems. First, it explains the analyses in both Byrd and Gasperini. In Byrd, by balancing, the Court was able to avoid a substantial Trial by Jury issue: whether the Seventh Amendment provides a right to jury trial for the “statutory employer” issue. Likewise, in Gasperini (II), by applying the Byrd test, the Court was able to avoid a difficult Reexamination Clause issue: whether a federal appellate court may apply a “deviates materially” standard in reviewing a trial court’s denial of a new trial motion.64

By contrast, in Gasperini (I), the application of “deviates materially” by a federal district judge presented no substantial constitutional question. As the Court observed in that very opinion, “[T]he Reexamination Clause does not inhibit the authority of trial judges to grant new trials for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. That authority is large.”65 Thus the issue in Gasperini (I) did not raise a difficult Seventh Amendment question, and the Court did not need to avoid a question by applying a less state-protective Byrd balancing test.

The constitutional avoidance interpretation of Byrd not only explains the extant cases: it also avoids all the theoretical and practical difficulties explicated in the previous section. The theoretical difficulty was justifying how an “essential characteristic” identified by a federal court

63 See INS v. St. Cyr, 533 U.S. 289, 299-300 (2001) (“[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems.”) (citing cases).
64 See Gasperini, 518 U.S. at 438.
65 Id. at 433.
could trump a twin aims violation, when Congress (as interpreted by Hanna) has mandated use of the state rule whenever divergence would violate twin aims. Constitutional avoidance solves this difficulty. On this view, when a federal court applies Byrd, it is not privileging a federal interest over a federal statute. Instead, it is interpreting a federal statute, in a way that avoids constitutional difficulties.66 Byrd and Hanna are not dueling interpretations of the same statute: they are interlocking interpretations. Byrd applies where a constitutional issue is present, and Hanna applies in all other cases. This interpretation is also true to Erie, because it gives maximum sway to the policy of avoiding litigant inequity first noted in that decision, compromising that policy only in the name of avoiding serious constitutional issues in federal court.

Constitutional avoidance is also much more workable than essentialism as a trigger for the Byrd test. Essentialism is infinitely malleable, and threatens to undermine, erratically, the legislative intent embodied in the RDA (as interpreted by Hanna). Constitutional avoidance is a much more concrete trigger because the court need only decide whether the state rule raises a substantial constitutional issue. This interpretation of Byrd mitigates the potential encroachment on twin aims in the name of protean federal interests, and is therefore a desirable trigger for an alternative test.

Finally, constitutional avoidance explains why “balancing” has been confined to two Supreme Court cases, and has not been extended to other cases that arguably involved important federal interests: both Byrd and Gasperini contained potential Seventh Amendment issues, and the other cases did not. The approach even explains why Byrd and Gasperini curiously failed to address the Seventh Amendment issues head on, despite identifying them. Both decisions were actively trying to avoid addressing the possibly thorny constitutional problems.

Quite frankly, this is the only reading that makes sense of Gasperini (I). It was hard enough to define the Byrd trigger before Gasperini, but most thought it at least included judge-jury rules. Gasperini proved that theory wrong, and showed that the trigger must be even narrower than that. The only principled basis for a narrower trigger is the need to avoid a constitutional question. Helpfully, that trigger is confirmed pages later in Gasperini (II), where the Court seemed to apply Byrd to avoid a difficult constitutional question.

66 The RDA is certainly cryptic enough to suffer interpretation. See Ely, supra note 4, at 710 (noting that the RDA is not self-defining).
For all of these reasons, if Byrd is characterized as a different test from Hanna’s twin aims, it should be strictly limited to state rules that raise substantial constitutional questions. This reading explains the existing cases; puts the Byrd test on a solid theoretical footing; and provides a trigger that is far more workable than essentialism. The Supreme Court’s cases do not adopt this interpretation explicitly. But they do not say much of anything explicitly. And the Seventh Amendment-suffused language of Byrd and Gasperini strongly suggests that constitutional avoidance is what the Court was really up to. Lower courts could do much worse than this, if they must treat Byrd as a distinct test for RDA questions.

D. Erie framework for judge-jury questions

In short, this Part has provided several substantial reasons to doubt that federal law should dominate the judge-jury relationship in federal diversity cases. Federal law of course has a role here. If the Seventh Amendment or a federal statute requires a certain federal rule, it obviously controls. A valid Federal Rule should also prevail under Hanna’s REA holding.

But if the state judge-jury rule is bound up with state substance, then Erie’s constitutional holding requires a federal court to follow it. And where no Federal Rule controls, a state judge-jury rule that implicates Erie’s twin aims normally should apply, even when not bound up with state substance. The Byrd test, on the other hand, is either identical to the Hanna test, or should be limited to state judge-jury rules that raise constitutional issues in federal court.

Furthermore, even when constitutional avoidance warrants invocation of Byrd, sometimes Byrd balancing will favor the federal rule. In that event, the court must confront the constitutional issue, and if the Constitution does not prohibit the state rule, the state rule should control. There should certainly be no hegemony of federal law here: state law may come in under Erie’s constitutional holding, Hanna’s twin aims test, or Byrd’s balancing test.67

In the next two Parts, I apply this framework to two of the most basic and important judge-jury problems: the sufficiency of the evidence and the allocation of questions to judge or jury. In these concrete contexts, the importance of following state law—and the inequity of a federal enclave—become apparent. These Parts also show that, despite substantial adherence to

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67 Even if one rejects my reading of what Gasperini says about Byrd, one cannot deny that state law must have some influence on judge-jury rules. Substantive judge-jury rules, or those “bound up” with substance, must control in federal court. And, at least sometimes, Byrd balancing should not favor the federal rule (if it deserves to be called a balancing test at all, and not a federal trump card).
the enclave theory, many federal courts *do* follow state law. This indicates that my prescriptions are both workable and contain some truth.
II. Sufficiency of the evidence

In this Part, I apply the *Erie* framework developed above to the extremely important issue of the sufficiency of the evidence. Where an issue is committed to the jury, “sufficiency” marks the boundary between the jury’s authority and the judge’s authority. If the evidence is “insufficient” under the appropriate standard, then the judge is authorized to resolve against the party on that issue. If it is “sufficient,” then the judge must send the issue to the jury and allow the jury’s decision to stand after verdict.68

Sufficiency issues arise with respect to both pure factual issues (such as causation and intent) and so-called “mixed questions of law and fact.” Mixed questions require the application of the law to the facts found by the jury; the application of the negligence standard of care to the facts of a case is the classic example. Sometimes the mixed question is allocated to the judge, in which case the judge simply decides it and no sufficiency issue is presented. But when the mixed question is allocated to the jury, sufficiency comes into play because the judge must decide whether the evidence is sufficient to allow the jury to find that the law applies to the provable facts. I refer to this as “mixed question sufficiency,” in contrast to “historical fact sufficiency.”

As it turns out, the *Erie* analysis is somewhat different for mixed question sufficiency and historical fact sufficiency. In the first section, I show that the RDA framework indicated by *Gasperini* generally requires adherence to state court historical fact sufficiency opinions. Then in the second section, I show that mixed question sufficiency decisions are substantive, and therefore bind as a matter of constitutional law. In both areas, many federal appellate cases apply state law and therefore vindicate my approach.

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68 Though I often use the term “directed verdict,” the analysis applies equally well to motions for JNOV and summary judgment. As the Supreme Court has held, the primary difference between summary judgment and directed verdict “is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). “In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Id.* at 251-52.
A. Historical fact sufficiency

In a historical fact sufficiency decision, the judge must decide whether the jury should be allowed to infer a certain material historical fact from certain pieces of evidence presented at trial. For example, a judge may have to decide whether the plaintiff’s evidence of causation is sufficient to allow a jury to infer that the defendant caused the plaintiff’s injury.

A controversy raged for almost sixty years over whether state or federal abstract sufficiency standards should govern in diversity cases. The federal courts have always used a reasonable jury standard: the judge may take the issue from the jury only if reasonable jurors could not infer the existence of a fact from the evidence presented at trial. Several states, however, had materially different standards. Some states sent an issue to the jury if there was merely a scintilla of evidence to support the party trying to prove the fact: so-called “scintilla standards.” Other states have had “no evidence” standards for certain issues, requiring the issue to go the jury regardless of how little evidence the proponent proffers. Still other states phrase their standards in ways that arguably differed from the federal reasonable jury standard.

The Supreme Court never resolved whether the state or federal standard applies, and a circuit split soon developed. Today, the clear weight of authority lies on the side of the federal

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70 Arizona, for example, had a constitutional provision requiring a contributory negligence issue to always go to the jury. See Herron v. S. Pac. Co., 283 U.S. 91, 92 (1931); see also Steven Alan Childress, Judicial Review and Diversity Jurisdiction: Solving an Irrepressible Erie Mystery?, 47 SMU L. REV. 271, 293 (1994) (noting states that sometimes apply a “no evidence” standard).

71 The standard in Indiana, for example, allows the court to direct a verdict only if the evidence “points unerringly” one way. See Mayer v. Gary Partners & Co., Ltd., 29 F.3d 330, 333 (7th Cir. 1994).

72 See Dick v. New York Life Ins. Co., 359 U.S. 437, 445 (1959) (noting the circuit split but finding “the question is not properly here for decision”). Dick was the Supreme Court’s last word on the subject. The Supreme Court may never have stepped into to resolve the circuit split because it did not consider it to be an important one. Some evidence of that view appears in the case upholding general directed verdict practice, where the Court seemed to indicate that the choice of an abstract standard is not likely to be meaningful unless the state really does have a rare scintilla or no-evidence standard: “It hardly affords help to insist upon ‘substantial evidence’ rather than ‘some evidence’ or ‘any evidence,’ or vice versa. The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.” Galloway v. United States, 319 U.S. 372, 395 (1943).

Because the vast majority of states follow a reasonable jury standard or one very much like it, the Court may have been content to leave the issue to the few circuits where a state scintilla or no-evidence standard does present an issue. The Court’s language in Galloway recognizes, however, the crucial importance of state court decisions on particular sufficiency issues: the question that occupies the bulk of this Part.
Only the Sixth Circuit and D.C. Circuit clearly opt to apply the state standard (in the case of the D.C. Circuit, the district standard). In three circuits, the answer is still muddled or undecided, likely because the similarity between the state and federal standards does not require those circuits to make a choice.

It seems fairly clear that the abstract standard issue, which so perplexed the federal courts, is now an REA question, and a relatively easy one at that. In 1991, Federal Rule 50 was amended to provide that the court may resolve a jury issue against a party (either by directing a verdict or granting JNOV) only if “the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.” This amendment, adopted with full knowledge of the then-fifty-year-old debate, must be considered to have elevated the reasonable jury standard from federal rule to Federal Rule.

Under Hanna’s REA test, this Rule controls unless it purports to address matters that are not “rationally classifiable” as procedural. And the abstract standard is readily classifiable as procedural because the choice between “reasonable jury,” “scintilla,” and “no evidence” standards arguably represents a procedural decision about the relative capacity of judges and juries to infer the correct historical facts from the evidence presented at trial.

That a historical fact is a “jury issue” at all indicates a belief that the jury is more accurate than the judge at inferring the truth across some range of evidence. One might hold this belief for a variety of reasons: for example, jurors’ greater fund of real world experience, the fresh eyes they bring to a case, or the virtues of group deliberation and decision-making. On the other hand, the fact that directed verdict and JNOV are also available shows that we do not have complete confidence in the jury’s fact-finding ability: otherwise, we would trust the jury to find

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74 See Kusens v. Pascal Co., 448 F.3d 349, 360 (6th Cir. 2006); Raynor v. Merrell Pharm. Inc., 104 F.3d 1371, 1376 (D.C. Cir. 1997).

75 Compare Finley v. River N. Records, Inc., 148 F.3d 913, 918 (8th Cir. 1998) (federal) with Yeldell v. Tutt, 913 F.2d 533, 540 (8th Cir. 1990) (state), and To-Am Equip. Corp. v. Mitsubishi Caterpillar Forklift America, Inc., 152 F.3d 658, 664 (7th Cir. 1998) (federal) with Winger v. Winger, 82 F.3d 140, 143 (7th Cir. 1996) (state). See also Willis v. Westin Hotel Co., 884 F.2d 1556, 1563 n.5 (2d Cir. 1989) (noting the question remains undecided). For a more detailed review of the circuit split, see Childress, supra note 70.


the correct facts even when the evidence is slim. The potential problems with jury fact-finding are equally well known. Jurors may be too ready to credit certain kinds of evidence; they may bring biases into the jury room; group decision making may introduce cognitive biases. Jurors’ lack of experience with the realities of litigation and the limitations of evidence may cause them to over- or under-estimate the probabilities indicated by various pieces of evidence. Jurors may be too unwilling to credit circumstantial evidence, or may demand unrealistic quantities of evidence to support a fact (the “CSI effect”).

This risk of error is the cost of jury fact finding. That cost is incurred both by the litigant deprived of the proper verdict and by the system as a whole, which loses legitimacy when it produces an incorrect result. The legitimacy cost likely increases when the evidence is weaker, because the injustice is more blatant and observable when the jury renders a verdict against the great weight of the evidence.

The different sufficiency standards can be regarded as embodying different views of the relative costs and benefits of jury factfinding. A “no evidence” jurisdiction trusts the jury almost completely, and concludes that costs almost never exceed the benefits, such that withdrawal of the issue from the jury is warranted only when there is literally “no” evidence. A “scintilla” jurisdiction concludes that the costs exceed the benefits in only the most extreme cases. And a “reasonable jury” jurisdiction concludes that there is an even greater range of cases where the costs of jury decision are too high. The choice of sufficiency standard therefore has a rational procedural basis, grounded in the jurisdiction’s attitude toward the fact-finding capacities of juries. Under Hanna’s REA test, that is sufficient to require use of the federal standard. A federal court need not send a historical fact issue to the jury when it is supported by only a scintilla of evidence, or no evidence—regardless of contrary state practice.

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78 Directed verdict on historical facts may also be justified as a way to save time and costs, but this rationale is not completely persuasive. A directed verdict occurs after much or all of the evidence is in. JNOV occurs after both trial and verdict. Moreover, most of the cost in terms of time and resources occurs before trial, so a savings of the time it would take for the jury to render a verdict—at most perhaps a week—is not particularly significant in the scheme of things.

79 The “substantive rights” limitation of the REA might in some circumstances still indicate use of the state rule: for example, where the state has adopted a “no evidence” or “scintilla” standard for a particular cause of action for the purpose of favoring a particular class of litigant. This consideration is not present, however, where the state has simply adopted a standard applicable to all cases across the board, as most states have.

80 For another commentator who agrees that the amendment to Rule 50 mooted the abstract standard issue (though for somewhat different reasons), see Childress, supra note 70, at 312.
The amendment to Rule 50 did not, however, settle what is arguably a much more interesting question regarding historical fact sufficiency: the bindingness of state court decisions applying a reasonable jury standard (or one materially indistinguishable from that standard). Of course, most constellations of evidence at trial are unique, meaning that many state court historical fact sufficiency decisions are sui generis and never could have precedential value in a future federal case. But evidentiary problems do recur, which means that some historical fact sufficiency opinions will have precedential value. For example, in toxic tort litigation, a particular epidemiological report may conclude that a drug caused a birth defect. A state court may hold that a reasonable jury could conclude, on the basis of the report, that the drug caused the plaintiff’s birth defect. In a future case involving the same drug, the same sufficiency issue might arise. Similarly, in asbestos cases, certain problems of proving exposure to the defendant’s product may recur in state and federal court. In either of these situations, should a federal court be bound to conclude that similar evidence is sufficient (or insufficient) to create a jury issue?

This is an RDA question because Rule 50 does not purport to dictate how the “reasonable jury” standard applies to particular congeries of facts. And if the Hanna test applies, it seems clear that state court decisions should be binding in federal court. By hypothesis, the state court has come out one way or the other on a historical fact sufficiency issue that has recurring importance. The state has either chosen to allow the issue to go to the jury on certain evidence, or not. Either way, if the federal court does not follow the state decision, it will become, from the outset of the lawsuit, a more or less attractive forum for one of the parties, in the most important way possible: whether the case is winnable or doomed to failure. Such a crucial difference will undoubtedly cause forum shopping. And it would be inequitable in all the ways that matter under Erie: in one forum the case will have a chance of going forward, and in the other, it will not.

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81 As the Court’s reasoning in Galloway illustrated, the abstract standard is separable from applications of that standard. Galloway, 319 U.S. at 395.
83 Reinforcing my point, Chief Justice Warren’s law clerk at the time he wrote Hanna—John Hart Ely—agreed in an article written before 1991 that the twin aims test would mandate application of the state sufficiency standard. See Ely, supra note 4, at 714-16 (“Thus, state rules controlling such things as burden of proof, presumptions, and sufficiency of evidence should be followed where they differ from the federal court’s usual practice; but those
Is it possible to justify ignoring the state decisions and generating a twin aims violation? As shown in the previous Part, Byrd is either a subset of Hanna, or if it provides a distinct balancing test, should apply only where the state rule would raise a substantial constitutional question. State sufficiency opinions raise no such constitutional difficulty. The constitutionality of directed verdict practice (and sufficiency review in general) has been plain ever since the Court upheld the reasonable jury standard in 1943, in Galloway v. United States. If the reasonable jury standard did not violate the Seventh Amendment, then good faith applications of that standard cannot possibly violate the Amendment either.

At the most basic level, why should the federal courts have an interest in causing forum shopping and inequity by ignoring state court decisions on recurring issues of evidentiary sufficiency? It does not offend the dignity of a federal court to borrow state rules in this area: Hanna routinely requires such borrowing when procedural rules in any other area implicate twin aims. Hanna teaches that a federal court sitting in diversity is supposed to emulate a state court in all the ways that really matter (and where Constitution, statute, or Federal Rule does not require otherwise). These sufficiency decisions, affecting the very viability of the case, are surely rules that matter in that sense.

Nor does following these rules somehow impair the “essential function” of a federal court. It offends no constitutional principle. And a state court is not any less of a court—or even any less of a “federal” court—because it diverges from a federal court’s own opinion on the application of the reasonable jury standard. The Boeing court was simply in denial about the significance of Hanna when it asserted that “[f]ederal courts must be able to control the fact-finding processes by which the rights of litigants are determined in order to preserve ‘the essential character’ of the federal judicial system.” The court essentially refuted its own regulating such matters as the form of pleadings, order of proof, time limits on responsive pleadings, and the method by which an adversary is given notice can ordinarily be disregarded, though of course there is no reason they must.” (emphasis added). Ely thus would certainly agree that failing to follow state court decisions with precedential value would disserve the twin aims. A recent commentator’s assertion that standards for directed verdict do not affect forum decisions seems counterintuitive. See Childress, supra note 70, at 317. Indeed, the ease of getting to a jury is perhaps the key strategic decision in choosing a forum.

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85 Boeing Co. v. Shipman, 411 F.2d 365, 369-70 (5th Cir. 1969).

Query what the answer to the “abstract standard” question should have been if Rule 50 had not been revised. Hanna rather than Byrd would apply to the RDA question, because Galloway indicates that abstract standards do not normally implicate the Seventh Amendment, especially when the state standard is a more jury-favorable no evidence or scintilla standard. And because the availability of a scintilla or no evidence standard could affect forum choice or introduce inequity, the state abstract standard arguably would have controlled.
position when in the next breath it admitted that its holding would “affect state-created substantive rights in some cases.”

In fact, federal appellate cases for more than forty years have accorded binding force to state historical fact sufficiency decisions. A brief review of some of these cases shows that courts intuitively recognize the validity of my position. For example, in one case the plaintiff’s decedent had been found fatally injured lying between the rails of a railroad track, and could produce no eyewitnesses. The court followed similar state cases holding that evidence as to his likely path, combined with a schedule showing that a train was likely passing about that time, was sufficient to allow a jury to conclude that he was hit by the train. In another appellate case—a slip and fall case—the evidence showed that the plaintiff slipped on old, brown lettuce. The court relied on numerous state cases to hold that the appearance of the lettuce was sufficient to allow a jury to infer that the lettuce had been on the floor a long time (during which time it should have been noticed by store employees).

A recent D.C. Circuit case involved a plaintiff alleging that the drug Bendectin had caused certain birth defects. A previous district case (i.e., the equivalent of a state court case) had held that certain scientific evidence was sufficient to show that Bendectin could cause the defects plaintiff alleged. The D.C. Circuit stated that it would normally consider such a case to be binding. It declined to follow the district case only because new evidence tended to show that the causal link was more tenuous than previously believed: a perfectly legitimate reason under standard *Erie* principles to distinguish the district case.

Perhaps the most interesting case is *Rotondo v. Keene Corp.* from the Third Circuit. The cases cited in the previous two paragraphs came from circuits in the minority that apply or applied state sufficiency standards in diversity cases as a matter of course, and one might attempt

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86 Id.  
90 Id. at 1376.  
91 Id.  
92 Under *Erie*, federal courts are permitted to conclude that intervening events would cause the highest court within the state (here, the district) to reach a different result. See *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1040 (7th Cir. 2006) (“Under *Erie* . . . the federal court’s task is not to make an independent decision but to predict how the Supreme Court of North Carolina would understand and apply its own law.”).  
93 956 F.2d 436 (3d Cir. 1992).
to distinguish them on that basis. But the Rotondo court applied the federal abstract standard: “This court applies the federal standard for judging the sufficiency of the evidence in diversity actions.” The court nevertheless proceeded to conclude that Pennsylvania’s criteria for sufficiency of causation evidence in an asbestos case were binding on a federal court. The Third Circuit read the Pennsylvania cases to require proof of proximity and product identity to send the exposure issue to the jury, and found that directed verdict was improper because the plaintiff had shown both. The court went on to note, “Although it is true that there was no direct evidence that Rotondo inhaled asbestos fibers shed by Ehret pipe covering, nothing in the Pennsylvania cases precludes the jury from making that inference from testimony of the nature presented here.” This too indicated that the Third Circuit considered the state sufficiency opinions to be binding.

Anyone casually familiar with asbestos litigation knows that sufficiency of exposure evidence is the crucial issue in most cases. If the Third Circuit had come out the other way, and applied either a looser or stronger test for sufficiency, the consequences would have been dramatic. A stricter standard would have caused defendants to flock to federal court, and vice versa. And the disparate outcomes in litigated cases would have been highly inequitable. As the Third Circuit intuitively recognized, neither Byrd nor the bindingness of the abstract federal standard requires such an unjust result. It and the other cases applying this sort of state opinion show that my prescription is both practical and required by standard Erie principles. A highly suspect enclave theory should not countenance a blatant twin aims violation.

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94 The Third Circuit case is from 1969, when the Third Circuit also followed the state standard.
95 Rotondo, 956 F.2d at 438.
96 Id.
97 Id. at 441 (emphasis added).
98 For two other cases treating state sufficiency opinions as binding, see Am. & Foreign Ins. Co. v. General Elec. Co., 45 F.3d 135, 140 (6th Cir. 1995) (applying Michigan cases on the sufficiency of causation evidence to determine that plaintiff had only presented evidence establishing “speculation and conjecture,” requiring directed verdict); Arms v. State Farm Fire & Cas. Co., 731 F.2d 1245 (6th Cir. 1984) (stating that Tennessee cases would be binding if they existed, instead turning to other state court cases).
B. Mixed question sufficiency

Mixed question sufficiency decisions illustrate another dimension of state law’s influence on the judge-jury relationship in diversity cases: the federal constitutional dimension. In historical fact sufficiency mode, the judge must decide whether a reasonable jury could infer certain historical facts from the evidence presented at trial. Mixed question sufficiency mode asks whether a reasonable jury could find that the historical facts provable at trial measure up to the legal standard. In fact, when the historical facts are undisputed, the mixed question is the only issue. Then, if the mixed question is allocated to the jury, the issue must still go the jury unless it is not open to reasonable dispute. But the mixed question is also present in cases where the historical facts are disputed. There, the court must also decide whether the facts that the proponent can possibly prove measure up to the legal standard at issue in the case.

Negligence provides the classic example of a mixed question. The historical facts in a negligence case consist of the narrative of events and states of mind that would fill a newspaper story about the events in question. In the case of a pedestrian hit by a car, these questions might include “whether a pedestrian looked for traffic before stepping off the curb, whether at this time defendant’s automobile was 50 feet or 200 feet away, whether the traffic signal was red or green, the speed of the car, the distance in which it could be stopped at that speed, whether the driver saw the pedestrian, whether he sounded a horn, and so on.” The mixed question, on the other hand, requires the jury to decide “whether the pedestrian should have looked or should have seen the car, whether he should have proceeded with the traffic light as it was, the reasonableness of the car’s speed, the adequacy of brakes which could perform as these could, whether the driver should as a reasonable man have foreseen that the pedestrian would continue into danger, and should have blown his horn.” As demonstrated by all the “shoulds,” the mixed question demands a normative judgment. The decision maker must ascertain whether the conduct in the case should be a ground for imposing liability.

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99 Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 114 (1923) (recognizing that even when the jury is entrusted with law application, “it is exercised by both court and jury, the court doing so under the guise of preventing the jury from falling into manifest error”); *see also* James B. Thayer, “Law and Fact” in Jury Trials, 4 HARV. L. REV. 147, 168 (1890) (characterizing “the question for the court” as “whether a reasonable person could, upon the evidence, entertain the jury’s opinion. Can the conduct which the jury are judging, reasonably be thought reasonable?”)

100 Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 668 (1949).

101 *Id.* at 668; *see also* Thompson v. Keohane, 516 U.S. 99, 110 (1995) (defining facts as “a recital of external events and the credibility of their narrators”)

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As a matter of jurisprudential theory, the mixed question arises because the law contains standards as well as rules. True rules do not really give rise to a mixed question because the broad rule of law depends only upon the finding of a particular historical fact. A speed limit is the obvious example. The law penalizes a driver who exceeds 55 miles per hour; all that matters is the historical fact, without the need for any mediating mixed question. The consequences of the conduct were all specified before it occurred. Standards, unlike rules, do not specify the consequences of conduct ahead of time. They instead set out a broad goal or purpose (for example, “reasonable” or “justifiable” behavior), and require the decision maker to determine, at the time of application, whether liability on particular facts would further the goal. By expressly postponing the moment of evaluation to the time when the standard is applied, standards allow circumstances and the facts of the particular case to be taken into account.

Holmes famously argued that because of their normative content, all mixed questions should go to the judge. “[W]hen standards of conduct are left to the jury, it is a temporary surrender of a judicial function which may be resumed at any moment in any case when the court

102 Larry Alexander & Ken Kress, Against Legal Principles, 82 IOWA L. REV. 739, 740 (1997) (“Rules are legal norms that are formal and mechanical. They are triggered by a few easily identified factual matters and are opaque in application to the values that they are designed to serve.”).

103 Legal rules that depend on a person’s state of mind fall within this category. A state of mind is a historical fact, though often a difficult one. For example, the law assigns consequences to an intent to discriminate on the basis of race. Once that intent is found, legal consequences follow, without any mediating principle, so here too, the task of law application is mechanical. See Pullman-Standard v. Swint, 456 U.S. 273, 286 n.16 (1982) (holding that intentional discrimination is both an “ultimate fact” and “a pure question of fact”); id. at 289 n.19 (accordingly holding that “[w]e need not, therefore, address the much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact”); United States v. McConney, 728 F.2d 1195, 1203 (9th Cir. 1984) (“there are those mixed questions in which the applicable legal standard provides for a strictly factual test, such as state of mind, and the application of law to fact, consequently, involves an ‘essentially factual’ inquiry”); see also Bohlen, supra note 99, at 112 (state of mind is a historical fact).

104 To be sure, classifying a particular rule of law as a rule or a standard is not always an easy task. But for purposes of this Article, I aim only to establish that there exist mixed questions requiring the exercise of normative, evaluative judgment at the time of application. Because I showed in Part II.A that historical fact sufficiency decisions should control in federal court as well, courts should not in practice have to worry about distinguishing historical fact sufficiency decisions from mixed question sufficiency decisions.

105 See Roscoe Pound, The Theory of Judicial Decision (III), 36 HARV. L. REV. 940, 951-52 (1922) (“Standards, applied intuitively by court or jury or administrative officer, are devised for situations in which we are compelled to take circumstances into account; for classes of cases in which each case is to a large degree unique.”).

The debate regarding the relative utility of rules and standards is of course a perennial one, and need not detain us here. In brief, rules give clearer notice that certain conduct is illegal and have lower costs of enforcement, but produce arbitrary results at the margins, require higher up-front costs to determine the appropriate point of liability, and are problematic where uncertainty is a concern. Standards are costlier to apply and worse for prospective advice, but postpone the moment of evaluation and thus allow the decision maker to incorporate facts as they develop and provide nuanced justice in the individual case. For purposes of this article, I am only interested in showing that standards exist, giving rise to mixed questions requiring normative judgment at the time of application.
feels competent to do so.” Holmes based his argument on the normative nature of the mixed question, observing that “[w]hen a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of a fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability, and in this way the law is gradually enriching itself from daily life, as it should.”

Holmes’s preference for allocation to the judge did not carry the day. Today, some mixed questions go to the judge and some to the jury. Mixed questions in the area of contracts, for example, normally go to the judge, while those in torts normally go to the jury. States ordinarily give precedential effect to mixed questions decided by judges, but not to mixed questions decided by juries—no doubt in part because the reason for the jury’s decision remains forever unexplained. Still, even when the mixed question goes to the jury, the judge retains a vestigial evaluative role: she must decide whether a reasonable jury could find that the facts provable by a party measure up to the legal standard at issue. In plain English, the judge may decide the clear cases. These “clear case” decisions too customarily receive precedential force.

Mixed question or mixed question sufficiency decisions obviously have less precedential value than decisions on pure questions of law. A mixed question decision is more particularistic and will necessarily apply to a smaller number of future cases. Yet it can still exert a meaningful influence because similar cases should be decided similarly, and cases with stronger facts for the side that won in the first case should also be decided similarly. The decisions may have analogical value for courts applying the same standard in a different, but arguably similar,

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107 Id. at 120-21.
108 Martin B. Louis, Allocating Adjudicative Decision-Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion, 64 N.C. L. REV. 993, 1019 (1986); Stephen A. Weiner, The Civil Jury Trial and the Law-Fact Distinction, 54 CAL. L. REV. 1867, 1875, 1875 n.37 (1966) (“[T]he conclusion of the jury will have no precedential value extending beyond the very case being adjudicated”). One of the few judges to give precedential weight to a decision of a mixed question by a jury was, as one might predict, Holmes. See Commonwealth v. Sullivan, 15 N.E. 491, 494-95 (Mass. 1888).
109 Many lawyers erroneously believe that a directed verdict is always unavailable when the legal issue is “reasonable” behavior, but the practice of mixed question sufficiency review shows that this is not the case. The judge may direct a verdict if the facts provable by the plaintiff would not be sufficient to permit a reasonable jury to conclude that the defendant acted unreasonably. I.e., in the clear cases, the judge may direct a verdict.
110 See Weiner, supra note 108, at 1875.
111 See HOLMES, supra note 106, at 123 (“The trouble with many cases of negligence is, that they are of a kind not frequently recurring, so as to enable any given judge to profit by long experience with juries to lay down rules, and that the elements are so complex that courts are glad to leave the whole matter in a lump for the jury’s determination.”).
factual context. For example, if one court determines that a use of a particular product should have been “reasonably anticipated” by the manufacturer as a matter of law, a future court should be bound to conclude the same. As a result, if one defines “the law” as the body of useful precedent, mixed question decisions are, in this sense, part of the law.

This introduction to the mixed question is essential, because its normative nature crucially impacts the *Erie* analysis. In the first place, it means that mixed question decisions by judges are certainly binding under *Erie*’s constitutional holding. A decision holding that a certain set of facts measures up to a legal standard defines a rule of conduct just as much as the pure rule of law in *Erie*. An independent federal decision would repeat the original *Erie* mistake by erecting a second system of state substantive law for diversity litigants, which is beyond the power of both Congress and the federal courts.

In fact, one might say that the bindingness of mixed question decisions is the closest possible question to the original one in *Erie*, and in some cases nigh indistinguishable. Indeed, before *Erie*, opponents of *Swift v. Tyson*—including the authors of numerous law review articles cited favorably in *Erie* itself—criticized the federal courts for failing to follow state court mixed question decisions. The fact that the Supreme Court has never explicitly addressed the

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112 See *Ornelas v. United States*, 517 U.S. 690, 698 (1996) (holding that a Court of Appeals should review a probable cause determination de novo, stating, “It is true that because the mosaic which is analyzed for a reasonable-suspicion or probable-cause inquiry is multi-faceted, one determination will seldom be a useful precedent for another. But there are exceptions. . . . And even where one case may not squarely control another one, the two decisions when viewed together may usefully add to the body of law on the subject.”); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984) (“ ‘Reckless disregard,’ it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law.”); *United States v. McConney*, 728 F.2d 1195, 1205 (9th Cir. 1984) (observing that the application of law to fact in Fourth Amendment exigent circumstances determination is of “clear precedential importance”).

113 See Weiner, supra note 108, at 1924 (“[W]hen law application is performed by a judge, it takes on aspects of law declaration; the result of the specific application is to establish a principle applicable to future cases.”).

114 See Charles I. Dawson, *Conflict of Decisions Between State and Federal Courts in Kentucky, and the Remedy*, 20 Ky. L.J. 3, 7 (1931) (criticizing divergence between state and federal courts on application of the fellow servant rule); Note, *Aftermath of the Supreme Court’s Stop, Look and Listen Rule*, 43 HARV. L. REV. 926, 932 (1930); William M. Meigs, *Decisions of the Federal Courts on Questions of State Law*, 8 SO. L. REV. (N.S.) 452, 464 (1882) (criticizing federal courts that refused to follow state court interpretations of particular contracts or instruments: “This departure from the general rule must undoubtedly, in any case where they construe the instrument in a different way from the State court, have the result of producing two rules of property as to the same matter within the same territorial limits—and this, too, in the cases cited, in relation to real estate.”); see also William M. Meigs, *Decisions of the Federal Courts on Questions of State Law*, 45 AM. L. REV. 47, 71 (1911) (criticizing state courts that used *Swift v. Tyson* as a license to declare the general law of other states; specifically criticizing a Georgia decision that refused to treat Alabama cases applying the fellow servant rule as binding in a case governed by Alabama law).

Pre-*Erie*, the federal courts reached independent conclusions on several different kinds of mixed questions, most notably the application of the doctrine of res ipsa loquitur and the application of the fellow servant rule.
question, and has moved on to more exotic Erie issues, should not cast any doubt on the analysis. Mixed question decisions may be particularistic, and may often be easily distinguishable, but the federal courts must reckon with them rather than disregard them entirely.

And if mixed question decisions are binding under the constitutional holding, then the boundary-marking mixed question sufficiency decisions—judges’ decisions on what constitute “clear cases”—must be as well. To set the boundary, the judge must determine whether the standard possibly extends to the facts of the case, itself a normative judgment. As Holmes recognized long ago,

When a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of a fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability, and in this way the law is gradually enriching itself from daily life, as it should. . . . On the other hand, if the court should rule that certain acts or omissions coupled with damage were conclusive evidence of negligence unless explained, it would, in substance and in truth, rule that such acts or omissions were a ground of liability, or prevented a recovery, as the case might be.  

City of Chicago v. Robbins, 67 U.S. 418, 428 (1862) (holding that a nuisance question involving “the application of common law rules” was a matter of general law); Chicago, M & St. P. Ry. Co. v. Ross, 112 U.S. 377, 395 (1884) (conducting a fact-sensitive analysis of whether two individuals were under common employment for purposes of fellow servant rule, relying on cases from many states), overruled by New England R. Co. v. Conroy, 175 U.S. 323 (U.S. 1899); Yates v. City of Milwaukee, 77 U.S. 497, 506 (1870) (holding that a question of dedication was “one of fact, to be determined by ascertaining the intention of those who laid out the lots, from what they did, and from the application of general common law principles to their acts. This does not depend upon State statute or local State law. The law which governs the case is the common law, on which this court has never acknowledged the right of the State courts to control our decisions.”); H. Parker Sharp & Joseph B. Brennan, The Application of the Doctrine of Swift v. Tyson Since 1900, 6 Ind. L.J. 367, 377 (1929) (“The liability of a master for personal injuries to a servant is, in the absence of a state statute, a matter of general law. Federal courts will not be bound by state decisions as to whether a man is a vice principal or a fellow servant.”).

One might argue that mixed question decisions are too particularistic to affect primary conduct and therefore do not produce the evils that motivated the Erie decision. In the first place, that is empirically inaccurate: many mixed question decisions do have precedential value, for the reasons discussed above, and thus may have an effect on primary conduct.

Second, the effect of mixed question decisions on primary behavior is beside the point because the “affects primary conduct” test is not an accurate statement of Erie’s constitutional holding. Rather, this test was developed by commentators (and picked up by Justice Harlan in his Hanna concurrence) as a limiting principle for RDA questions. See Hanna, 380 U.S. at 475 (Harlan, J., concurring) (state practice should control “if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation”). This limiting principle did nothing (and could have done nothing) to shake the original holding of Erie: that Congress (and ergo the federal courts) does not have the authority to regulate by half measures, through promulgating rules of conduct that apply in diversity but not in state courts.

HOLMES, supra note 106, at 120-21.
Because the judge only decides the “clear” cases, mixed question sufficiency decisions admittedly reveal even less about state substantive law than mixed question decisions do.\textsuperscript{117} Mixed question sufficiency decisions admittedly reveal even less about state substantive law than mixed question decisions do, because the judge only resolves the “clear” cases. But they still reveal something. They police the boundaries of the abstract standards, and thus illuminate the outer limits of state law. Just as Congress should not be able to legislate answers to mixed questions that apply only in federal court, it should not be able to legislate different \emph{boundaries} for state law standards. Ergo, the federal courts are precluded, constitutionally, from reaching conclusions that differ from the state court decisions.

The practical advice for a federal court is simple: it must reach decisions that are consistent with the mixed question sufficiency decisions in the state courts. If a relevant state court opinion directed a verdict in favor of a party, then the federal court must direct a verdict on analogous facts or facts that are weaker for that party. On the other hand, if a relevant state court opinion refused to direct a verdict, then the federal court should refuse to direct a verdict on analogous facts or facts stronger for that party.\textsuperscript{118} Simply put, the federal court must accept that what the state courts think are “clear” cases are, in fact, clear.

Numerous federal appellate decisions have given binding force to state mixed question sufficiency opinions. For example, in Jewell \textit{v.} CSX Transportation, Inc., the jury question was whether a particular railroad crossing was “extra-hazardous.”\textsuperscript{119} The plaintiff argued that she had presented sufficient evidence to create a jury question on “extra-hazardous,” including the fact that (a) the angle between road and track was acute (requiring an awkward movement to look down the track); (b) the setting sun created significant glare; (c) the angle brought the track into the vehicle’s blind spot, and (d) the narrow crossing, elevated railroad bed, and ruts in the

\textsuperscript{117} The judge’s function is a kind of reasonableness review, much like a federal district court’s function when it applies the habeas statute to determine whether a state court decision was an “unreasonable application” of federal law. 28 U.S.C. § 2254(d)(1).

\textsuperscript{118} One might ask whether a jury’s ultimate resolution of the mixed question should be binding in federal court. The answer is no, because no state court treats a particular jury verdict as having precedential value on the particular point of law. \textit{See} Weiner, \textit{supra} note 108, at 1875. State courts do treat mixed question sufficiency decisions as having precedential value, for what they are worth. \textit{See id.} at 1875 n.37.

\textsuperscript{119} 135 F.3d 361 (6th Cir. 1998). If the crossing had been extra-hazardous, the railroad would have been required to put additional signals at the crossing. “The rationale of the extra-hazardous crossing doctrine is that there are some circumstances under which the ordinarily prudent person would not be sufficiently alerted by the usual and statutory signals and would not appreciate the degree of danger involved unless given greater warning of the actual approach of a train.” \textit{Id.} at 362.
road distracted drivers from the oncoming train.\textsuperscript{120} The Sixth Circuit examined the Kentucky sufficiency cases on the issue of “extra-hazardous,” and found that Kentucky courts routinely direct verdicts for the defendant on the “extra-hazardous” issue when the plaintiff has not produced evidence of a physical obstruction that prevented him from seeing the train.\textsuperscript{121} The court accordingly concluded that it was required to direct a verdict for the defendant, given the absence of any evidence of a physical obstruction.\textsuperscript{122}

The result of this case depended crucially on the Kentucky mixed question sufficiency cases. Without the Kentucky cases, the Sixth Circuit’s interpretation of “extra-hazardous” was not a necessary one. The plaintiff’s reading was plausible—it is certainly not beyond the pale to say that an acute angle, setting sun, and blind spot make a crossing extra-hazardous. But the Kentucky cases policing the boundaries of the standard reflected a policy choice: that it does not promote safety to hold railroads liable for failing to take extraordinary precautions unless there is a physical obstruction blocking drivers’ view of an oncoming train. Under \textit{Erie}’s constitutional holding, this policy choice binds the federal courts. It would have created a dual system of state substantive law if the Sixth Circuit had allowed a jury to conclude that the crossing was extra-hazardous in a case not involving a physical obstruction.

The Eleventh Circuit’s decision in \textit{Federal Kemper Life Assurance Co. v. First National Bank of Birmingham} illustrates the proper effect of state decisions refusing to direct a verdict on a mixed question.\textsuperscript{123} In Alabama, an insured must disclose to the insurer diseases that “materially increase the risk of loss.” Some Alabama cases had held that certain conditions materially increase the risk of loss as a matter of law, such that no reasonable jury could conclude otherwise. These diseases included cancer, Hodgkin’s Disease, and tuberculosis.\textsuperscript{124} Other Alabama cases, however, had refused to rule on the issue as a matter of law, in cases involving syphilis, cirrhosis, pregnancy, and cataracts.\textsuperscript{125} The Eleventh Circuit concluded that the plaintiff’s condition—an ileostomy—was far more similar to syphilis or cirrhosis than it was to cancer or tuberculosis. The court therefore properly refused to hold that no reasonable jury

\begin{itemize}
  \item \textsuperscript{120} Id. at 363.
  \item \textsuperscript{121} Id. at 364.
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} 712 F.2d 459 (11th Cir. 1983).
  \item \textsuperscript{124} Id. at 463.
  \item \textsuperscript{125} Id.
\end{itemize}
could conclude otherwise.\textsuperscript{126} Directing a verdict would have cut off liability in a case where the state courts would not have done so, having the effect of creating a dual system of law, in violation of \textit{Erie’s} constitutional holding.

Many other federal appellate decisions use state mixed question sufficiency decisions in a similar way.\textsuperscript{127} These courts intuit that the state decisions define the boundaries of “reasonable” applications of state law, and thus limit the discretion of federal courts. Though admittedly none of these cases explicitly recognizes that the state decisions fall within \textit{Erie’s} constitutional holding, they put the lie to any notion that the judge-jury relationship is a federal enclave. In fact, use of the state decisions comes so naturally to these courts precisely because the decisions are part of state substantive law.

There exist, however, a significant number of cases where a federal court of appeals has flatly refused to treat state court mixed question sufficiency decisions as binding. A recent example is the Fifth Circuit’s decision in \textit{Ellis v. Weasler Engineering, Inc.}\textsuperscript{128} The historical facts were not in dispute; all the parties agreed that the plaintiff had been injured while inspecting a running pecan harvester. The case involved only a mixed question: whether a reasonable manufacturer should have anticipated that an operator of its pecan harvester would inspect the machine while it was running. The defendant argued that several analogous state court cases indicated that the use was not a reasonably anticipated one as a matter of law. One state court had granted judgment as a matter of law where the plaintiff had used the rear part of a folding chair seat as a step ladder; in another state case, the plaintiff had intentionally inhaled

\textsuperscript{126} Id. at 464.
\textsuperscript{127} See, e.g., Billiar v. Minn. Mining and Mfg. Co., 623 F.2d 240, 246 (2d Cir. 1980) (using New York cases to determine it was proper to submit to the jury the issue of whether the plaintiff was a “knowledgeable user” of a dangerous product); John Hancock Mut. Life Ins. Co. v. Dutton, 585 F.2d 1289, 1292-93 (5th Cir. 1978) (sending a case to the jury, relying on Georgia cases on whether husband who beat wife should have anticipated fatal response); Brown v. State Farm Mut. Auto. Cas. Ins. Co., 506 F.2d 976, 978-79 (5th Cir. 1975) (sending to jury on basis of Alabama cases construing “reasonable time” for insured to provide notice of suit to insurer); Wilson v. Nooter Corp., 475 F.2d 497, 501-02 (1st Cir. 1973) (reversing directed verdict on borrowed servant issue where “[i]n New Hampshire law it is for the jury to weigh the factors and decide which employer exercised the right to control,” and where no reported New Hampshire case had directed a verdict on this ground); Union Pac. R.R. Co. v. Lumbert, 401 F.2d 699, 701 (10th Cir. 1968) (sending to jury on basis of Wyoming cases holding that driver could have acted reasonably even if he did not stop, look, and listen before crossing railroad track); Carman v. Harrison, 362 F.2d 694, 698-99 (8th 1966) (using Nebraska cases to mark out the meaning of “guest” in an automobile guest statute); Pinehurst, Inc. v. Schlamowitz, 351 F.2d 509, 514-16 (4th Cir. 1965) (granting judgment as a matter of law to defendant on plaintiff’s contention that failing to post night watchman at barn that burned down was negligent, relying on North Carolina sufficiency cases); Metro. Coal Co. v. Johnson, 265 F.2d 173, 180-81 (1st Cir. 1959) (directing a verdict for coal company on basis of state decisions on whether a defendant should have anticipated misconduct by children).
\textsuperscript{128} 258 F.3d 326 (5th Cir. 2001).
propane gas to get high. The defendant also relied on previous Fifth Circuit cases where the court had granted judgment as a matter of law on various questions of “reasonably anticipated use.”

The Fifth Circuit could have easily distinguished the cases cited by the defendant, which all involved uses that are obviously dangerous to an average person, in a way that inspecting a running pecan harvester may not be. But rather than take the completely legitimate, common law approach of distinguishing the cases, the Fifth Circuit denied that they ever have any precedential force for a federal court:

[Each decision relied upon by Nut Hustler constitutes only a finding of an adjudicative fact specific to that particular case, viz., whether the claimant’s damage in that particular case arose from a reasonably expected use of the specific product. Because each of the Louisiana decisions relied upon by Nut Hustler with respect to the issue of reasonably anticipated use is a decision making a finding of fact, rather than a decision making or interpreting law, the jury, the district court, and this court are not bound in this diversity case by those state cases on their findings of facts with respect to the issue of reasonably anticipated use.]

The Fifth Circuit utterly failed to recognize what Holmes noticed more than a century ago: that state court opinions on the sufficiency of evidence to show a mixed question do “make” and “interpret” law by determining whether the legal standard does or does not extend to the facts of the particular case.

Other appellate cases have refused to treat state mixed question sufficiency decisions as binding. For example, one Fifth Circuit case involved whether a defendant had adequately warned of danger at a work site. A Texas case had held that a warning is adequate, as a matter of law, if made to the plaintiff’s employer or foreman. The Fifth Circuit flatly refused to treat that Texas case as binding. Another case from the Fourth Circuit involved the question of whether a plaintiff was contributorily negligent when she ran into a plate glass panel. The court refused
to even consider state cases holding that such an act may or may not constitute contributory negligence as a matter of law.\footnote{Brant v. Robinson Inv. Co., 435 F.2d 1345, 1346-47 (4th Cir. 1971).}

These decisions—and the countless others like them that do not reach the case reports (such as oral decisions by district judges)—represent an \textit{Erie} mistake of constitutional magnitude. A state court that directs (or refuses to direct) a verdict on a mixed question has concluded that the standard cannot (or can) extend to the facts of the case, and has thereby defined the outer limits of that standard under state law. Not even Congress may authorize this selective departure from state practice in the federal courts. Congress could accomplish that result only by legislating rules that apply in federal \textit{and} state court. A federal court should have no greater power.

How are these courts erring so egregiously? First, they appear not to recognize that mixed question decisions are normative. For example, the \textit{Ellis} court assumed that these decisions do not “make” or “interpret” law. As the reasoning above and the quotes from Holmes show, this is not true.

Second, these courts’ decisions are products of the same misconceptions about \textit{Byrd} that I exploded in Part I: namely, that it establishes a federal monopoly over issues that affect the distribution of authority between judge and jury. For example, the Fifth Circuit cases that disregarded mixed question sufficiency decisions all cited \textit{Boeing Co. v. Shipman}, and all the Fourth Circuit cases cited \textit{Boeing}’s analogue in that circuit, \textit{Wratchford v. S.J. Groves & Sons Co.}, for the proposition that state law cannot affect the judge-jury relationship in federal court.\footnote{See \textit{Ellis}, 258 F.3d at 337; \textit{Gray}, 515 F.2d at 1221 (both citing \textit{Boeing Co. v. Shipman}, 411 F.2d 365, 369-70 (5th Cir. 1969)); \textit{Brant}, 435 F.2d at 1347 (citing \textit{Wratchford v. S.J. Groves & Sons Co.}, 405 F.2d 1061 (4th Cir. 1969)).} \textit{Boeing} and \textit{Wratchford} are two of the chief examples of the “enclave” theory of judge-jury relations. They predate \textit{Gasperini}, and cannot survive its holding that judge-jury issues \textit{can} be governed by state law.

More fundamentally, as I demonstrated in Part I, \textit{Byrd} does not even \textit{purport} to apply where \textit{Erie}’s constitutional holding is involved. To the contrary, \textit{not} applying the state rule here raises a serious constitutional issue. \textit{Byrd} itself recognized as much, by taking care to specify that the state rule at issue in that case was not “bound up” with traditional state substance.\footnote{\textit{Byrd}, 356 U.S. at 563.} The state rules I am talking about here are much more than “bound up with” state substance: in a very
real sense, they are state substance. By disregarding them, the Ellis, Gray, and Brant courts violated the Constitution.

As a coda to this section, it is appropriate to mention that the bindingness of state mixed question sufficiency opinions solves the riddle of a Supreme Court decision that has long puzzled commentators, Stoner v. New York Life Insurance Co. The facts are as follows. An accident had generated parallel litigation in state and federal court involving the issue of whether the plaintiff had experienced “total disability.” Two state courts had held that the plaintiff had produced sufficient evidence of “total disability” within the meaning of his insurance policy. Despite these rulings, in the federal action, the judge directed a verdict against the plaintiff on the “total disability” issue. The Supreme Court reversed in a short opinion, noting that in state court, “[e]ach time respondent argued that petitioner’s evidence failed to present a submissible case. Each time the Kansas City Court of Appeals expressly stated that the evidence as to total disability presented a question for the jury.” Stoner thus appears to recognize the bindingness of state mixed question sufficiency decisions.

Many commentators, however, in thrall to the received wisdom which held that sufficiency was judged by federal standards, have not known what to make of Stoner’s insistence that the state sufficiency cases were binding. They tried to write it off as simply a law of the case opinion: i.e., because the same issues had been decided between the same parties, they should not have been relitigated. But the reasoning of the opinion is not consistent with that interpretation. The Court said,

We have recently held that in cases where jurisdiction rests on diversity of citizenship, federal courts, under the doctrine of Erie Railroad Co. v. Tompkins, must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently. In particular this is true where the intermediate state court has determined the precise question in issue in an earlier suit between the same parties, and the highest court of the state has refused review.

The Court was not relying on law of the case principles: it was giving the intermediate state decisions precedential force. Confirming this, later in the opinion the Court cited sufficiency

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136 311 U.S. 464 (1940).
137 Id. at 466.
138 Id. at 467.
139 Id. at 467-68.
141 Stoner, 311 U.S. at 467.
opinions from the Missouri Supreme Court to argue that “the Missouri Supreme Court likewise would conclude that a finding of total disability here is supported by the evidence.” If it was merely relying on law of the case reasoning, what the Missouri Supreme Court would have done was irrelevant: only what had actually happened in the case would have mattered. This too made it clear that the Court recognized the bindingness of the sufficiency opinions.

Though this case, decided shortly after *Erie* itself, and long before the core RDA opinions, is not a model of clarity, it contains the Supreme Court’s recognition of a basic truth. Mixed question sufficiency opinions are binding because they mark the boundaries of state standards for primary liability, and thus fall within the original constitutional holding of *Erie*. In addition, as demonstrated earlier, historical fact sufficiency opinions bind a federal court because divergent approaches to recurring facts would seriously undermine the twin aims of *Erie*. Though the amendment to Rule 50 means that federal law provides the abstract sufficiency standard, state law should shape the application of that standard.

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142 Id. at 469.
143 Ignoring the state decisions is even more egregious when it results in removing a question from the jury that would have gone to the jury in state court. Commentators have long recognized that directed verdicts can cloak judges’ own value choices in the mantle of “reasonable jury behavior.” *See Galloway*, 319 U.S. at 397 (Black, J., dissenting); Thayer, *supra* note 99, at 163 (“In handling this keen-edged instrument, the demurrer to evidence, it is more than likely that the just line between the duties of court and jury was often overstepped by assuming that what the court thought the right inference was the only one allowable to the jury.”); Bohlen, *supra* note 99, at 118-19 (noting that it is tempting for judges to enforce own social views by directing verdicts under the guise of “reasonable” jury conclusions). This kind of error is regrettable in any case. The error is compounded when the federal judge is not only enforcing his own views at the expense of the jury, but is ignoring state policy in violation of *Erie* to boot.
III. Allocation of issues to judge or jury

Sufficiency of the evidence demonstrated two of the three ways state law may influence the judge-jury relationship in federal court: under *Erie*’s constitutional holding, and under *Hanna*’s RDA test. The second important judge-jury issue—the allocation of questions to judge or jury—implicates all three. This is an area that lies in the shadow of the Seventh Amendment, and if *Byrd* ever supplies an independent RDA test, it is here.\(^{144}\) Still, even when *Byrd* applies, the federal rule might not necessarily win, if *Byrd*’s balancing test is to be taken seriously.

To this point, however, commentators have taught that state law has no influence on issue allocation. For example, the Wright and Miller treatise says, “After the decisions handed down by the Supreme Court in the line of cases discussed above, the complete dominance of federal law in the area of jury trial rights clearly had been established.”\(^{145}\) The two cases relied upon by the treatise (and by the cases cited therein) for that proposition are *Byrd* and *Simler v. Conner*.\(^{146}\)

The per curiam *Simler* opinion actually has little or nothing to say about the issue at hand because it is simply a rather ordinary Seventh Amendment opinion.\(^{147}\) The Seventh Amendment right to jury trial turns on whether a claim is “legal” or “equitable”; if the claim is legal, then jury trial is required in federal court, but if it is equitable, then bench trial is permissible. The lower court in *Simler* had turned to state law to determine whether a claim was “legal” or “equitable” for Seventh Amendment purposes. The Court held, unsurprisingly, that this use of state law in this context was improper:

> We agree with respondent that the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. . . . Only through a holding that the jury trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved. . . . [T]he characterization of that state-created claim as legal or equitable for purposes of whether a right to jury trial is indicated must be made by recourse to federal law.\(^{148}\)

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\(^{144}\) Notably, at least one distinguished commentator agrees with me that *Byrd* left open the question whether *Erie* requires a federal court to follow a state’s allocation of a particular mixed question to judge or jury. See Weiner, *supra* note 108, at 1910 n.213 (specifically with reference to the question of a reasonable time issue in a contract case, upon which state courts disagree).


\(^{146}\) For a sample of the many cases cited in Wright and Miller that rely on *Byrd* and *Simler*, see Int’l Fin. Servs. Corp. v. Chromas Techs. Canada, Inc., 356 F.3d 731, 735 (7th Cir. 2004); Granite State Ins. Co. v. Smart Modular Techs., Inc., 76 F.3d 1023, 1026 (9th Cir. 1996); Owens-Illinois, Inc. v. Lake Shore Land Co., Inc., 610 F.2d 1185, 1189 (3d Cir. 1979); Halladay v. Verschoor, 381 F.2d 100, 109 (8th Cir. 1967).

\(^{147}\) 372 U.S. 221 (1963).

\(^{148}\) *Id.* at 222.
Simler held only that the Seventh Amendment right to jury trial is governed by a federal test. It did not hold that issue allocation is invariably governed by federal law. In context, it is plain that the quote most often lifted from Simler—that “the right to a jury trial in the federal courts is to be determined as a matter of federal law”—is addressing only the Seventh Amendment floor on the right to a jury trial. It nowhere purports to say what happens when the Seventh Amendment does not apply.

The Seventh Amendment does not require all issues to go to the jury, and Simler is entirely silent about the effect of state practice in those areas. For example, when the state cause of action is equitable, the Seventh Amendment does not require jury trial. Similarly, the Supreme Court has never held that the Seventh Amendment requires the allocation of mixed questions to the jury—even in “legal” actions. Here too state law might have some influence, and Simler does not address the question. In these areas, state practice should arguably have some influence, and Simler does not provide the answer.

The other case relied upon to demonstrate the supposed hegemony of federal law is Byrd. Unlike Simler, Byrd is at least an Erie decision, rather than a Seventh Amendment decision. But, as demonstrated in Part I, Byrd does not come close to mandating a federal monopoly. The best reading is that it is coextensive with the Hanna test. At the very most, Byrd indicates that an alternative to Hanna may be proper where the state rule raises a substantial constitutional issue in federal court. And even if Byrd balancing were to apply, the state rule could still conceivably come out on top if the state interest and potential for outcome disparity are sufficiently strong.

This Gasperini-influenced interpretation of Byrd instantly indicates a role for state law in areas where the allocation of questions between judge and jury raises no substantial constitutional question. In the first place, if the state allocates a question (mixed or historical) to the jury, then the state rule could not conceivably raise a constitutional question. No part of the Constitution provides a right to bench trial in federal court. Accordingly, a state rule allocating to the jury can never raise a substantial constitutional question, and the Hanna test must apply. That test would normally indicate use of the state rule, because disregarding the state allocation to the jury would often violate twin aims. The ability to get to a jury is almost always to one
party’s strategic advantage. If the federal system allocated to the judge, it would often cause forum-shopping and inequity, in violation of twin aims.\textsuperscript{149}

Similarly, where it is clear that a state claim is equitable rather than legal (a question that is, for Seventh Amendment purposes, one of federal law),\textsuperscript{150} it is already clear that the Seventh Amendment does not require jury trial. If the state uses a judge, the state rule presents no substantial constitutional question and \textit{Hanna} should mandate use of the state rule. The same holds true if the claim is clearly equitable, but the state courts use a jury. The state rule still presents no substantial constitutional question because the Seventh Amendment is a floor, not a ceiling.\textsuperscript{151}

These are easy \textit{Erie} questions. Federal courts should have no interest in denying litigants a right to a jury trial when they would enjoy one in state court. And federal courts should have no need to insist on a jury trial where the Seventh Amendment plainly does not require it, where such insistence introduces substantial disparities between the state and federal forum, in violation of twin aims. The courts have gotten carried away by a few expansive lines in \textit{Byrd} and \textit{Simler}, misconstrued or taken out of context, and which clearly provide no warrant for a blatant twin aims violation.

The really difficult question arises only when the state allocates a question to the judge, but the claim is clearly legal, or at least not clearly equitable. Then the state rule may raise a difficult constitutional question if applied in state court. \textit{Byrd} itself may be an example of this sort of case. There it was not clear whether the right to trial by jury applied to “statutory employer” issues, and the Court avoided answering the question by holding that federal law controlled regardless of the Seventh Amendment. An independent \textit{Byrd} test could apply in these Seventh Amendment-shadowed areas.

\textsuperscript{149} The identity of a decision maker of course often impacts litigation strategy. \textit{See} Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198, 203 (1956) (where the Court concluded that arbitrability is governed by state law when not governed by the Federal Arbitration Act; “The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result.”).

\textsuperscript{150} \textit{See Simler}, 372 U.S. at 222.

\textsuperscript{151} Many federal cases cited in Wright and Miller, \textit{see supra}, note 146, fail to understand this. Relying on \textit{Simler}, they seem to think that once the claim is denominated legal or equitable, the game is up. To the contrary: \textit{Simler} only governs whether a jury trial is required \textit{under the Seventh Amendment}. It does not mandate use of a judge in all other instances; it could not, as the Constitution does not provide a right to bench trial. And \textit{Simler} has nothing to say about whether, under the \textit{Erie} doctrine, a federal court should heed a state practice that is more jury-favorable than the federal custom.
Byrd may not have spoken to the issue of mixed question allocation, because the Court actually did not specify the exact error in the case: whether the Court of Appeals erred because it decided disputed factual issues for itself, or whether it also erred because it decided the mixed question by applying “statutory employer” to the facts. Later Fourth Circuit cases opted for the former interpretation, and continued to allocate the mixed question to the judge, following state practice. But a mixed question could potentially also raise Seventh Amendment concerns if the state allocates it to the judge. The Supreme Court has never held that any mixed question must go to the jury, but noted two open Seventh Amendment questions in Markman v. Westview Instruments, Inc., a federal question case: (1) “the extent to which the Seventh Amendment can be said to have crystallized a law/fact distinction,” which could preclude allocation of certain mixed questions to judges in federal court, and (2) “whether post-1791 precedent classifying an issue as one of fact would trigger the protections of the Seventh Amendment if (unlike this case) there were no more specific reason for decision.” A state practice of allocating a mixed question to the judge could raise either question. If it did, then under my interpretation of Byrd and Gasperini, Byrd balancing may be in order.

I say “may be in order” because a state rule may not be in the RDA zone: it may be substantive or bound up with substantive rights. And if that is the case, the Byrd constitutional avoidance canon is useless. The court is not interpreting the RDA, but is instead faced with a clash of the titans: Erie, purporting to require the court to follow the state allocation to the judge, and the Seventh Amendment, purportedly requiring the jury. One principle has to yield. And the court cannot avoid the constitutional problem by means of a canon of statutory interpretation.

153 In Byrd, this difficulty was patently absent. The Court concluded that the state rule was purely procedural, and not “bound up” with any substantive right (where substance is understood in its traditional sense). See Byrd, 356 U.S. at 537-38 (“The policy of uniform enforcement of state-created rights and obligations . . . cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury.”) (emphasis added); see also C. Douglas Floyd, Erie Awry: A Comment on Gasperini v. Center for Humanities, Inc., 1997 BYU L. REV. 267, 276 (“Byrd makes clear that the Court was concerned only with a rule of pure ‘form and mode,’ which the Court had explicitly determined had no underlying substantive or extralitigation policy objectives. To carry this narrow principle further to permit an open-ended and undefined balancing process to displace state rules that do have important extralitigation objectives would be more than an unwarranted extension of Byrd. Such a result would erode the core holding of Erie itself—that it would be unconstitutional for Congress, and a fortiori the courts, to displace state law with a federal rule of decision in areas of legislative policymaking that the Constitution has reserved to the States.”).
There is good reason to believe that state allocations of mixed questions often are substantive or bound up with substantive rights. The task of applying law to fact is a fundamentally normative task, and the evidence indicates that states often allocate to judge or jury not for procedural reasons related to the convenient and fair administration of justice, but rather to take advantage of the special norms that judges or jurors are perceived to bring to the task. The states intentionally shape the contours of rights by importing the norms of the judge or the jury. When the allocation is intended to shape the contour of the right in this way, it is at the very least “bound up with” state substantive law.

Juries, for example, are commonly thought to decide mixed questions in light of popular values, ordinary experience, common sense, and notions of fair play on the facts of particular cases, while judges are thought to rule on the basis of policy, principle, and concern for the prospective importance of the decision in the individual case. As Holmes somewhat resignedly put it in one of his later works, after he had failed to persuade the world that judges should decide all mixed questions, “[O]ne reason why I believe in our practice of leaving questions of negligence to [the jury] is what is precisely one of their gravest defects from the point of view of their theoretical function: that they will introduce into their verdict a certain amount—a very large amount, so far as I have observed—of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community.” Or as Professor Gergen more succinctly puts it, “[T]hat an issue is put to the jury indicates that we want (or at least are satisfied with) the answer of ordinary intuitive morality. That an issue is put to the judge indicates that we want an answer based on policy or principle.”

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154 Of course, even when the issue goes to the jury, the judge always retains the authority to cut off the “unreasonable ends” of the spectrum. Accordingly, in that range, the choice of judge or jury does not affect substantive outcomes. Within the range of reasonableness, however, the choice of judge or jury can drastically affect the distribution of outcomes.

155 The different role of the jury in tort and contract cases has been recognized since Thayer’s time. See Thayer, supra note 99, at 160-61; see also Pound, supra note 105, at 957 (arguing that the law relating to transactions demands clear rules while the law relating to “individual human life” should be contained in standards); Weiner, supra note 108, at 1888.

156 OLIVER WENDELL HOLMES, JR., Law in Science and Science in Law, in THE ESSENTIAL HOLMES 185, 197 (Univ. of Chicago Press 1992). For a similar argument, see Louis, supra note 108, at 1011 (claiming that the jury often gets a mixed question because of “its inclination to ignore unpopular law, to render compromise verdicts, to redistribute the wealth of corporate and governmental defendants, and in general to render a rough cut brand of justice”).

157 Mark P. Gergen, The Jury’s Role in Deciding Normative Issues in the American Common Law, 68 FORDHAM L. REV. 407, 417 (1999). See also HOLMES, supra note 156, at 196 (“When the circumstances are too special and complicated for a general rule to be laid down the jury may be called in.”).
The allocation of mixed questions in the traditional common law actions tends to be based on the effect the allocation will have on the shape of the right. In contracts, mixed questions normally go to the judge, because the judge is thought to be more familiar with the norms of the commercial community, and thus brings stability, predictability, and rational decision making to the task of applying the rules of contract law.\textsuperscript{158} In torts, mixed questions typically go to the jury, which is thought to be best situated to discover the relevant norm: the proper behavior of the ordinary person.\textsuperscript{159} In a nineteenth century case, the Supreme Court recognized the normative nature of the allocation to the jury in negligence cases:

Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.\textsuperscript{160}

Rights on the boundary between contract and tort can take on vastly different shapes depending on whether the judge or the jury applies the law. The judge most often decides whether a business has committed an unfair and deceptive trade practice, and the allocation is often justified on the basis of the predictability this ensures.\textsuperscript{161} One can imagine how different that right would be if the jury applied its notions of what practices are “unfair and deceptive.” An area where the states differ substantially is the contractual duty of good faith and fair dealing. If a jurisdiction assigns the contractual duty of good faith and fair dealing to a jury, then the defendant’s behavior will likely be judged on the basis of traditional popular morality. If the question is assigned to the judge, the decision will likely be based on more constrained rules of commercial behavior, such as honesty and the reasonable use of discretionary power under the

\textsuperscript{158} See Thayer, \textit{supra} note 99, at 160-61; Gergen, \textit{supra} note 157, at 441; Louis, \textit{supra} note 108, at 1032 (arguing that the judge applies the law in commercial cases because of “the legal profession’s fear of jurors and their tendency to render a rough cut, ad hoc, and therefore uncertain brand of justice”).
\textsuperscript{159} See Harry Kalven, Jr., \textit{The Dignity of the Civil Jury}, 50 VA. L. REV. 1055, 1058 (1964) (“[T]he jury with its common sense and feel of the community is the ‘expert’ tribunal for the two great distinctive issues posed by the common law: drawing the profile of negligence and handling the individual pricing of damages”). Holmes thought a judge could, over time, develop a capacity for applying the negligence standard. But the rejection of his view in nearly every jurisdiction represents a decision that a jury has best access to the norms needed to decide the question. See Gergen, \textit{supra} note 157, at 436.
\textsuperscript{160} Sioux City & Pac. R.R. Co. v. Stout, 84 U.S. 657, 664 (1873).
\textsuperscript{161} Gergen, \textit{supra} note 157, at 467.
contract. The right may have the same name, but it takes on a drastically different meaning depending on who gets to apply the law.

It is true that the allocation of mixed questions may have procedural rationales as well. Allocating a mixed question to the jury saves time and conserves judicial resources. One might think that judges’ time is better spent managing cases and announcing pure rules of law, instead of crafting opinions on more fact-bound issues with limited precedential value. It was long thought (and may still be true) that the jury enjoys greater immunity from corruption. Finally, using the jury rather than the judge avoids the creation of a body of precedent, which may be desirable to preserve flexibility and adaptability in the law over time. Alternatively, a jurisdiction might choose the judge specifically for the purpose of creating precedent in planning-heavy areas like contract law. These reasons all have little to do with substantive outcomes, and are instead fairly classed as procedural considerations related to the fair and efficient disposition of judicial business. Do they make the allocation decision “rationally classifiable” as procedure, removing it from the constitutional domain, making it subject to the Byrd canon of constitutional avoidance and mandating application of the balancing test?

Not necessarily, because allocation rules intended to shape the contours of a substantive right still remain “bound up with” state substance. In the first place, it simply cannot be true that the merest procedural rationale gives Congress the authority to displace state law rules that are “substantive” or “bound up with” state substance. Otherwise, even the rule in Erie would be vulnerable. A rule of no liability to trespassers along railroad tracks saves time and judicial resources, compared with a rule that imposes a duty of care. But that slim procedural rationale cannot give Congress the authority to replace the duty identified in Erie. Moreover, rules

162 See id. at 451, 456.
163 For example, cases in Montana and North Carolina hold that the judge may apply the law to the facts in negligence cases. Id. at 434. See also Weiner, supra note 108, at 1896 (noting that courts were divided on whether reasonable time in contract law is for the judge or jury); id. at 1917 (courts are divided on who applies the probable cause standard in a false imprisonment case).
164 See id. at 1889.
165 See THE FEDERALIST NO. 83 (Alexander Hamilton) (“The strongest argument in [the jury’s] favor is, that it is a security against corruption. As there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion, there is room to suppose that a corrupt influence would more easily find its way to the former than to the latter.”); Charles W. Wolfram, The Constitutional History of the Seventh Amendment, 57 MINN. L. REV. 639, 708-09 (1972) (one purpose of the Seventh Amendment was to guard against oppressive and corrupt judges).
166 Of course, the state may have chosen the judge for the purpose of creating a stable body of precedent to guide planning behavior. This may be a major reason for allocating certain questions in business law to the judge. See, e.g., Markman v. Westview Instruments, Inc., 517 U.S. 370, 388-90 (1996).
“bound up with” state substance, such as burdens of proof and choice of law rules, have possible procedural rationales too, but are thought to be so closely tied to the substance of the state law right that not even Congress should be able to selectively abrogate them in federal court.  

For at least some mixed questions, the normatively grounded allocation to judge or jury should be enough to shift the question into the constitutional domain of rules “bound up with” state law. Negligence is the clearest example. If Congress or the federal courts could allocate application of the negligence standard of care to the judge, then the very nature of that right would change because the right is tied up with the fact that the jury applies the law. The same holds true for other claims where the nature of the right depends on the identity of the decision maker: for example, the duty of good faith and fair dealing or the cause of action for unfair and deceptive trade practices, which depend crucially on whether judge or jury applies the law. The allocation helps to determine the nature of the substantive right, and should shift the *Erie* question into the constitutional zone.

In fact, in a “reverse *Erie*” case actually cited in *Byrd*, the Supreme Court recognized that issue allocation may, in a real sense, form part of the substantive right. In a FELA case, the Ohio Supreme Court had held that state practice allocating the issue of fraud in the execution of a release to the judge. The Supreme Court reversed: “We have previously held that the right to trial by jury . . . is part and parcel of the remedy afforded railroad workers under the Employers Liability Act. . . . It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classed as a mere ‘local rule of procedure’ for denial in the manner that Ohio has here used.” *Byrd* cited the case as one where the jury trial right was bound up with the substantive right, and thus implicitly recognized that federal courts must follow state allocations that are “part and parcel” of the substantive right.

*Erie*’s constitutional holding thus likely requires courts to follow the state allocation for at least some mixed questions, and if the state allocates to the judge, the courts will have to

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168 *See* Gergen, *supra* note 157, at 484 (“In the United States, the bedrock principle in negligence can be put this way: if a person acts in a way that foreseeably physically harms his neighbor or his neighbor’s property, and if the appropriateness of his conduct is at all in doubt, then his neighbors will decide whether he should pay for the harm he caused.”).
170 *Id.* at 363.
171 *Byrd*, 356 U.S. at 536.
confront the Seventh Amendment question instead of balancing away the state rule under the Byrd canon of constitutional avoidance. What is the Seventh Amendment answer likely to be? Even when the claim is a legal one, the Seventh Amendment most likely will not require allocation to the jury. First, the federal courts routinely assign mixed questions to the judge rather than the jury, without ever identifying a constitutional problem. Second, history provides no strong support for finding a constitutional problem. In 1791, there was no developed practice regarding the allocation of mixed questions. The question was not discussed in Congress or in the ratifying legislatures. And Holmes was able to argue as late as the early twentieth century that the judge should decide all mixed questions.

Finally, where Erie—the foundational doctrine of modern federalism—requires use of the state allocation, the courts should be reluctant to find that the Seventh Amendment requires a contrary result. The Seventh Amendment was adopted on a federalism rationale. The states did not want the federal courts to abrogate state law rights to jury trial in diversity cases, and felt that features of Article III—including the Supreme Court’s jurisdiction to review law and fact, and Congress’s power to create the lower federal courts—threatened that right. This helps to explain why the Amendment is one of the very few Bill of Rights guarantees to resist incorporation through the Fourteenth Amendment: it was never intended to restrict the states’ allocation decisions in their own causes of action, but only to prevent the federal courts from

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173 See Weiner, supra note 108, at 1891-92 (arguing that there is no constitutional right to a jury application of the reasonableness standard to the facts in negligence because the tort did not exist in 1791, and other questions of reasonableness at the time were determined by the judge). Moreover, even in cases where there was a developed tradition in 1791, the historical practice would not necessarily be binding under the Seventh Amendment. The Seventh Amendment “was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common law jurisdictions.” Galloway v. United States, 319 U.S. 372, 392 (1943).
174 Neither Congress nor the ratifying legislatures discussed the incidents of jury trial, such as whether mixed questions were required to go to jury. Wolfram, supra note 165, at 723, 730; Edith G. Henderson, The Background of the Seventh Amendment, 80 HARV. L. REV. 289, 290 (1966) (“Nowhere in the history of the Philadelphia convention, the ratifying conventions of the several states, or the specific ‘legislative history’ of the Bill of Rights can any evidence be found that the relation of judge to jury was considered as affected in any but the most general possible way by the seventh amendment, or even that it was considered at all.”); see also Louis, supra note 108, at 1008-09 (noting that the Seventh Amendment “has never been construed to require the automatic submission to the jury of all debatable mixed questions going to the merits. Indeed, on several occasions the United States Supreme Court has eschewed the opportunity to so hold and has said only that assignment of mixed questions to the judge or jury is subject to the influence, but not necessarily the command, of the seventh amendment,” but also arguing that some mixed questions are “facts” that may not be taken from the jury).
175 See HOLMES, supra note 106, at 126.
176 AKHIL REED AMAR, THE BILL OF RIGHTS 89 (1998).(arguing on this ground that “the best reading of the amendment is probably as follows: if a state court entertaining a given common-law case (because, say, it involves diverse citizens or raises a federal question) must follow—must ‘preserve’—that state-law jury right”).
encroaching on traditional jury trial rights. Following a state’s decision to allocate to the judge is consistent with the Amendment’s federalism-based rationale—especially when the allocation is bound up with substantive rights.

This caveat for mixed questions bound up with substantive rights still leaves room for the application of an independent Byrd test: where the state assigns historical and non-bound-up mixed questions in “legal” claims to the judge. But even here the federal rule still might not trump the state rule. Recall that most interpret Byrd as a balancing test involving three factors: the federal policy in favor of trial by jury, the state interest in having its procedural rule followed in federal court, and the state/litigant’s interest in conformity between state and federal outcomes.\(^{177}\) The balance in Byrd mandated the federal rule because the federal interest was strong, the state interest in its “form and mode” rule was minimal, and the likelihood of outcome disparity was low due to the jury control devices that are available in federal court.\(^{178}\) The same result will not necessarily hold true where a state’s interest in its allocation to the judge is more intense (or more sensitively characterized than it was in the Byrd opinion) or if there is serious potential for outcome disparity.\(^{179}\)

What is actual current federal practice in this area, taking into account all the cases, and not just those cited in Wright and Miller? No court to this point appears to have recognized the complex ways that state law may influence the judge-jury allocation in federal court. Instead, the decisions lurch between instinctive adherence to the state rule and reflexive fealty to the enclave theory of the judge-jury relationship.

Good examples are provided by the courts’ treatment of mixed question allocations. An example of instinctive adherence to state practice is provided by the unfair and deceptive trade practices statute in North Carolina, enacted in 1975. Soon after enactment, the state supreme court held that “[o]rdinarily it would be for the jury to determine the facts, and based on the jury’s finding, the court would then determine as a matter of law whether the defendant engaged

\(^{177}\) In a case decided shortly after Byrd, the Court reached a similar conclusion on similar facts. In Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273 (1959), the district court had followed state practice and itself decided whether employment was “not in the regular course of business.” Id. at 277. As in Byrd, the Court found that “[w]e have been given no reason for the distinction in the Pennsylvania practice of trying such disputed factual issues to the court.” Id. at 278. Accordingly, the federal policy in favor of jury determination of the facts controlled. Justice Frankfurter dissented, pointing out that “no prior federal case would justify a ruling that in the federal courts application of law to fact is a jury function,” nor was there evidence that such was the practice at the time the Seventh Amendment was adopted. Id. at 282.

\(^{178}\) See Byrd, 356 U.S. at 532, 539-40.

\(^{179}\) Of course, the state rule will still not control if the Seventh Amendment actually dictates otherwise.
in unfair or deceptive acts or practices in the conduct of trade or commerce.”¹⁸⁰ The court did not specify why it entrusted this mixed question to the judge, but it was likely motivated by a desire to ensure consistent and predictable enforcement of this important new cause of action.¹⁸¹ When the Fourth Circuit had to face the allocation question in an unfair and deceptive trade practices case, it did not mention Byrd, but simply quoted the language from the North Carolina opinion verbatim, and held that in federal court, as in state court, the mixed question is for the judge.¹⁸² Here is an obvious example of state law’s influence in the judge-jury realm.

Other mixed question cases also indicate that federal law is not the monolithic influence that courts and commentators make it out to be. A Third Circuit case followed state practice in holding that the application of the probable cause standard in a malicious prosecution case is for the judge, over a dissent that cited Byrd and argued that federal law governed.¹⁸³ A recent First Circuit case recognized that the allocation question is at the very least more complicated than Wright and Miller would have it:

We note that plaintiffs might have argued—but did not—that although all of the pertinent facts are undisputed, the issue should have gone to the jury if the characterization question was a close call. Sometimes, legal questions are left to the jury in close cases even where all the facts are undisputed (e.g., whether behavior is negligent) and sometimes not (e.g., the interpretation of a written document based solely on its language). Whether this ‘judge versus jury’ issue would be governed by federal or state law in a diversity case, Cf. [Byrd], and how it would be treated under federal or Maine law, are interesting questions but they need not be resolved in this case.¹⁸⁴

A very recent case from the Fifth Circuit unreflectively held that “[w]hether a cause of injury is foreseeable is a question for the jury,” and cited a Mississippi case in support of that proposition.¹⁸⁵

One Fourth Circuit case comes close to explicitly recognizing one of my main points: that some allocations are bound up with substantive rights and must control under Erie’s constitutional holding. In Justice v. Pennzoil Co., the issue was whether a company had made

¹⁸¹ See Louis, supra note 108, at 1034 (“Arguably, the North Carolina Supreme Court took the crucial determination from the jury to control this remedial menace to the pocketbooks of local businesses, many of which doubtlessly were unaware of the Act’s full scope, and to achieve consistency in results.”).
¹⁸⁵ Foradori v. Harris, 523 F.3d 477, 496 (5th Cir. 2008).
“reasonable use” of the surface of a tract of land. West Virginia allocates the mixed question to the judge. The court held that state practice bound the federal court, despite Byrd and the “federal policy” in favor of jury trial contained therein:

In contrast [to Byrd], the rule articulated in [West Virginia] is one of state property law. Unreasonable use of land by a mineral owner is not measured by the tort standard of the ordinary reasonable man; rather, it is measured by concrete legal standards rooted in the common law. It is not a matter readily susceptible of jury determination. The rule of Adkins is not only bound up with but assures the continuity of those substantive rights and obligations of the parties which were defined generations ago.

In short, because the West Virginia rule was bound up with substantive rights, it was binding under Erie’s constitutional holding. This and the other cases that followed the state rule cited Byrd, so they must have recognized that some state influence is consistent with the holding of that case.

Unfortunately, other cases—some from the same circuits—uncritically accept that issue allocation is solely a matter of federal law. For example, in the First Circuit’s Rankin v. Allstate Insurance Co., a Maine statute provided an insured with attorney’s fees and interest of the insurer “unreasonably delayed” in making payment. The Court cited Byrd and held that “juries in federal court usually decide whether conduct was ‘reasonable.’ . . . Under the Seventh Amendment, it would not matter whether Maine courts gave such issues to the judge.” The Court therefore did not even inquire into state practice or the reasons for it.

In the Third Circuit’s Goodman v. Mead Johnson & Co., a state court had held that the discovery rule exception to the statute of limitations was a question for the judge, and even set

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186 598 F.2d 1339 (4th Cir. 1979).
187 Judge Posner seemed to accept the concept in Fidelity & Deposit Co. of Maryland v. Rotec Indus., Inc., 392 F.3d 944 (7th Cir. 2004), a case involving whether judge or jury should decide whether a contract is divisible. He began by repeating the conventional wisdom: “[I]n all cases in federal court, including diversity cases, the allocation of responsibility between judge (‘law’) and jury (‘fact’) is governed by federal rather than state law.” Id. at 949. But then he qualified that statement: “The line frays, however, when the procedural rule is generated by a substantive policy, and it is possible to view the fact-law distinction in contract cases in that light, as designed to reduce contractual transaction costs by allowing most contract disputes to be resolved without a trial.” Id. He did not find it necessary to resolve the issue in that case.
188 For district court cases holding that the state allocation controls, see Banks v. Yokemick, 144 F. Supp. 2d 272, 286 (S.D.N.Y. 2001) (following state’s allocation of question—whether municipality’s refusal to indemnify was arbitrary and capricious—to judge, relying on Gasperini and distinguishing Byrd); Calef v. Fedex Ground Package System, Inc., 2007 WL 2570185 at *8 (N.D. W. Va. 2007) (holding that because state court provided jury where federal court would not, no Seventh Amendment issue was present and state practice controlled).
189 336 F.3d 8, 15 n.5 (1st Cir. 2003).
forth some substantive reasons for the allocation. Yet the federal court disregarded the state practice, on the authority of Byrd, and committed it to the jury. The dissent in the case made my point: that an allocation bound up with substantive rights binds under the constitutional holding (and also noted that divergence disserves the twin aims of Erie).

Finally, a recent case from the First Circuit held that the state practice of submitting the question of whether a contract is integrated to the judge does not bind a federal court, citing Byrd. This, despite the fact that allocation of mixed questions to the judge in contract cases has a well-established normative rationale: to ensure that the norms of commercial behavior, and not popular morality, determine whether liability is warranted.

These decisions are not necessarily wrong: frankly, there is not enough discussion of the relevant state rules to decide whether they were bound up, raised a constitutional question, or should be controlling under the Byrd balancing test. But the reasoning is at best incomplete.

The argument set out in this section—as well as the many federal cases cited above that apply the state rule—puts the lie to the notion that allocation is solely a matter of federal law. In fact, a court should ask four different questions when confronting a state law issue allocation:

1. If the state allocates to the jury, then no further inquiry is needed. So long as divergence would violate twin aims (as it normally will), the state rule controls.
2. If the claim is clearly equitable and the state allocates to the judge, the Byrd constitutional avoidance canon does not apply, and state law should also control if the twin aims test is met.
3. If the state allocates a mixed question to the judge, and the allocation is bound up with substantive rights, then the state rule controls as a matter of constitutional law unless the Seventh Amendment requires otherwise.
4. Finally, if none of these is true, the Byrd test may apply, but may still indicate use of the state rule under certain circumstances.

To be sure, there is not and should not be federal hegemony in this area.

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190 534 F.2d 566 (3d Cir. 1976).
191 Marcoux v. Shell Oil Products Co. LLC, 524 F.3d 33, 44 n.10 (1st Cir. 2008) (though reaching the same result under federal law).
IV. Conclusion

In the last two Parts I have hopefully succeeded in demonstrating the real and substantial state and litigant interests that are at play in the area of judge-jury rules. Though sufficiency and issue allocation are by no means the only significant judge-jury issues, they show that an unthinking adherence to the enclave theory of judge-jury relations has substantial inequitable consequences and is not warranted by existing case law. State rules of sufficiency and allocation often involve powerful state interests, sometimes of federal constitutional magnitude. And failing to follow these state rules produces substantial unfairness for litigants, generating a substantial likelihood of forum shopping and inequity, in violation of the twin aims of *Erie* as explicated in *Hanna*.

There is no good reason why *Byrd* should be invoked to resist application of these state rules. *Byrd*, conceived as a competing test with *Hanna* twin aims, is problematic on its own because it envisions a federal interest trumping a statutory interpretation, and also requires an unworkable essentialism. *Gasperini* complicated the picture even further by refusing to use *Byrd* to analyze a state rule that crucially impacted the judge-jury relationship. The only way to harmonize the decisions is to say that *Byrd* is no different from the *Hanna* test, or that it provides a separate test only where that enables the avoidance of difficult Seventh Amendment questions.

In either case, *Hanna* will apply to many state judge-jury rules, and mandate adherence in federal diversity cases. The widespread influence that state rules have in the actual cases—the ones not cited by Wright and Miller—confirms that this must be so. It is time for the courts and the treatise makers to acknowledge that state law should have meaningful influence on the judge-jury relationship in federal court.