THE HEAD-ON COLLISION OF GASPERINI AND THE DERAILMENT OF ERIE: EXPOSING THE FUTILITY OF THE ACCOMMODATION DOCTRINE

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I. INTRODUCTION

Despite the common sentiment among law school students that cases such as Erie Railroad Co. v. Tompkins¹ and Hannah v. Plummer² made Civil Procedure the toughest first-year course, simplifying concepts is the key.³ Dating back 2,000 years, early Greek philosophers struggled with the conundrum of squaring a circle.⁴ Aristotle logically pointed out that a square is not a circle, nor is a circle a square.⁵ Children encounter this basic truth when faced with the daunting task of fitting wooden pegs of certain shapes into their corresponding silhouette. It becomes apparent that the square peg cannot

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¹ 304 U.S. 64 (1938).
³ See Benjamin J. Roesch, Erie Similarities: Alaska Civil Rule 68, “Direct Collisions," and the Problem of Non-Alining Background Assumptions, 23 ALASKA L. REV. 81, 81 (2006) (explaining that few Supreme Court decisions have evoked more anguish among law students and criticism among scholars than Erie); see also RICHARD D. FREER, LAW SCHOOL LEGEND SERIES: CIVIL PROCEDURE (BarBri, A Thomson Business CD-ROM, current through 2005) [hereinafter Law School Legends] (acknowledging the woes of most first-year students with Civil Procedure and advising them to keep it simple).

⁴ See Robin Wilson, Professor, Squaring the Circle and Other Impossibilities, Lecture at Gresham College (Jan. 16, 2008) at ¶ 2 (transcript available at http://www.gresham.ac.uk/printtranscript.asp?EventId=624). Professor Wilson points out the problem of squaring the circle intrigued various ancient Greek mathematicians. Id. Several attempts were made to solve it but all proved unsuccessful. Id. Not until the nineteenth century was it formally acknowledged that to square a circle was a geometric impossibility. Id. In common vernacular the phrase “squaring the circle” refers to a task that is impossible to carry out. Id.

⁵ See ARISTOTLE & WILLIAM CHARLTON, ARISTOTLE’S PHYSICS: BOOKS I AND II 2–3 (J.L. Ackrill & Lindsay Judson eds., William Charlton trans., 1992) (1837); see also PIERRE BAYLE, ET AL., HISTORICAL AND CRITICAL DICTIONARY: SELECTIONS 310 (Richard H. Popkin trans., Hackett Publ’g 1991) (1697) (establishing that the ancient example of squaring the circle has been well-used for ages).
fit into the circular cut-out, no matter how many splinters are suffered trying. Except for sawing-off the edges of the square, in essence rounding it out, the square had no place in the circle's properly designated spot. Assume, for the purposes of this Article, that federal interests will be categorized as the circle, and conversely, state interests will be represented by the square. Applying this geometric metaphor to the civil procedure dilemma of whether state or federal law controls in a federal diversity action, one arrives at the nostalgic conclusion that it is impossible for the circle to be congruous to the square.

The United States Supreme Court decided *Gasperini v. Center for Humanities, Inc.* during its 1995–1996 term. The issue before the Court was whether a federal court sitting in a diversity action should apply state law (the square) or federal law (the circle) in examining the excessiveness of a jury award. Justice Ruth Bader Ginsburg, writing the majority opinion, framed the Court's reasoning around determining the compatibility of the New York provision and the Seventh Amendment's Re-examination Clause. As part of tort reform legislation, the New York legislature passed section 5501(c) with the

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9. *Gasperini v. Ctr. for Humanities, Inc.*, 515 U.S. 415, 422 (1996). The following excerpt from a legal publication, published the year the case was decided, demonstrates that the issue presented in *Gasperini* was novel:

> When cases are tried in federal court under "diversity jurisdiction" — because the parties are from different states — the question has been most difficult, because diversity cases are tried under state substantive law and federal procedural law. State laws controlling the permissible size of jury verdicts appear to be procedural but may actually have substantive effects. And that means that the impact of the 7th Amendment on the review of jury verdicts in federal diversity cases was an issue worthy of the attention of the Supreme Court.

Supreme Court Rules that Federal District Court Must First Review Reasonableness of $450,000 Jury Verdict in Favor of Photographer William Gasperini Whose Photographs Were Lost by Center for Humanities, and that Federal Circuit Court May Then Review District Court's Decision for Abuse of Discretion, 18 ENT. LAW REP. 2, 2 (1996) [hereinafter Supreme Court Rules]. The issue was presented to the Supreme Court in a case that a jury awarded a photographer, William Gasperini, $450,000 in damages on account of the loss of his 300 transparencies. *Id.* Mr. Gasperini was a resident of California and was well-regarded as a journalist for CBS News and the Christian Science Monitor. *Id.* He was a free-lance photographer who had earned approximately $10,000 over the course of a decade from 1984–1994 taking photos in Central America. *Id.*

10. U.S. Const. amend. VII.
12. N.Y. Civ. Prac. Law and Rules § 5501(c) (McKinney 1995). Doctors' malpractice insurance premiums were on a projected path of rising by nearly 30 percent per year in 1985. Political Malpractice, *N.Y. Times*, Dec. 9, 1985, at A22. The average physician in New York was paying $20,000 annually. *Id.* Lawyers were blaming the incompetence of doctors, while doctors pointed to the complexity of modern medicine
intention of creating a soft cap on inflated compensatory and punitive damage awards. The New York law provided that the appellate division must utilize a deviates-materially-from-comparable-compensation standard to determine the issue of excessiveness. The traditional approach taken by federal courts had been an abuse of discretion review involving a shock the conscience examination. The federal approach employed a much broader criterion than the New

dramatically increasing the opportunity for claims. Id. Representatives for both the insurance industry and factions of the legal profession expressed their disquiet with Governor Mario Cuomo's proposed cap on personal injury damage awards. See Tamar Lewin, Insurers, Lawyers Question Cuomo Plan, N.Y. TIMES, Apr. 9, 1986, at D5. A representative for an insurance company commented:

'It's all or nothing at this point .... [H]e was unhappy that the commission did not discuss the contingency-fee system, under which lawyers who take personal injury cases get paid a percentage of whatever they recover for their clients: That's a fundamental part of the problem; lawyers won't settle if they have this incentive to go for the million-dollar verdict.

Id. One lawyer expressed his adamantly opposition to the cap:

I was delighted that he didn't go with the cap .... Fear of the cap is 99 percent of why I wake up in the middle of the night. We're having a cascade of caps in other states, and it really isn't fair to victims. Even a million dollars is not anywhere near enough to compensate someone who's [sic] lost his arms or legs.

Id. The following demonstrates the much anticipated passing of the New York tort reform legislation and its far-reaching impact on the state budget: "What city officials call tort reform could do the rest .... The city projects a saving of $30 million from its plans to limit damage claims." Maurice Carroll, New York City is Closing in on Goal for New State Money, N.Y. TIMES, Jan. 30, 1985, at B1.

13. Gasperini, 518 U.S. at 423. The Court explained New York's legislative intent behind section 5501(c) through Governor Mario Cuomo's statement: "This will assure greater scrutiny of the amounts of verdicts ... promote greater stability ... greater fairness for similarly situated defendants throughout the State." Id. at 424.


In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

Id.; see also J. Benjamin King, Clarification and Disruption: The Effect of Gasperini v. Center for Humanities, Inc. on the Erie Doctrine, 83 Cornell L. Rev. 161, 179-80 (1997). In Gasperini, the district court denied the Center's motion for a new trial without explanation. See Supreme Court Rules, supra note 9, at 2. The Second Circuit Court of Appeals reversed. Id. In an opinion by Judge Guido Calabresi, the Court of Appeals explained that the jury's award was excessive under New York's standard because in such cases New York law required consideration of the uniqueness of the transparencies and the earning level of the photographer. Id. In Gasperini, the photographer failed to show that all 300 transparencies were unique and his earnings did not support such a large award. Id.

15. See Matthews v. CTI Container Transp. Int'l Inc., 871 F.2d 270, 278 (2d Cir. 1989) (illustrating that prior to 1986, New York law employed the same standard as the federal courts); Floyd, supra note 8, at 267 (same).
York standard because it required greater deference for the trial court’s determination.\textsuperscript{16}

The \textit{Gasperini} Court held that appellate review of excessive jury awards was not in conflict with the Seventh Amendment’s Re-Examination Clause.\textsuperscript{17} However, more importantly, and central to this Article’s focus, the Court held that the federal shock the conscience standard was controlling on the appellate court.\textsuperscript{18} Thus, the federal law prevailed as far as the vertical tension between state and federal choice-of-law at the appellate court level.\textsuperscript{19} Microscopically examining this portion of the opinion, the Court’s logic represented a proper application of precedent.\textsuperscript{20} Consequently, the Court compounded its brief clarity by holding that New York’s “deviates materially”\textsuperscript{21} standard could be implemented at the federal trial court level without any detriment to federal interests.\textsuperscript{22} The salient consideration for accommodation was whether “federal courts can give effect to the substantive thrust of § 5501(c) without untoward alteration of the federal scheme for the trial and decision of civil cases.”\textsuperscript{23} The \textit{Gasperini} Court found both state and federal interests could be accommodated.\textsuperscript{24} “The Court determined that the federal interest in narrowly limiting appellate review for excessiveness and the New York interest in broadening

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\item \textsuperscript{17} \textit{Gasperini}, 518 U.S. at 419.
\item \textsuperscript{18} Id. at 439.
\item \textsuperscript{19} See Eva Madison, \textit{The Supreme Court Sets New Standards of Review for Excessive Verdicts in Federal Court in \textit{Gasperini} v. Ctr. for Humanities, Inc.}, 50 \textit{ARK. L. REV.} 591, 610–11 (1997). “For a federal court sitting in diversity, the Erie question is omnipresent. A guiding principle that has developed through the Supreme Court’s treatment of vertical choice-of-law issues: federal courts apply the substantive law of the forum state and the procedural law of the federal system.” King, supra note 14, at 162.
\item \textsuperscript{20} Madison, supra note 19, at 606. Justice Ginsburg engaged in a bifurcated analysis:
\begin{quote}
First, the Court examined the New York provision under the Erie doctrine, ultimately concluding that a federal court in diversity jurisdiction must apply New York’s standard for determining excessiveness. Second, the Court considered whether the Seventh Amendment’s Re-examination Clause nevertheless precluded application of New York’s provision in federal court. The Court determined that, contrary to some of its earlier precedents, the Re-examination clause did not preclude all appellate review of denials of new trial motions on excessiveness grounds . . . . The Court held that, under Erie, New York’s standard must be applied at the district court level . . . precluded application of the state standard of review at the appellate level.
\end{quote}
\textit{Id.} at 606–07.
\item \textsuperscript{21} N.Y. C.P.L.R. 5501(c) (McKinney 1995).
\item \textsuperscript{22} \textit{Gasperini}, 518 U.S. at 437–38.
\item \textsuperscript{23} Id. at 426.
\item \textsuperscript{24} Roesch, supra note 3, at 93.
\end{itemize}
judicial review for excessiveness could both be given effect without disrupting the scheme of the federal courts." 25  Having federal and state interests cohabit in the realm of Erie jurisprudence was a novel concept. 26

Over a decade later, Gasperini has been followed fifty-five times, criticized once, and distinguished on eleven occasions. 27  The greater majority of cases that have followed Gasperini cite to its broader holding that appellate review of excessive jury awards does not offend the Seventh Amendment's Re-Examination Clause. 28  However, the progressive rule etched out by the majority in Gasperini — to accommodate when possible — has seldom been applied. 29  There are particular cases that demonstrate the accommodation doctrine has been waning. 30  The facts in Gasperini presented a unique situation.

25. Madison, supra note 19, at 611.

26. Gasperini, 518 U.S. at 462 (Scalia, J., dissenting) (expressing disapproval of the majority holding because of its novelty and departure from case law).


28. Compare Huss v. Gayden, 991 So. 2d 162, 170 (Miss. 2008) (Graves, J., dissenting) (citing to Gasperini for the proposition that federal law governs procedural matters in federal diversity cases), with Consorti v. Owens-Corning Fiberglas Corp., 518 U.S. 1031, 1031 (1996) (showing generally that Gasperini, for over a decade, has been frequently cited to concerning the procedure-substance dichotomy, appellate review of jury awards, and the Re-Examination Clause; but rarely, if ever, for the accommodation doctrine). In Huss, the Mississippi Supreme Court was faced with the question of whether a statute of limitation defense under state law could be invoked by the physician in a medical malpractice suit. Huss, 991 So. 2d at 163–64. The Huss Court looked to Gasperini for the following proposition: "When a federal court hears a diversity case . . . federal law governs procedural matters." Id. at 170. However, the court relied on York to declare that statutes of limitations were substantive in nature which made the state law controlling. Id. at 168–69, 170–71. In Consorti, which was decided a month after Gasperini, the question presented was whether, for Erie purposes, "a distinction exists between a state statute that imposes explicit monetary limits on damages awards in civil cases and a state statute that establishes substantive standards." Brief in Opposition, at i, Consorti v. Owens-Corning Fiberglas Corp., 518 U.S. 1031 (1996) (No. 95-1339), 1996 WL 33467737. The case was remanded for further consideration in light of Gasperini. Consorti, 518 U.S. at 1031.


30. In Loughman v. Unum Provident Corp., 536 F. Supp. 2d 371, 379 (S.D.N.Y. 2008), which was the same federal district court from which Gasperini originated, the Gasperini holding was boldly criticized in part. In Cooper Indus. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 437 (2001), the United States Supreme Court distinguished Gasperini, demonstrating the difficulty of finding the precedent applicable. The United States Court of Appeals for the First Circuit has struggled extensively with Gasperini and has frequently found occasion to distinguish it rather than follow it. See Rivera v. Turabo Med. Ctr. P'ship, 415 F.3d 162, 172 (1st Cir. 2005); Correia v. Fitzgerald, 354 F.3d 47, 54 (1st Cir. 2003); Grajales-Romero v. Am. Airlines, Inc., 194 F.3d 288, 300 (1st Cir. 1999). Various other lower federal courts across all jurisdictions have shared in the difficulty of squaring the circle of Gasperini. See ConT Trend Res. v. Oxy USA, 101 F.3d 634, 642 (10th Cir. 1998); Monahan Corp., N.V. v. Whitty, 319 F. Supp. 2d 227, 229.
permitting for such an ad hoc solution. The ramification of the accommodation doctrine is the state of turmoil, uncertainty, and improbability to which traditional choice-of-law analysis has been reduced to in light of the unusual harmony struck by the Gasperini Court.

Gasperini is an exemplar of the impossibility of squaring the circle. Part II of this Article explores the basic principles for understanding the inner-workings of Erie jurisprudence and exactly how accommodation became prevalent in that analysis. Although accommodation, post-Gasperini, is now an integral factor to examine when determining which body of law applies in a diversity suit—it has proven to be an inefficient, unworkable, and enigmatic precedent. In Part III, this Article outlines the most important cases in which federal courts of appeals and district courts sitting in diversity have struggled with accommodation in the wake of Gasperini. Each case presented poses a different conflict between state and federal law concerning such matters as entry of judgments, declaratory judgments, or attorney's fees. However, all of the cases reveal the same truism—accommodation is pointless. By deconstructing the accommodation doctrine to expose its flaws and impractical nature, Part IV of this Article will make apparent that the ideal remedy is for the Supreme Court to rid Erie jurisprudence from this notion of accommodating.

II. THE INNER CIRCLE: ERIE'S PROGENY

Beginning with the seminal case of Erie R.R. Co. v. Tompkins, the United States Supreme Court declared that a federal court in a diversity action must apply federal procedural law and state substantive law. In Erie, the plaintiff was injured by an open door while he


31. See Gasperini, 518 U.S. at 431 n.10 (conveying Justice Brennan's sentiment that his agreement with the majority decision was based on factors unique to the case before him).

32. See Wilson, supra note 4, at para. 2.

33. 304 U.S. 64 (1938).

34. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72-73 (1938). See Erie, 304 U.S. at 79-80. The Court's holding announced to the world the decision that all lawyers recog-
was walking alongside a railroad track.\textsuperscript{35} He subsequently brought suit against the railroad company.\textsuperscript{36} The lower courts in \textit{Erie} were required to make a distinction under tort law as to the status of the plaintiff-pedestrian in order to determine what duty the defendant-railroad company owed him.\textsuperscript{37} The question for decision was whether
the longstanding *Swift v. Tyson* doctrine should be disapproved. The Rules of Decision Act and the Rules of Enabling Act provided the underlying rationale for distinguishing between procedure and substance. For appellate courts to continue to apply the *Swift* doctrine—creating federal common law and abridging state substantive rights—was an unconstitutional usurpation of power and a grave misinterpretation of the Rules of Decision Act. From this justification sprouted the twin aims of *Erie*—ensuring equal protection of the law and deterring forum shopping.

Seven years later, *Guaranty Trust Co. v. York* augmented the basic precepts of *Erie* by creating the outcome-determinative test. The clash between state and federal law in that case arose because the plaintiff brought a claim that, pursuant to applicable state law, was barred by the statute of limitations. However, the federal trial court judge decided to ignore the state law and apply the federal equitable doctrine of laches, which allowed the plaintiff to proceed with the cause of action. Justice Felix Frankfurter, writing the opinion for the Court, asserted:

> The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is

reasoned that federal courts must apply state law in civil cases except when those laws conflict with acts of Congress or with the Constitution.

Lavietes, supra note 35, at B11.

38. 41 U.S. 1 (1842).
40. Younger, supra note 34, at 1011.
42. 28 USC § 2072 (1934).
44. Id. at 75–78. The result of the case had a significant impact on shifting power from federal to state courts and safeguarded against forum shopping by opportunistic litigants. Lavietes, supra note 35, at B11. The disposition of the case by the United States Supreme Court also had the unfortunate consequence of putting Mr. Danzig's practice out of business because he was working on a contingency basis. Id.
46. Id.; Floyd, supra note 8, at 273.
48. The etymology of the word laches is French from the words meaning remissness and slackness. *Black's Law Dictionary* 891 (8th ed. 2004). Laches is defined as the "[u]nreasonable delay in pursuing a right or claim — almost always an equitable one — in a way that prejudices the party against whom relief is sought . . . . Also termed sleeping on rights." Id. A second definition for laches is "[t]he equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought." Id. The doctrine of laches is an exemplar of an exercise of the reserved power of equity to withhold relief otherwise regularly given where in a given case it would be unfair and unjust to grant such relief. Id.
relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court.50

Accordingly, the Supreme Court held that a federal court must apply the state's statute of limitations because a statute of limitation is considered a matter of substantive law for Erie purposes.51 The state law governed because to hold otherwise would have an impact on the outcome of the case.52 York stood for the assertion that the outcome of a diversity case should be identical in federal court as it would be in state court, to the extent that legal rules have a bearing on affecting the outcome.53 This outcome-determinative test paralleled and emphasized the importance of consistent outcomes, equal protection, and forum shopping in Erie.54 However, conceivably any rule could affect the outcome of a case.55 Thus, the Supreme Court did not place any limits on the application of this outcome-determinative test.56

A decade later, Byrd v. Blue Ridge Electric Coop., Inc.57 contributed the balancing test, which clarified many gaps in the Court's interpretation and application of Erie.58 The question for the Court to

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50. Id. at 109.
51. Id. at 107–08. A federal court must apply state substantive law and federal procedural law. Erie, 304 U.S. at 77 (1938). Once a law is considered either substantive or procedural, the aforementioned rule applies respectively. Floyd, supra note 8, at 274.
52. York, 326 U.S. at 110.
53. Id.
54. Floyd, supra note 8, at 273–74.
55. See Law School Legends, supra note 3. Professor Charles Alan Wright referred to York as the most Delphic of the Erie progeny. CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 403 (5th ed. 1994). The obscure nature of York's balancing approach has been compounded by Supreme Court neglect in failing to address the concept for nearly four decades, aside from a perfunctory citation in Hanna. Richard D. Freer, Some Thoughts on the State of Erie After Gasperini, 76 Tex. L. Rev. 1537, 1638 (1998). Although lower federal courts have found balancing approaches helpful, they have struggled to apply it consistently because the Supreme Court has not sufficiently developed the concept. Id.; see also Floyd, supra note 8, at 278 (recognizing that any rule of procedure, if not complied with, could be outcome determinative).
56. Law School Legends, supra note 3.
58. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 549–50 (1958); see Floyd, supra note 8, at 275. The first step of the Erie analysis is to determine whether state and federal law conflict with respect to the disputed issue before the district court. See Esfeld v. Costa Crociere, S.P.A., 289 F.3d 1300, 1306–07 (11th Cir. 2002). If no conflict exists then the analysis need not proceed further because the court can apply state and federal law harmoniously to the issue at hand. Id. at 1307. However, if the applicable state and federal law conflict then the district court asks whether a congressional statute or Federal Rule of Civil Procedure covers the disputed issue. Id. If a federal statute or rule of procedure is on point, the district court is to apply federal rather than state law. Id. If no federal statute or rule is on point, then the court must decide whether federal judge-made law, and not state law, should govern. Id.
address in this worker's compensation suit was whether the federal court sitting in diversity was required to apply the South Carolina law providing for judges to determine the status of workers as employees, as opposed to independent contractors. The appropriate federal practice was to leave such issues for a jury to determine. The Court struggled to decide whether the judge-jury dilemma was outcome-determinative under York, but in the end concluded the federal right to a jury trial governed, even if it did affect the course of the litigation. The threshold question the Court determined was whether the state procedure at issue was an integral part of the worker's substantive rights created by the State. This delicate handling of the issue by the Byrd Court, in particular the pivotal question of whether the state procedure was integral to or bound up with substantive rights, was not addressed by the Gasperini majority.

Hanna v. Plummer involved a clash between Federal Rule of Civil Procedure and the provision for service of process on an administrator or executor of an estate in Massachusetts. The Court's mining whether federal judge-made law applies the district court should begin its examination by deciding whether applying state law to the dispute would yield differing outcomes in state and federal court. If the response is negative, then the district court should apply federal judge-made law. If the answer is affirmative, which means the state law is outcome-determinative, then the court must apply the state law standard. However, such an outcome-determinative state law is only applicable if there is no countervailing federal interest at stake that warrants application of the federal law. These steps when taken together constitute the proper approach that a district court ought to utilize in cases involving Erie issues.


The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows: (1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion residing therein.

Hanna, 380 U.S. at 461. Respondent argued that the action could not be maintained because service had been made contrary to and in violation of the provisions of the state statute. Id. at 461-62. Massachusetts state law provided:

Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the
holding was two-fold. The Court held that not every state procedural law, if violated, would be outcome determinative under the York rationale. Therefore, the Court clarified the application of the outcome-determinative test under York by stating that a state rule is outcome-determinative if compliance with it would be burdensome and influence the choice between federal and state court as suitable forums. Hanna stands for the proposition that there is a different prong of the Erie analysis to apply where a federal rule is directly applicable and controlling. This result is dictated by the Supremacy Clause of the United States Constitution and will even displace state law on matters of substance. 

Furthermore, Justice John M. Harlan II, in a concurring opinion to Hanna, provided a different approach to the majority's delineation of substantive for purposes of Erie and York. Justice Harlan declared that the focus of Erie extended beyond the twin-aim concerns of forum shopping and equitable administration of the law. Justice Harlan's concurring opinion is relevant for the purposes of understanding the Gasperini opinion because it demonstrates a plausible and distinct approach to the same issue resolved by the Hanna majority.

creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate.


67. See Floyd, supra note 8, at 277–78. Professor Floyd believes Hanna was the last important chapter of the Court's Erie jurisprudence in which the Court clarified its previous decisions. Id.

68. Hanna, 380 U.S. at 468.

69. Id.

70. Id. at 472–74. After Hanna, it has been well-established that the interpretation of the Erie doctrine as a single and all-encompassing principle actually consists of two separate parts. Freer, supra note 55, at 1637–38. If the Constitution or Congress directs the federal courts to apply federal law, then federal law is controlling. Id.

71. U.S. Const. art. VI, §2.

72. Freer, supra note 55, at 1637.

73. See id. Professor Freer refers to this analysis as the RDA prong of the Erie doctrine, which embodies the Erie concern of the state substantive versus federal procedural dichotomy. Id.

74. Hanna, 380 U.S. at 470.

75. See Floyd, supra note 8, at 280–81.

76. Hanna, 380 U.S. at 474.
III. THE PROBLEM OF THE SQUARE: ACCOMMODATION IN THE GRAND SCHEME

The Gasperini decision has inspired fierce academic debate, critical scholarly articles, and confusion among law students. Two years after the United States Supreme Court rendered its decision, one scholar made the following comments about the expected outlook of Gasperini's effects:

[Blyrd and Gasperini call for a broadening beyond the “twin aims” version of “outcome-determination” analysis to include consideration of the nature and weight of the state's interest in application of its own rule in federal court, with particular focus on whether it is “bound up with” clearly substantive state-law rights and an eye to whether the state or federal interest should prevail or if the two can be accommodated. It is too early to hazard more than a fairly tentative guess...]

This speculation was overly optimistic to say the least and to make use of the metaphor—the eye on accommodation has proven to be blind and inoperable. On the contrary, Professor Richard Freer expressed that the Supreme Court had a duty to set meaningful precedent. He condemned the Court's faulty logic: “In Gasperini, the Court had another opportunity—perhaps its best in a generation—to make a meaningful contribution to [choice-of-law] analysis... Instead, the Court has left the field about as murky as it was before.”

The ensuing cases demonstrate the actual effect of the opaque accommodation doctrine over a decade later.

In 2008, the United States District Court for the Southern District of New York heavily criticized Gasperini in Loughman v. Unum Provident Corp. The case involved a class action suit by beneficiaries against the defendant-insurer, which raised several common law claims and the Employee Retirement Income Security Act. One beneficiary was employed by a company that had purchased a long-
term disability policy for its employees. The policies provided for the payment of benefits only in the event that an employee suffered long-term disability. Each policy contained language about an elimination period that would begin to run on the first day of disability. The beneficiaries became disabled and sought to recover benefits, including but not limited to, those benefits that accrued during the elimination period. The defendant-insurer denied the request for benefits and moved for summary judgment on the basis that the policies precluded benefit payments during the elimination period. However, the plaintiffs cited to controlling precedent in which summary judgment had been granted in favor of beneficiaries collecting benefits during an elimination period.

Senior District Court Judge William C. Connor, writing the opinion, cited to Judge Charles L. Brieant's sentiment echoed in Gasperini: "If there is a federal district court standard, it must come from the Court of Appeals, not from the over 40 district court judges in the Southern District of New York, each of whom sits alone and renders decisions not binding on the others." The abovementioned footnote in Gasperini stated as a general matter that a district court's legal conclusion does not bind other judges sitting within the same district. Strikingly similar to Gasperini, the decision in Loughman was

85. Loughman, 536 F. Supp. 2d at 373.
86. Id.
87. Id. at 373–74.
88. Id. at 374.
89. Id. The beneficiaries relied on a portion of the policy that read "[t]he benefit will be paid for the period of disability..." as meaning that "once the elimination period had run a policyholder [was] entitled to receive retroactive benefits" for the entire time spent disabled. Id.
90. Id.
91. Id. at 378.
92. Gasperini, 518 U.S. at 431 n.10. In Loughman, during the issuance of Judge Brieant's oral ruling, there was an exchange between the counsel and the court in which the judge stated:

Please, there are certain district judges who think that's true. Please read the footnote in Gasperini against the Center for Humanities. These findings and conclusions and judgment to be entered, if it survives a further appeal, will be binding upon the parties but it's not binding on any other judge in this district or anywhere else in the country. They can read that policy and they can apply their own views and judgments towards it. So no precedent is ever created in the district court. You wouldn't believe how many people think otherwise. You are not alone in thinking that. Please read Gasperini. It's in a footnote and it's very, very clear.

Loughman, 536 F. Supp. 2d at 378.
93. Loughman, 536 F. Supp. 2d at 379. Furthermore, the judge pointed out that Wright's Federal Practice and Procedure provides the following solution for such circumstances:
based on factors unique to that case, demonstrating the unpredictable applicability of the precedent. Consequently, Loughman epitomizes the difficulty of having multiple district courts apply varying standards when there is a federal standard on point being applied at the appellate level.

Among the federal circuits, the confusion over Gasperini has been most apparent in the United States Court of Appeals for the First Circuit. Initially, there was the case of Grajales-Romero v. American Airlines, Inc. in 1999, which involved an airline company appealing a district court's award of damages to an injured party. As to the question of whether the damage award was reasonable, the airline company argued the evidence was insufficient to support the award. The court properly acknowledged that the federal rule required a verdict to remain intact, unless it was grossly excessive or shocking to the conscience. The airline company attempted to be opportunistic in crafting Gasperini to stand for the proposition that a district court is required to review an award for consistency with other awards in similar cases. The court of appeals expressly rejected this Gasperini argument based on its reading of state case law.

At least in most circumstances, a ruling by the first court that its judgment should not establish nonmutual preclusion should be honored by later courts without further inquiry. Such rulings are most apt to be made by the first court in response to the same factors that ordinarily enter into the appraisal of a prior opportunity to litigate by later courts, but on the basis of intimate familiarity with the quality of the litigation, the probability of compromise, and the like. Later courts should not be eager to substitute their own remote appraisal of the litigation, simply in hopes of avoiding relitigation or inconsistent results.

Id. 94. Id. 95. Compare Rivera v. Turabo Med. Ctr. F’ship, 415 F.3d 162, 172 (1st Cir. 2005), with Grajales-Romero v. Am. Airlines, Inc., 194 F.3d 288, 300 (1st Cir. 1999) (demonstrating two First Circuit Court of Appeals cases dealing with the same issue). 96. 194 F.3d 288 (1st Cir. 1999). 97. Grajales-Romero v. Am. Airlines, Inc., 194 F.3d 288, 292 (1st Cir. 1999). 98. Grajales-Romero, 194 F.3d at 292. 99. Id. at 299. This is the same federal standard that had been followed by New York state courts and all federal courts at the time Gasperini was decided. Gasperini, 518 U.S. at 439 (1996); Segal v. Gilbert Color Sys., Inc., 746 F.2d 78, 80–81 (1st Cir. 1984). 100. Grajales-Romero, 194 F.3d at 300. Recall that in Gasperini, New York case law mandated state courts to determine if an award substantially deviated from previous awards in similar cases. See Gasperini, 518 U.S. at 418–21. In this case, the airline company contended that the damages award was excessive because it was inconsistent with awards approved by the Supreme Court of Puerto Rico in analogous cases. See Grajales-Romero, 194 F.3d at 300. 101. Grajales-Romero, 194 F.3d at 300. "If local law placed a substantive cap on . . . damages, it would control . . . but Puerto Rico case law suggests no such departure from [the] ordinary practice of reviewing awards under the federal standards for judging excessiveness . . . ." Id.
In 2005, First Circuit Court of Appeals had occasion to revisit its position in Grajales-Romero.\textsuperscript{102} In Rivera \textit{v.} Turabo Medical Center Partnership,\textsuperscript{103} the court enunciated that if state law deviates from the federal standard for judging excessiveness, then a federal court sitting in diversity must give effect to state substantive standards for examining jury awards.\textsuperscript{104} The defendant emphasized a trend in the precedent from the Supreme Court of Puerto Rico, which suggested that courts consistently reduced damage awards for medical malpractice.\textsuperscript{105} Therefore, the defendant reasoned that the federal district court was obligated, under the \textit{Gasperini} approach, to reduce the plaintiff's award to conform to Puerto Rico's precedent.\textsuperscript{106} The First Circuit repeatedly rejected the notion that \textit{Gasperini} directed federal district courts to reexamine damages awards for consistency with awards approved by the highest state court in like cases.\textsuperscript{107} "As we have explained, \textit{Gasperini} would control if state law departed from the ordinary practice of reviewing awards under the federal standards for judging excessiveness, but Puerto Rico law 'suggests no such departure.'"\textsuperscript{108} The court further distinguished \textit{Gasperini} by "[e]mphasizing . . . none of the cases in which we have rejected \textit{Gasperini} arguments involved medical malpractice claims, [the defendant-insurer] asserts that \textit{Gasperini} requires remittitur of damages here despite our extant case law."\textsuperscript{109}

Thus, \textit{Rivera} turned on the court finding Puerto Rico's standard for reviewing awards to be as high a standard as the federal shock-

\textsuperscript{102} Rivera, 415 F.3d at 172. The U.S. Supreme Court declined to review the decision of the United States Court of Appeals for the First Circuit, affirming the district court in finding that a total damages award of $5.5 million was not excessive in a medical malpractice suit against a hospital's physician. \textit{See $5.5. Million Award for Brain-Damaged Baby Not Excessive, N.Y. L. Health L. Update, Apr. 2006, at para. 1.} "Regarding the alleged excessiveness of the award, the appeals court relied on the Supreme Court's ruling in \textit{Gasperini} . . . that 'the federal court's sitting in diversity must apply state substantive law standards in reviewing jury awards if the state law departs from the federal standards for judging excessiveness.'" \textit{Id.}

\textsuperscript{103} 415 F.3d 162 (1st Cir. 2005).

\textsuperscript{104} Rivera \textit{v.} Turabo Med. Ctr. P'ship, 415 F.3d 162, 171–72 (1st Cir. 2005). The court was citing to the Supreme Court's holding in \textit{Gasperini}. Rivera, 415 F.3d at 171–72. It also cited \textit{Gasperini} to expand on the notion that \textit{Erie} precludes a recovery in federal court significantly greater than the recovery that would have been acceptable in a state court down the street. \textit{See id.}

\textsuperscript{105} \textit{Id. at 172.}

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{Id.; cf. Gasperini, 518 U.S. at 423 (indicating that federal courts, pursuant to New York state law, must examine damage awards in similar cases to determine if they deviate materially).}

\textsuperscript{108} \textit{Rivera, 415 F.3d at 172.}

\textsuperscript{109} \textit{Id.}
the conscience standard. The court elaborated on the distinction between Gasperini and the case before it:

That consonance distinguishes this case from Gasperini, which involved a New York law that empowered state courts to reduce any damages award that “deviates materially from what would be reasonable compensation.” The Supreme Court emphasized that New York’s “deviates materially” rule entailed “[m]ore rigorous comparative evaluations” than the federal standard and that it had a “manifestly substantive” objective. Unlike New York’s . . . standard, the Puerto Rico Supreme Court’s standard has been expressed in terms similar to the federal standard.

The court rejected what it coined a “Gasperini argument” and held that the federal standard of reviewing awards was controlling.

Given a plain understanding of Erie, a clash between state and federal law is difficult to resolve in itself. However, requiring judges to check for the possibility of accommodation as an additional step in the analysis complicates matters even further. Houben v. Telular Corp., a post-Gasperini federal appellate court case originating in Illinois, illustrates this notion. Houben involved an Erie conflict between the Illinois Wage Payment and Collection Act (“IWPCA”) and Federal Rule of Civil Procedure 79(a) concerning

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110. Id.
111. Id. at 172–73 (alteration in original).
112. Id. at 172.
113. Id. at 172–74.
114. 304 U.S. 64 (1938).
115. See Esfeld v. Costa Crociere, S.P.A., 289 F.3d 1300, 1306 (11th Cir. 2002) (discussing the multi-step analysis under the Erie doctrine). The distinction between substance and procedure is not readily apparent and post-Erie the Supreme Court has strived to establish a coherent standard to determine when federal law applies in diversity cases. Id. “Because of the difficulties associated with the application of the Erie doctrine, we have adopted a multi-step analysis for determining whether state or federal law should apply to a particular issue raised in a diversity case.” Id.
116. See George Rutherglen, Teaching Procedure: Past and Prologue, 47 St. Louis U. L.J. 13, 15 (2003). (“The same ever-increasing complexity also holds for leading decisions. The seemingly simple command of Erie—There is no general federal common law—now has become an intricate combination of state and federal procedures, as in Gasperini v. Center for Humanities, Inc.”).
117. 309 F.3d 1028 (7th Cir. 2002).
118. Houben v. Telular Corp., 309 F.3d 1028, 1029 (7th Cir. 2002).
119. 820 ILL. COMP. STAT. 115/1 (1986). The statute states “[t]his Act applies to all employers and employees in this State, including employees of units of local government and school districts, but excepting employees of the State or Federal governments.” Id.
120. Fed. R. Civ. P. 79(a). The rule is entitled “Records Kept by the Clerk: Civil Docket.” Id. The rule provides:

The clerk must keep a record known as the “civil docket” in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States. The clerk must enter each civil action in the docket. Actions must be assigned con-
the docketing of judgments. The plaintiff (an employee) had a labor dispute with her former employer (defendant, Telular Corporation) about commissions owed her with respect to a final judgment she had earned against the company. The judgment was granted under a state law claim and docketed on May 20, 1999. The IWPCA provided "that an employer who has been ordered by a court to pay wages due an employee and fails to do so within 15 days is liable for statutory penalties of 1% of the wages per calendar day of delay, with a maximum possible penalty of [double] the paid wages." On appeal, the employer raised several objections to the trial court's reliance on the state statute. First, the employer argued the statute did not apply because it had made a timely post-trial motion under Federal Rule of Civil Procedure 59, which tolled the triggering of any penalties. Second, the employer argued the statutory penalty could not be applied because it conflicted with the federal statute and consecutive file numbers, which must be noted in the docket where the first entry of the action is made. Each entry must briefly show the nature of the paper filed or writ issued, the substance of each proof of service or other return, and the substance and date of entry of each order and judgment. When a jury trial has been properly demanded or ordered, the clerk must enter the word "jury" in the docket.

Id.. Rule 79 indicates that "it is the date of docketing that counts." Houben, 309 F.3d at 1028.

121. Houben, 309 F.3d at 1029.
122. Id.; see also Houben v. Telular Corp., 231 F.3d 1006 (7th Cir. 2000) (detailing the facts of the first appearance of this case before the court of appeals). In the original trial, Ms. Houben pursued state and federal claims against her former employer. Houben, 309 F.3d at 1029. The jury returned a verdict in favor of the employer on the federal claims but found in favor of Ms. Houben on her state claim, under the Illinois Wage Payment and Collection Act, on May 18, 1999. Id.

123. Houben, 309 F.3d at 1029.
124. Id.
125. Id. at 1030.
126. FED. R. CIV. P. 59.
127. FED. R. CIV. P. 59(a)(1).

The Court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows: (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or (B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

Id.

128. 28 U.S.C. § 1961 (2008). The employer claims the federal statute is controlling because it provides the time frame for when an employee is entitled to collect judgment and calculates the applicable interest which accrues. Houben, 309 F.3d at 1030. The federal statute is entitled "Interest."

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment. The Director of the
dure governing when a judgment-creditor is entitled to demand payment.129 Last, the employer maintained it tendered a check to the employee one week after its post-trial motion was denied, satisfying the judgment in a timely fashion pursuant to federal law.130 The district court looked to Miller v. Kiefer Specialty Flooring, Inc.,131 where the Illinois appellate court interpreted the IWPCA and concluded that “an exception, objection, challenge, post-judgment motion, or an appeal does not toll the accrual of the statutory interest penalties.”132 Ultimately, the district court judge decided the state statute was not applicable.133

The central issue on appeal was whether the district court was required to apply the penalty provision of the Illinois statute or if it was inapplicable “for one reason or another.”134 The Seventh Circuit was faced with the quandary of determining whether the Illinois statutory penalty was a rule of substance that the district court was bound to apply or a rule regulating procedure which carried no weight in federal court.135 Judge Diane Wood recognized “[i]t is . . . useful to take a quick look at the development of the [Erie] doctrine and the approach the current Supreme Court appears to be taking to this central issue of judicial federalism.”136 The judge explained the common setbacks when faced with an Erie problem:

Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges. (b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.


129. Houben, 309 F.3d at 1030.

130. Id. at 1029–30. Telular Corporation delivered a check for the original judgment amount plus statutory interest calculated pursuant to 28 U.S.C. § 1981. Id. Houben accepted the check but refused to execute a satisfaction of judgment form or release. Id.


132. Houben, 309 F.3d at 1030.

133. Id.

134. Id.


136. Houben, 309 F.3d at 1032. See Garmisa, supra note 135, at 1. “With its current emphasis on states’ rights, the U.S. Supreme Court has been tinkering with the notoriously subtle distinctions of the Erie doctrine.” Id. George Dargo, Associate Professor of Law at New England Law School, wrote a letter to the New York Times expressing his sophisticated concerns with the new wave of federalism.

The Reagan Administration study titled “The Status of Federalism in America” condemns the Supreme Court for allowing Congress to ‘undermine the sovereign decision-making authority of the states’ and for acquiescing in the improper expansion of a virtually omnipotent national government. You correctly note that the Administration has followed a double standard on this – pushing for national power on some issues . . . and for state power on others . . . .” Contribution the Supreme Court made to viability of American federalism nearly half a century ago. In 1938, when our constitutional law was going
Although the Erie doctrine is a familiar one, it is notorious for the subtle distinctions it requires courts to draw between matters that are "substantive" (a conclusory term that means that state law will be used in cases where the rule of decision is derived from state law) and matters that are "procedural" (a similarly conclusory term that means the law of the forum will apply, and thus the same case will be handled differently depending on whether it is being pursued in a state court or a federal court).^137

Close scrutiny of the Illinois statute revealed state courts had interpreted the legislative purpose of the provision was "to ensure that employees who win wage cases would receive timely and complete payments without any foot-dragging by employers."^138 On the one hand, if the federal rule frames the time period during which an employer must pay up, then the date for payment in this case was June 10, 1999. On the other hand, if the state court's interpretation that post-judgment motions have no effect can be viewed as being so intimately bound with the IWPCA, then state law should govern. As such, May 20, 1999, was the operative date. As such, May 20, 1999, was the operative date.141

Therefore, the threshold inquiry was whether the Illinois statutory penalty was substantive according to the Byrd analysis.143
Since Illinois decisional law declared that a motion for a new trial fails to toll the statutory penalties, the Rules of Decision Act\(^{144}\) required that the court follow the Illinois law.\(^{145}\) The court unpacked some of the distinctions between rules of procedure versus substance.\(^{146}\) Courts have recognized certain rules of substance to be readily apparent, such as: 1) state land law classifying a person walking by a railroad track as a trespasser or invitee; 2) tort defenses of contributory negligence versus comparative negligence; and 3) due course rules applicable to endorsers of commercial paper.\(^{147}\) Conversely, the following rules have been held to be obviously procedural: 1) service of process; 2) the filing of court documents; and 3) available discovery devices.\(^{148}\) There also exists a middle ground which is occupied by hybrid rules exuding some substance and some procedure.\(^{149}\) The court seemed to ascertain that the IWPCA, at least in function, was procedural but its legislative thrust was overwhelmingly substantive.\(^{150}\)

As a result, the court extracted the following guidance: "\textit{Gasperini} represents an acknowledgment that some statutes have both substantive and procedural aspects. This court has also encountered this type of problem . . . ."\(^{151}\) The court struggled with the amorphous accommodation doctrine and deduced "\textit{it seems possible to us, in light of the substantive policy Illinois has expressed in the IWPCA in favor of prompt payment of judgments for past wages and in keeping with \textit{Gasperini}'s approach, that state substantive interests and federal procedural rules might be capable of accommodation.}"\(^{152}\) A creative manipulation of Federal Rule of Civil Procedure 62\(^{153}\) was the only possibility for the court to harmonize the state and federal interests in this case.\(^{154}\) Essentially, the time component of Federal Rule 62(a)

\(^{143}\) Id. at 1032; see also Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536 (1958) (referencing the balancing of interests test).


\(^{145}\) Houben, 309 F.3d at 1032. \textit{Erie} established the rule that federal courts were obliged to follow state decisional law, as well as all other state law, in cases governed by the Rule of Decision Act. \textit{Id.; see also} Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–75, 77–78 (1938) (overruling \textit{Swift} and holding that state common law is law for purposes of the Rules of Decision Act).

\(^{146}\) \textit{See} Garmisa, \textit{supra} note 135, at 1.

\(^{147}\) Id., 309 F.3d at 1033.

\(^{148}\) Id.

\(^{149}\) Id.

\(^{150}\) Id.

\(^{151}\) Id. at 1036.

\(^{152}\) Id. at 1038 (emphasis added).

\(^{153}\) \textit{FED. R. CIV. P. 62}.

\(^{154}\) Houben, 309 F.3d at 1038; \textit{FED. R. CIV. P. 62}. Theoretically, the cumbersome accommodation would have been as follows:

\[\text{[Accommodation] would require us to put together two aspect of Rule 62 as follows: first, the 15-day period provided by the IWPCA would begin to run on the date when execution on a federal judgment is first possible according to}\]
would be followed and the state's substantive interest would come into play by requiring the judicial discretion mentioned in Federal Rule 62(b) to be narrowly focused; the result would enable quick execution with any dispute between the parties being resolved on appeal.  

However, the court exposed the doctrinal flaws inherent in the accommodation doctrine. First, the only imaginable accommodation the court could fathom would yield an undesirable result. Wedging together the state and federal laws would imply that the state law possessed a unique scope that warranted undercutting the discretion of federal judges. Moreover, the judicial discretion had been validly conferred upon federal judges by a constitutionally enacted law—Federal Rule 62. Although this concern was not as prevalent in Gasperini, in the case at bar it had the potential for grave repercussions. Second, the accommodation approach, vis-à-vis its application in this case, seemed to beg the question. The very approach in itself assumed that the IWPCA was a specialized state law worthy of being given such effect. Additionally, state courts had not interpreted the statute in a unique light, but held it was a typical post-judgment interest statute. The court clarified that it was not the role of a federal court to decide if it had a special substantive doctrine embedded in a particular state law. Despite the clever effort, accommodating the Illinois law with the federal rule failed miserably—it was simply impractical and over-burdensome. The Houben

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Rule 62(a) (the 11th day after the judgment); and second, the district court would be required in this special substantive area . . . to exercise its discretion under Rule 62(b) in favor of permitting immediate execution and leaving it to the parties to fight out on posttrial [sic] motions and on appeal the question whether or not the initial judgment was correct.

Houben, 309 F.3d at 1038.

155. Houben, 309 F.3d at 1038.
156. Id. “There are still problems with this accommodation [approach] . . . because it implies that state law deprives federal judges of discretion that has been conferred on them by valid federal rules.” Id.
157. Id.
158. Id.
159. Id.
160. PATRICK J. HURLEY, A CONCISE INTRODUCTION TO LOGIC 156–59 (Peter Adams & Kerri Abdinoor eds., 7th ed. 2000). Begging the question is an informal fallacy that occurs when the arguer creates the illusion that inadequate premises provided for the conclusion by leaving out a key premise, restating the conclusion, or reasoning in a circle. Id.
161. Houben, 309 F.3d at 1038.
162. Id. at 1038–39.
163. Id. at 1039.
164. See Garmisa, supra note 135, at 1 (stating that in this recent case, since Gasperini, accommodation simply did not work because the state rule directly collided with Federal Rule 62). Federal Rule 62 imposes an automatic stay preventing execution of a judgment until the expiration of 14 days after entry while Federal Rule 62(b) permits the district court to issue a further stay of execution during the pendency of a timely
Court gave accommodation a try, but it turned out to be more of a frustration than a useful solution.

Accommodation has also plagued the procedural efficiency of declaratory judgments. The United States District Court for the Southern District of New York, in a robust opinion, delved into the procedural-substantive dichotomy in the hopes of achieving a delicate accommodation between the two competing interests. In *Nap Inc. v. Shuttletex, Inc.*, a manufacturer brought a diversity suit against his insurer-supplier for breach of warranty, and sought a declaratory judgment for commercial liability. The plaintiff, a New York retail corporation, had contracted with a New Jersey corporation to purchase lace in bulk. The defendant was the commercial general liability insurer for the New Jersey supplier. The breach of contract arose because the supplier failed to deliver machine-wash proof lace as had been guaranteed. The insurer moved to dismiss the declaratory action relying on New York law that postulated a third

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filed motion for new trial under Federal Rule 59 or a motion for judgment as a matter of law under Federal Rule 50. *Id.* In contrast, the Illinois statute gives the trial court none of the flexibility assured by Federal Rule 62(b) and (d) because it requires that the judgment be paid or else the penalties automatically accrue. *Id.* Subsection (b) of Federal Rule 62 provides:

Stay Pending the Disposition of a Motion. On appropriate terms for the opposing party's security, the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the following motions: (1) under Rule 50, for judgment as a matter of law; (2) under Rule 52 (b), to amend the findings or for additional findings; (3) under Rule 59, for a new trial or to alter or amend a judgment; or (4) under Rule 60, for relief from a judgment or order.

FED. R. CIV. P. 62. The other relevant portion of the rule is subsection (d).

Stay with Bond on Appeal. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a) (1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

*Id.*

165. See generally *Nap, Inc. v. Shuttletex, Inc.*, 112 F. Supp. 2d 369 *passim* (S.D.N.Y. 2000) (providing just one of several cases in which state and federal statutes governing declaratory judgment have been in conflict). A declaratory judgment is a binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement. Black's Law Dictionary 859 (8th ed. 2004). Declaratory judgments are often sought, for example, by insurance companies in determining whether a policy covers a given insured or peril. *Id.* A declaratory judgment can also be used to express the opinion of the court on a particular question of law without mandating that any additional action be taken. STEVEN H. GIFFS, BARRON'S LAW DICTIONARY 131 (5th ed. 2003).


167. *Id.*

168. *Id.* at 370–372.

169. *Id.* at 370.

170. *Id.*

171. *Id.*

172. N.Y. INS. LAW § 3420 (McKinney 1999).
party had no standing to bring a direct action against an insurer.\textsuperscript{173} However, the plaintiff sought declaratory relief action based on the Federal Declaratory Judgment Act,\textsuperscript{174} not New York law.\textsuperscript{175} The court was faced with the challenge of choosing the proper measure to apply “in adjusting the balance of procedure versus substance and the federal-versus-state-law jurisdictional equation, demanding[ing] delicate calibrations.”\textsuperscript{176} Since the arguments on each side were based on differing law, the court had to weigh the two opposing interests implicated in the evenhanded choice.\textsuperscript{177} The court addressed whether: 1) the underlying dispute would be resolved on the basis of federal procedure or state law; and 2) the state law was substantive or procedural in nature.\textsuperscript{178}

\begin{footnotesize}
\begin{itemize}
\item[(a)] No policy or contract insuring against liability for injury to person . . . or against liability for injury to, or destruction of, property shall be issued or delivered in this state, unless it contains in substance the following provisions or provisions which are equally or more favorable to the insured . . . (a)(2) A provision that in case judgment against the insured or his personal representative in an action brought to recover damages for injury sustained or loss or damage occasioned during the life of the policy or contract shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer, then an action may, except during a stay or limited stay of execution against the insured on such judgment, be maintained against the insurer under the terms of the policy or contract. (b) Subject to . . . limitations . . . an action may be maintained by the following persons against the insurer upon any policy or contract of liability insurance that which is governed by such paragraph, to recover the amount of a judgment against the insured or his personal representative: (b)(1) any person who, or the personal representative of any person who, has obtained a judgment against the insured or his personal representative, for damages for injury sustained or loss or damage occasioned during the life of the policy or contract . . . .

\textsuperscript{Id.}
\item 173.\textsuperscript{173} \textbf{Nap}, 112 F. Supp. 2d at 371–72.
\item 175.\textsuperscript{175} 28 U.S.C. § 2201. The Federal Declaratory Judgment Act states that: (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

\textsuperscript{Id.}
\item 176.\textsuperscript{176} \textbf{Nap}, 112 F. Supp. 2d at 371.
\item 177.\textsuperscript{177} \textit{Id.} “The decision calls for much more meticulous weighing of constitutional values and subtle accommodations of divergent interests implicated in the equitable administration of justice than a cursory look at the narrow private issue here would indicate.” \textit{Id.}
\item 178.\textsuperscript{178} \textit{Id.} at 370.
\end{itemize}
\end{footnotesize}
The New York Insurance Law permitted non-parties injured by an insured to sue the insurer. The defendant argued the legislative intent of the statute was to restrict and circumscribe the amount of multi-party litigation, which could be brought against insurers in such scenarios expressly covered in the provisions of the statute. Furthermore, the requirement for entry of a judgment against the insured was substantive because state law required the satisfaction of a condition precedent prior to entry of any judgment. The plaintiff's counter-argument was that the Federal Declaratory Judgment Act controlled because it was merely procedural. In other words, the federal statute should have governed because it simply limited the timing or control of when an action might otherwise commence. The court disagreed with this construction by stating "[plaintiff's] arguments are also contrary to the proper application of the Act and to overarching policy ends of promoting harmonious federal-state relations in the administration of justice."

As a result, the court concluded that a careful examination of the legislative intent underlying the New York law demonstrated it was predominantly substantive, but had some incidental procedural elements. The court recognized it was obliged by precedent to make delicate accommodations between state and federal law. The attempt at accommodation consisted of varying interpretations of each statute in order to yield a balanced solution. The court downplayed certain procedural elements and overemphasized other substantive dimensions of the statute only to discover that too much state substantive policy was at stake to "disturb the delicate federal-state jurisdictional equilibrium." Yet again, accommodation was not possible.

On a national scale, accommodation has been most troublesome with regard to attorney's fees under Federal Rule of Civil Procedure 68 and the wide array of differing state rules on offer of judgment. Federal Rule 68 operates like a procedural cost-shifting tool

179. N.Y. Ins. Law § 3420(b) (McKinney 1999).
181. Id. at 372.
182. Id. Plaintiff argues the federal statute merely offers a remedy which does not abrogate substantive rights. Id.
183. Id.
184. Id.
185. Id.
186. Id.
187. Id. at 376.
188. Id.
189. FED. R. CIV. P. 68.
intended to apply in certain limited circumstances and has hardly ever been considered to shift post-offer attorney's fees. Alongside Federal Rule 68, there are various state rules governing offer of judgment which present various additional penalties for “failing to accept qualified offers of judgment, including the shifting or barring of post-offer attorneys’ fees, interest, double costs, prevailing party damages, and delay damages.” There is a split among courts across the country as to whether various state rules awarding attorney’s fees to litigants who make fee-inducing offers of judgment may be applied by a federal court sitting in diversity. Among all the states, Alaska has a unique rule governing the awarding of attorney’s fees which is premised upon the English Rule that provides for a portion of the prevailing party’s legal fees to be

works.bepress.com/cgi/viewcontent.cgi?article=1000&context=michelle_hartmann (last visited Nov. 5, 2009). In response to Federal Rule 68's narrow scope, many states have passed lofty offer of judgment rules that are more expansive in purpose than Federal Rule 68. Id. The following twenty-four states follow the text of Federal Rule 68 in permitting only the defending party to make offers of judgment: Alabama, Arkansas, Delaware, Hawaii, Indiana, Iowa, Idaho, Kansas, Kentucky, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New York, North Carolina, North Dakota, Oregon, Rhode Island, Vermont, Washington, West Virginia, and Utah. Id. at 3. Twenty states have enacted offer of judgment rules that permit any party to make an offer of judgment, including: Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Louisiana, Maryland, Minnesota, Nevada, New Jersey, New Mexico, Ohio, South Carolina, South Dakota, Tennessee, Wisconsin, and Wyoming. Id. at 3–4. Two other states, Michigan and Oklahoma, permit plaintiffs to make a counter-offer once the defendant makes an initial offer. Id. at 4. Texas permits any party to make an offer once the defendant files a declaration with the court invoking its state offer of judgment rule. Id.; see also Roesch, supra note 3, at 106 (explaining that cases from around the country have dealt with application of state rules awarding attorney's fees or other additional costs and the result has been several different approaches to the application of such state rules in diversity cases).

191. Guy, supra note 190, at 1. At first glance, Federal Rule of Civil Procedure 68 seems to govern the effects of defendant's offers of judgment in federal court. See Roesch, supra note 3, at 94–95. The federal rule provides:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or to the property or the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is no more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

Fed. R. Civ. P. 68 (indicating the Advisory Committee Notes). Federal Rule 68 was never intended to apply universally for every type of case. See Guy, supra note 190, at 3. This slim focus distinguishes the federal rule from many state offer of judgment rules. Id.

192. See Guy, supra note 190, at 13.

193. Roesch, supra note 3, at 84.
shifted to the losing party.\textsuperscript{194} In diversity cases brought under Alaska law, Alaska Rule of Civil Procedure 68\textsuperscript{195} encounters a plain conflict with the federal rule.\textsuperscript{196} On the one hand, "Federal Rule 68 was intended to promote settlement by shifting costs onto plaintiffs who recover less at trial than they were offered pursuant to the rule."\textsuperscript{197} On the other hand, Alaska Rule 68 not only serves to encourage settlement but also aims to recognize the prevailing party for all attorney's fees purposes under Alaska's fee-shifting system.\textsuperscript{198} The consequence of Alaska Rule 68 is how it plays out in federal diversity cases in light of Federal Rule 68.\textsuperscript{199} "The inquiry reveals a number of pitfalls that federal courts confronted with potentially conflicting federal and state rules of civil procedure must avoid in determining when there is a 'direct collision' between those rules."\textsuperscript{200} All of the cases, since \textit{Gasperini}, have dealt with conflicts between state laws and Federal Rule 68 in problematic ways, none of which have fulfilled the command of \textit{Gasperini}.\textsuperscript{201}

Several courts have utilized the \textit{Erie-Hanna} analysis to determine whether application of a state offer of judgment statute is appropriate in a diversity action.\textsuperscript{202} One scholar has pointed out that "[a]fter the Supreme Court's refinement of the \textit{Erie} doctrine in \textit{Gasperini} v. Center for Humanities, Inc., an especially careful analysis of the purposes of both the relevant federal rule and the state statute is required to avoid the unnecessary and undesirable federal abrogation of state substantive law."\textsuperscript{203} In general, a state offer of judgment rule

\textsuperscript{194} \textit{Id.} at 81. Unlike the rest of the country, Alaska does not follow the American Rule on attorney's fees under which each party bears its own litigation costs. \textit{Id.} at 82.

\textsuperscript{195} \textit{Alaska} R. Civ. P. 68.

\textsuperscript{196} \textit{Roesch}, \textit{supra} note 3, at 83.

\textsuperscript{197} \textit{Id.} at 84.

\textsuperscript{198} \textit{Id.}

\textsuperscript{199} \textit{Id.} at 83–84.

\textsuperscript{200} \textit{Id.} at 84.

\textsuperscript{201} \textit{See id.} at 85; \textit{see also} \textit{Gasperini}, 518 U.S. at 426 (referencing that accommodation of state and federal interests is an imperative command post-\textit{Gasperini}).

\textsuperscript{202} \textit{Roesch}, \textit{supra} note 3, at 99.

\textsuperscript{203} \textit{Id.} at 82. Three principal questions emerge from the Supreme Court's elaboration of \textit{Erie} in \textit{Gasperini}, but there is no bright-line or clear criterion for deciding whether a particular state rule is substantive. \textit{Guy, supra} note 190, at 9–10. The first \textit{Erie} question is whether the relevant state law is consistent with a valid federal rule or statute that is on point. \textit{Id.} at 10. Only if the relevant federal rule or statute cannot be accommodated in a manner that avoids conflict with the relevant state law will the federal rule or statute control and displace the contrary state law. \textit{Id.} If the federal rule or statute can be accommodated with the relevant state law, then additional inquiries must be made. \textit{Id.} The first inquiry is whether the application of the standard would have so important an effect upon the fortunes of one or both litigants that failure to apply it would result in an inequitable administration of the law and discrimination against citizens of the forum state. \textit{Id.} The next inquiry is whether the state rule, if applied in a diversity case, would infringe on an essential characteristic of the federal system. \textit{Id.}
should not conflict with Federal Rule 68 because “if an attempt is made to accommodate important state offer judgment interests with Federal Rule 68, as is required under Gasperini, there generally should be no ‘direct collision’ . . .” The inquiry into whether a federal rule or statute governs requires an in-depth examination of the intended scope and purpose of both the state and federal rules.

In particular, a close review of Alaska Rule 68 yields anomalous results. There is no direct collision between Alaska Rule 68 and Federal Rule 68 because there is a specific purpose of the former for which the latter was not intended. Alaska Rule 68 affords parties with an additional means of qualifying as the prevailing party to have the fees shifted. The scope of its federal counterpart was never meant to cover determinations of prevailing party status in awarding fees. Therefore, Alaska Rule 68 must be applied in the absence of any conflict with Federal Rule 68. However, the examination does not end there because Gasperini left room for the operation of a federal rule despite an acknowledgement of a substantive state rule. “Although the substantive consequences of the offer of judgment and the determination of which parties can extend such offers should govern, it can be inferred that Federal Rule 68 should control the manner in which offers are made and accepted.” The argument in favor of accommodating Federal Rule 68’s characteristics of time and place is that it will provide for the efficient operation of federal courts. Nevertheless, when inquiring into whether the federal rule is broad enough to govern, the following can be concluded: “Because Federal Rule 68 was not intended to affect prevailing party status for attorneys’ fees purposes but to maintain the status quo . . . its consequences cannot govern when the status quo differs from the underlying assumption. State law should be applied.”

Cases from around the nation have encountered the puzzle of applying state rules awarding fees and have taken varied approaches to statutes similar to Alaska’s rule. For example, in MRO Communications, Inc. v. AT&T Co. the district court awarded the defendant-

204. Guy, supra note 190, at 10.
205. Roesch, supra note 3, at 99.
206. Id. at 100–05.
207. Id. at 100.
208. Id.
209. Id.
210. Id.
211. Id. at 103.
212. Id. at 104.
213. Id.
214. Id. at 105.
215. Id. at 106.
216. 197 F.3d 1276 (9th Cir. 1999).
provider post-offer attorney’s fees and costs against the plaintiff-subscriber pursuant to Nevada’s state offer of judgment rule. In that case, the United States Court of Appeals for the Ninth Circuit held that no Erie conflict could exist between the state rule and Federal Rule 68 because the federal rule did not cover defendant’s obtaining judgment.\(^2\)\(^1\)\(^7\) In Walsh v. Kelly,\(^2\)\(^1\)\(^8\) the United States District Court for the District of Nevada awarded the defendant costs incurred after the date of the rejected offer of judgment in accord with Federal Rule 68, but failed to award post-offer attorney’s fees permitted under Nevada’s state rule.\(^2\)\(^2\)\(^0\) The Walsh Court distinguished the holding in \textit{MRO Communications, Inc.} as limited to facts where a defendant has prevailed.\(^2\)\(^2\)\(^1\) Basically, the court held that the Nevada rule was in conflict with Federal Rule 68 and did not apply the state rule.\(^2\)\(^2\)\(^2\) The following sheds some light on these two holdings: “The conclusion on which these holdings is [sic] based — that Federal Rule 68 is broad enough to occupy the state rule’s entire ‘field of operation’— is shortsighted. It ignores \textit{Gasperini’s} requirement that Federal Rules be interpreted to accommodate and ‘to avoid conflict’ with contrary state rules and ‘important regulatory policies.’”\(^2\)\(^2\)\(^3\)

Equally important, in \textit{Monhan Corp., N.V. v. Whitty},\(^2\)\(^2\)\(^4\) the United States District Court for the District of Massachusetts mentioned the accommodation test and explained when it was not applicable.\(^2\)\(^2\)\(^5\) The issue in the case was whether to grant the defendant’s motion for attorney’s fees and sanctions.\(^2\)\(^2\)\(^6\) The defendant moved for attorney’s fees under Federal Rule of Civil Procedure 11 and certain provisions of Massachusetts’ state law.\(^2\)\(^2\)\(^8\) The general rule was that state-created statutes awarding attorney’s fees should be applied in federal diversity cases.\(^2\)\(^2\)\(^9\) Preemptively, the district court carefully circumscribed its potential \textit{Erie} analysis and denied the defendant’s motion observing:

For one thing, even though it might be said that [Massachusetts General Law] is substantive in nature, i.e., outcome-de-
terminative, because of the mandate of the Rules Enabling Act . . . neither the outcome-determinative test . . . nor the Gasperini accommodation test, applies. And that is because it is well settled that the Federal Rules of Civil Procedure will supercede a state rule if a federal rule is coextensive with the state rule, and if the federal rule is otherwise constitutional.  

The court was unwavering in its assessment that Federal Rule 11 was coextensive with the provisions of the Massachusetts' law. In this case, the court's solution was a straightforward application of Hanna which the Gasperini Court avoided and criticized, despite Justice Antonin Scalia's dissent.

IV. SQUARING THE CIRCUMFERENCE: REMOVING ACCOMMODATION FROM THE ANALYSIS

From entry of judgment to attorney's fees, attempts at accommodation have taken several different forms in diversity cases but have all illuminated a single axiom. The basic truism is that accommodation is not a useful analytical tool in Erie jurisprudence, as evidenced by its meager precedential weight. Gasperini's accommodation doctrine has lingered for well over a decade, during which time it could and should have clarified a convoluted Erie analysis for lower federal courts. The aforementioned cases serve as plain proof of the present necessity to abolish the accommodation doctrine. This Article does not base the answer to the problem posed by accommodation solely on the probability or infrequency of precedent. To be sure, the crux of the solution is founded upon the numerous cases that have attempted to apply the unsound accommodation test and failed. There have been noteworthy criticisms about the mysterious and illogical nature of the Gasperini holding, all of which are

230. See Whitty, 319 F. Supp. 2d at 228-29 (implying that the court did not bother to engage in the convoluted and, in this case, unnecessary Erie analysis).
231. Id. at 229.
232. Freer, supra note 55, at 1641-43; Gasperini, 518 U.S. at 468 (Scalia, J., dissenting).
233. 304 U.S. 64 (1938).
234. See Shepard's, supra note 27 (shepardizing the precedent of Gasperini).
236. Floyd, supra note 8, at 297.

Gasperini provided the Court with a much needed opportunity to explore the foundations of Erie, to reconcile its disparate approaches in Hanna and Byrd, and to explain, confine, or reject Byrd's balancing approach in light of the uncertainties and criticism that it has spawned. Instead, the Court confounded the confusion by its studied indifference to the real issues presented by its invocation of Byrd.

Id.
237. See supra Part III.
crystallized when understood in the context of the pivotal cases delineated in Part III of this Article.\textsuperscript{238}

The failure of accommodation was most noticeable in \textit{Houben v. Telular Corp.},\textsuperscript{239} which will serve as the medium for discussing the abolition of accommodation.\textsuperscript{240} The \textit{Houben} Court was hampered by the awkwardness of stretching state and federal interests in order to have the two coexist.\textsuperscript{241} The court stated “[i]f the possible accommodation we have outlined is too much of a strain, we must turn to more general principles to resolve this case.”\textsuperscript{242} Clearly, the court was indecisive as to whether the Illinois state law concerning entry of judgment was actually procedural or substantive.\textsuperscript{243} Thereupon, the court turned to \textit{Hanna} for the proposition that there is a gray area in which a state law might rationally be categorized as procedural.\textsuperscript{244} This resort to \textit{Hanna} was unusual because, as many commentators have suggested, \textit{Gasperini} had the effect of completely undermining \textit{Hanna} on its path to accommodation.\textsuperscript{245} The overall critique is that \textit{Gasperini} deflated longstanding confidence in the rule that a Federal Rule of Civil Procedure on point applies in federal court, despite a contrary state rule.\textsuperscript{246}

“Observers hoped the Supreme Court would provide clarification and guidance” in \textit{Gasperini} for all of the loose-ends left by \textit{Erie}’s tenets.\textsuperscript{247} The \textit{Gasperini} majority never spelled out the sense in which the New York state rule was substantive rather than procedural. \textit{Gasperini} left the approach to this critical issue open-ended. The Court could have meant that the New York rule was substantive in

\begin{itemize}
\item \textsuperscript{239} 309 F.3d 1028 (7th Cir. 2002).
\item \textsuperscript{240} \textit{Houben v. Telular Corp.}, 309 F.3d 1028, 1039–41 (7th Cir. 2002); see also supra Part V.
\item \textsuperscript{241} See Gordon, supra note 238, at 219 (utilizing the metaphor of a riddle to advance federalism and state bias to explain the \textit{Gasperini} decision). “The \textit{Gasperini} Court’s accommodation of state and federal law creates a multifaceted riddle.” \textit{Id.}
\item \textsuperscript{242} \textit{Houben}, 309 F.3d at 1039.
\item \textsuperscript{243} \textit{Id.} Similarly, the \textit{Gasperini} Court endeavored to resolve a traditional \textit{Erie} dilemma of whether the issue was substantive or procedural when it really seemed to fall in between. Edie C. Grinbalt, \textit{Gasperini in Line with Erie: New York Law Determines Excessiveness of Verdict in Diversity Cases}, 13 Touro L. Rev. 675, 679 (1997).
\item \textsuperscript{244} 380 U.S. 460 (1965).
\item \textsuperscript{245} \textit{Houben}, 309 F.3d at 1039.
\item \textsuperscript{246} See King, supra note 14, at 163–64 (claiming that \textit{Gasperini} affected the \textit{Erie} doctrine in two principal ways, one of which was diluting the \textit{Hanna} test).
\item \textsuperscript{247} \textit{Id.; accord Freer, supra note 55, at 1660 (observing that the \textit{Gasperini} holding represented a grave departure from traditional \textit{Erie-Hanna} analysis).
\item \textsuperscript{248} Freer, supra note 55, at 1639.
\end{itemize}
the York249 or Hanna sense of outcome-determination. Even still, the Court could have viewed the state law as procedural in form but substantive in nature because it had objectives extending beyond the litigation itself that were bound up with the state's definition of substantive rights in the sense of the Byrd250 Court's dictum. Nevertheless, Justice Ginsburg never made the majority's rationale clear.251 As opposed to utilizing Erie's twin aims to discern whether the statute was substantive, the Court simply declared the rule as one of substance because it implicated the twin aims test.252 The Court utilized the twin aims in a strange manner and at a most odd stage in the logical stepladder of Erie analysis.253 In sum, the Court relied on the much more dated York outcome-determination test and abruptly concluded.254

The fundamental difficulty with Gasperini is that the majority of the Court applied Byrd's balancing approach to displace the New York standard of review at the appellate level without explaining how the New York state rule was substantive.255 The Court did not elaborate on why the New York standard was any less substantive when applied on appeal than at trial, which was the foundation for the accommodation holding.256 When closely examined, the Court's opinion suggests that New York's rule was substantive in two diametrically opposed senses, one of which would have implied an opposite result from the

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251. Floyd, supra note 8, at 293.
252. Freer, supra note 55, at 1655.
253. Id. at 1654.
254. See Grinbalt, supra note 243, at 683 (explaining that the Court's application of York instead of Byrd only confused the already obscure realm of Erie jurisprudence because Byrd involved the most similar Erie-line conflict to Gasperini). The Court's rationale departed from the logical steps required under Erie and York. Once utilizing the outcome-determinative test, the next logical step . . . would have been to affirm the Second Circuit's use of the New York . . . statute. If using the traditional federal appellate standard to review jury awards creates the high risk of different outcomes in federal and state courts, federal appeals courts under Erie and Guaranty Trust should be required to use the New York standard and not the federal standard. The Gasperini Court failed to follow that logic.
255. Floyd, supra note 8, at 290. "That the Court did regard New York's standard as substantive is clear, but the basis for that conclusion is opaque." Id. Addressing the Gasperini Court's treatment of the issue of what standard governed review on a motion to set aside a verdict as excessive, Professor Freer pondered: "It is difficult to imagine an issue better calculated to incline the Court to address Byrd. Surprisingly, however, the Court never mentions Byrd on this point." Freer, supra note 55, at 1654. The Court only mentioned Byrd when determining whether the state standard could be applied on the appellate level, not on whether the state law was substantive or not to begin with.
256. See Floyd, supra note 8, at 291.
The backdrop was different in *Houben* than in *Gasperini* because the decision to apply the state or federal rule implicated only a federal trial court, and did not govern any happenings at the appellate level. Thus, accommodation would have been even more proper in *Houben*, but the court sided with the logic offered in Justice Scalia's dissent and read the federal rule as being broad enough to cover the issue. The *Gasperini* Court chose not to adopt a broad interpretation of the federal rule because it reasoned that federal courts had interpreted such rules with sensitivity to important state interests and regulatory policies. Nonetheless, the *Houben* Court decided to invoke a search for plain meaning in the federal rule to displace the Illinois statute's control in the matter. The *Houben* Court ruled that "[t]his analysis suggests strongly that the regime for collection of federal judgments is something fully addressed by positive federal law . . . [any] conflict between Illinois law and federal law, *Hanna* obliges us to follow the federal rule under the circumstances.

257.  *Id.* at 290.
259.  See *Houben*, 309 F.3d at 1039-40 (analyzing federal rule 62 and finding that it "suggests strongly that the regime for collection of federal judgments is something fully addressed by positive federal law").
262.  *Id.* "[I] think the Court's *Erie* analysis is flawed. But in my view, one does not even reach the *Erie* question in this case. The standard to be applied by a district court in ruling on a motion for a new trial is set forth in Rule 59 of the Federal Rules of Civil Procedure . . . ." *Gasperini*, 518 U.S. at 467 (Scalia, J., dissenting) (summarizing the basis for Justice Scalia's dissent).
264.  *Houben*, 309 F.3d at 1039-40; see also Roesch, *supra* note 3, at 82 (explaining that federal rules must be interpreted for their plain meaning to resolve issues of state rules on attorney's fees uniformly in federal court).
we have here." Implicitly, the court disavowed the *Gasperini* instruction, that courts must read federal provisions with sensitivity toward state substantive policies, as a departure from traditional *Erie-Hanna* analysis. This solution diverged from the *Gasperini* Court's approach, resuscitated *Hanna*, and paralleled the solution suggested by Justice Scalia in his *Gasperini* dissent.

Based on the foregoing analysis, the removal of accommodation is well-founded for several different reasons. First, accommodation has created uncertainty as to the precise weight that state and federal interests should be given. Second, the *Gasperini* holding created a danger of "unwarranted subordination of substantive state objectives" at the whim of "ad hoc judicial perceptions of amorphous federal procedural interests." Third, the Federal Rules of Civil Procedure are meant to provide a "singular, uniform method for adjudicating substantive rights in federal court." Since 1938, the Supreme Court has labored to fashion bright line rules that promote predictability in the resolution of *Erie* decisions. However, given the *Gasperini* Court's indifference toward seminal developments in *Erie's* progression, the analysis has been turned on its head. As a result, lower federal courts have been unable to adeptly apply the accommodation doctrine. Last, the inevitable deduction that opportunities to accommodate state and federal interests in any given case are extremely rare lends credence to its elimination.

A harsh critique of *Gasperini* is not shielded from opposing views or alternative explanations. A select group of scholars sympathize with the *Gasperini* majority. Some believe *Gasperini* was decided properly while others minimize the significance of admitted shortcom-

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266. Freer, supra note 55, at 1660.
267. Compare Houben, 309 F.3d at 1039 ("The first step is to decide whether, when fairly construed, the scope of any federal rule or statute is broad enough either to cause a 'direct collision' with the state law or otherwise 'controls the issue' before the court."), and Garmisa, supra note 135, at 1 (reporting on the Illinois Appellate Court's efforts to accommodate and the alternative solution that was reached), with King, supra note 14, at 188 (hypothesizing that the *Gasperini* Court accidentally failed to follow the rule in *Hanna* because it was mistaken about evidentiary levels for sufficiency of evidence standards), and *Gasperini*, 518 U.S. at 467 (Scalia, J., dissenting) (stating Justice Scalia's view that the conflict in *Gasperini* was really no conflict because the scope of Rule 59 was sufficiently broad).
268. Rowe, supra note 78, at 965.
269. Id. at 964.
270. Roesch, supra note 3, at 82.
271. King, supra note 14, at 162.
272. See Floyd, supra note 8, at 297 ("Rather, the Court itself 'did not attend to' the essential underpinnings of *Erie* and *Byrd'.").
273. See supra Part III.
Moreover, fascination with the awkward holding has led to justifications for the Court's fallacious logic in trying to make some sense of the result. Professor Daniel Gordon attributed the result in *Gasperini* to the role of federalism and Jewish influence on the Court's legal perspective. The Court's solution has been disparaged as being too state-friendly. The *Gasperini* Court had the intention of inhibiting inequity between state and federal damage awards but all it really did was confuse *Erie* thought. The Court circumvented federal policy and procedure by catering to *Erie*'s bias toward state law. While ingenious arguments have been made for why the *Gasperini* Court felt compelled to accommodate, a deeper problem still remains: accommodation was constructed with a structural gap that barred adaption to future cases.

V. CIRCLES IN CIRCLES, SQUARES IN SQUARES

In closing, the accommodation doctrine has perpetuated confusion and left lower federal courts struggling with its application. The premises upon which accommodation was founded were logically flawed because the *Gasperini* Court chaotically applied the precedent of *Erie*'s progeny to achieve a harmony between state law (the square) and federal law (the circle), unique to that particular case. The muddled rationale underlying accommodation has extended beyond Justice Ginsburg's majority opinion to all federal courts sitting in diversity. Accommodation has lurked in the shadows of *Erie* jurisprudence and on the few occasions when it has been invoked, it has proven futile. The accommodation doctrine was properly labeled a riddle because of the ingenuity required to discover its meaning and purpose. However, comfort can now be taken in recognizing that

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275. Rowe, *supra* note 78, at 965-66. "The Gasperini majority is not a shining model, but neither does it strike me as a severe muddle." *Id.* at 966.
277. *Id.* at 220. "The reasons why Justice Ginsburg constructs a blended and complicated federalism structure that includes state law and accords state policy so much importance, even while distorting that state policy, reach back to philosophical bases of the *Erie* doctrine and the federalist thinking of Justice Louis Brandeis and Justice Frankfurter." *Id.*
278. Rowe, *supra* note 78, at 964-65. Justice Ginsburg's logic in *Gasperini* was imbued with a bias towards state law which had been the trend in Supreme Court decisions since *Erie*. Gordon, *supra* note 238, at 214.
280. *Id.*
281. See Gordon, *supra* note 238, at 221.
283. 304 U.S. 64, 72-73 (1938).
284. See *supra* Part IV.
285. See *supra* Part III.
the solution is to nullify the riddle itself. A formal renunciation and eradication of the accommodation test will increase the efficiency of the federal court system by bringing clarity to *Erie* analysis. Consequently, conflicts of law over entry of judgment rules, statutes awarding attorney’s fees, and declaratory judgment rules will be subject to traditional *Erie* scrutiny.

In a future United States Supreme Court term there may come the rare occasion, which has typically surfaced every few decades, to grant certiorari on an *Erie* issue. In that next *Erie* dilemma, the

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287. See Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., 129 S. Ct. 2160 (May 4, 2009). Recently, the Supreme Court of the United States granted certiorari to decide the issue of whether a New York state statute limiting the availability of class actions for particular claims contains substantive law and thereby restricts a federal court’s power to certify a class action under Federal Rule 23 in a diversity action. *Id.*; The Oyez Project, Shady Grove Orthopedics Associates v. Allstate Insurance Co., available at http://www.oyez.org/2000–2009/2009/2009_08_1008 (last visited Nov. 5, 2009). Ironically, the case originated in the United States District Court for the Eastern District Court of New York from which an appeal was taken to the Second Circuit Court of Appeals—a strikingly similar procedural posture as *Gasperini*. Shady Grove Orthopedics Assoc. v. Allstate Ins. Co., 549 F.3d 137 (2d Cir. 2008), cert. granted, 129 S. Ct. 2160 (2009). It is both telling and a reason for concern that the Second Circuit cited to *Gasperini* in expounding its discussion of the *Erie* doctrine as it is the most recent pronouncement of the doctrine.

In *Shady Grove*, the plaintiff filed a putative class action against Allstate Insurance Company seeking statutory penalties under a New York law for overdue payments owing from a no-fault automobile insurance claim. See Brief for the Petitioner-Appellant at *6, Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., 2009 WL 2040421 (July 10, 2009) (No. 08-1008). The complaint invoked diversity jurisdiction under 28 U.S.C. § 1332(d)(2). *Id.* at *7 (providing diversity jurisdiction for class actions). The New York statutory scheme “require[s] that automobile insurers provide first-party coverage to their insureds for losses and injuries arising out of their use of insured vehicles, including medical expenses. . . . [An insurer must pay such first-party benefits within 30 days of the submission . . . and that overdue payments bear interest . . . .” *Id.* at 5. The complaint alleged that Allstate Insurance Company had a practice of routinely failing to pay first-party claims within the statutorily prescribed period. *Id.* at 6. As such, the claim was not only on behalf of the plaintiff but also on behalf of a proposed class of persons insured by Allstate who had similarly been denied the mandatory interest payments. *Id.*

The Eastern District Court of New York granted Allstate’s motion to dismiss the complaint on two grounds. See *id.* at *7. First, the plaintiff lacked standing as she was no longer a real party in interest after having assigned her rights to Shady Grove. *Id.* Second, New York Statute, Civil Practice and Law Rules § 901(b) required the action to be dismissed in its entirety because it limited the availability of class actions to collect statutory interest penalties. *Id.* Ultimately, the district court held that the New York statute was substantive in nature and *Erie* governed. *Id.* (applying state statute to dismiss plaintiff’s complaint). The Second Circuit Court of Appeals affirmed. See *Shady Grove*, 549 F.3d at 146.

On appeal, Shady Grove, on behalf of the class, argued that this diversity case was controlled by *Hanna*, not *Erie*. See Brief for the Petitioner-Appellant at *10–11, Shady Grove Orthopedic Assoc., 2009 WL 2040421 (2009). Shady Grove contends that Federal Rule of Civil Procedure 23 provides federal courts with the power to certify a class action in a diversity action regardless of a contrary state law. *Id.* Also, Shady Grove argues that, as a matter of policy and federalism, the basic principle that federal au-
Court must be conscious of the moment and seize the opportunity to progress *Erie's* progeny in a direction that has been desperately needed since before *Gasperini*. The Supreme Court ought to adopt the following perspective when treating *Gasperini*: “But if such significant alterations in the Court’s *Erie* jurisprudence are to be made, the Court should address those questions explicitly, with full awareness of what is at stake.” The Supreme Court can take a cue from this Article’s implicit geometry lesson that squaring a circle is impossible.

The stakes were too high and the jurisprudence awfully muddled to attempt fitting the square into the circle. The *Shady Grove* majority recognized as much: “We do not wade into *Erie’s murky waters* unless the federal rule is inapplicable or invalid.” *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010) (Scalia, J., majority) (emphasis added). The entire opinion referred to *Gasperini* a total of thirty times, the greater majority of which arose from Justice Ginsburg’s dissenting opinion. *Shady Grove*, 130 S. Ct. at 1437. The irony of the *Shady Grove* opinion is the manner in which the tables were turned with Justice Scalia delivering the opinion of the Court rather than dissenting—as was the case in *Gasperini*—and Justice Ginsburg defending the underpinnings of the fading *Gasperini*-approach in her dissent. In her *Shady Grove* dissent, Justice Ginsburg continued to champion sensitivity for state interests, which created the esoteric accommodation doctrine in the first place.

While a straight-forward and lucid pronouncement of *Gasperini’s* flailing vitality would have been ideal, the fact that accommodation did not resurface in the Court’s decision-making process is a remedial step forward. As an acclaimed writer once stated, “At every cross-way on the road that leads to the future, it has placed, against each of us, ten thousand men to guard the past . . . .” *Maurice Maeterlinck, The Measure of the Hours: Our Social Duty* VI (Alexander Teixeira De Mattos trans., Dodd, Mead & Co. 1907) (1904).

288. Floyd, *supra* note 8, at 304 (referencing the need for an unambiguous clarification of *Byrd* in light of the Court’s oversight in *Gasperini*).