A Federal Alternative to Erie Analysis of State Law Changes During Diversity Appeals

Michael J. Lonergan

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

Recommended Citation
Available at: https://ir.lawnet.fordham.edu/flr/vol50/iss6/4
NOTES

A FEDERAL ALTERNATIVE TO ERIE ANALYSIS OF STATE LAW CHANGES DURING DIVERSITY APPEALS

Introduction

When the law on which a trial court's judgment is based changes during the appeal of the case, the appellate court must decide whether to give retroactive or prospective effect to the change in law.¹ Retro-

¹ Making a distinction between two discrete contexts aids an understanding of the confusing vocabulary of retroactivity. In one, a court must determine the effect to be given a change in law that originates in another forum. This situation existed in United States v. Schooner Peggy, 5 U.S. 64, 67, 1 Cranch 103, 107 (1801) (treaty ratification), and presents itself to a federal appellate court in a diversity case whenever state law changes. See, e.g., Hegger v. Green, 646 F.2d 22, 26 (2d Cir. 1981). In this context, the terms “retroactive” and “prospective,” as applied to a change in law, mean simply that either the change in law applies to the facts of the case or it does not. In the second situation, a court of last resort must determine the effect to be given a change in law that it has made, Chevron Oil Co. v. Huson, 404 U.S. 97, 99 (1971), or is making, Cipriano v. City of Houma, 395 U.S. 701, 706 (1969), or that has been made by the Supreme Court on a constitutional issue. Gager v. White, 53 N.Y.2d 475, 482, 425 N.E.2d 851, 853, 442 N.Y.S.2d 463, 465 (1981). Here a court's concern for the precedent it is setting creates the need for a vocabulary that delimits precisely the class of cases to be covered by the change in law. There are four classes of cases possibly subject to a change in law: future cases—that is, cases arising after the change-in-law decision: the case in which the change occurs; cases pending at the time the change occurs: and cases that have reached final judgment. Thus, a change in law that is given “complete” or “absolute” retroactive effect would cover all classes of cases, thereby enabling litigants to attack collaterally the final judgments rendered in their cases. See Gideon v. Wainwright, 372 U.S. 335, 337-39 (1963); cf. Linkletter v. Walker, 381 U.S. 618, 628 & n.13 (1965) (briefly discussing cases, including Gideon, in which a change in law has been given “absolute” retroactivity); People v. Pepper, 53 N.Y.2d 213, 222, 423 N.E.2d 366, 370, 440 N.Y.S.2d 889, 893 (considering “complete” retroactivity but not applying it), cert. denied, 102 S. Ct. 510 (1981). A change in law given “retroactive” or “retrospective” effect would cover all cases except those which had reached final judgment. See Desist v. United States, 394 U.S. 244, 252 (1969). While a technical distinction has at times been drawn between the terms “retroactive” and “retrospective,” e.g., Note, Lien Avoidance Under Section 522(f) of the Bankruptcy Code: Is Retrospective Application Constitutional?, 49 Fordham L. Rev. 615, 620 n.29 (1981) [hereinafter cited as Lien Avoidance]; 12 Ottawa L. Rev. 502, 505 (1980), it is generally not observed, and the two terms are used interchangeably. E.g., Fox v. Parker, 626 F.2d 351, 352, 353 (4th Cir. 1980); Lien Avoidance, supra, at 620 n.29. A change in law given “nonretroactive” or “prospective” effect covers the case before the court and future cases. See Desist v. United States, 394 U.S. 244, 254 (1969); Stovall v. Denno, 388 U.S. 293, 300-01 (1967). Two reasons have been advanced for giving this kind of effect to a change in law. One is to avoid the accusation that the change in law would otherwise be an empty statement of a court's future intent, or mere dictum. Molitor v. Kane-land Community Unit Dist. No. 302, 18 Ill. 2d 11, 28, 163 N.E.2d 69, 97 (1959), cert. denied, 362 U.S. 968 (1960). The other is to reward a party for mounting a successful challenge to the old precedent, see id., and to encourage such challenges in the future. See Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390
activity advances important public policies by providing for their immediate implementation; prospectivity preserves the rights and expectations of parties who may have relied on the old precedent. Because these objectives are equally compelling, non-deliberative rules that implement one to the exclusion of the other are inappropriate. A deliberative assessment of the propriety of retroactivity or prospectivity has thus become the guiding principle of federal retroactivity analyses.


2. See McDonald v. Watt, 653 F.2d 1035, 1044 (5th Cir. 1981) ("ill effect of prospectivity is the partial frustration of the statutory purpose" that inspired the new rule). Other virtues of retroactivity that have been advanced are its curbing of "judicial legislating," Marino v. Bowers, 657 F.2d 1363, 1372 (3d Cir. 1981) (en banc) (Weis, J., dissenting), and its consonance with the principle, dependent upon a sense of continuity, that government is one of laws and not of men. People v. Pepper, 53 N.Y.2d 213, 220, 423 N.E.2d 366, 368, 440 N.Y.S.2d 889, 891, cert. denied, 102 S. Ct. 510 (1981).

3. E.g., Chevron Oil Co. v. Huson, 404 U.S. 97, 107-08 (1971); United States v. Estate of Donnelly, 397 U.S. 286, 295 (1970) (Harlan, J., concurring); Fitzgerald v. Meissner & Hicks, Inc., 38 Wis. 2d 571, 576-77, 157 N.W.2d 595, 597 (1968). The role of precedent as a guide to conduct can, of course, be overstated. See Smith, Retroactive Laws and Vested Rights, 6 Tex. L. Rev. 409, 419-20 (1928). But see 2 C. Sands, Sutherland's Statutes and Statutory Construction § 41.02, at 247 (4th ed. 1973) (referring to "general consensus among all people" that there should be "warning of the rules that are to be applied to determine their affairs") [hereinafter cited as Sutherland].

Currently, however, federal appellate courts in diversity cases consistently apply the non-deliberative rule of retroactivity of Vandenbark v. Owens-Illinois Glass Co.\(^5\) The Vandenbark rule prescribes that a federal appellate court apply retroactively any change in state law that occurs after the entry of judgment in the district court.\(^6\) In Vandenbark, the principle of deliberativeness squared off with the principle contained in the landmark case of Erie Railroad v. Tompkins\(^7\)—that of uniformity of state and federal adjudications of state created rights.\(^8\) The latter principle prevailed because, according to the Court, "[a]ny . . . conclusion [other than retroactive application of the state law change] would but perpetuate the confusion and injustices arising from inconsistent federal and state interpretations of state law."\(^9\) The Vandenbark rule has been criticized because, in giving retroactive effect to a change in state law to which a state might only give prospective effect, it risks the inconsistency it earnestly sought to prevent.\(^10\) To avert this potential inconsistency, Vandenbark's critics have recommended that a court extend its Erie analysis to the change in state law—that is, determine how a state would apply the change in its law, and rule accordingly.\(^11\)

This Note argues that the courts' and critics' preoccupation with Erie's principle of uniformity draws critical attention away from Vandenbark's true inconsistency—it's failure to implement traditionally deliberative modes of retroactivity analysis. Erie is concerned with the precedent set when a federal court applies its own rule of decision in a diversity case. Precedent connotes continuity and indefi-
nite duration. A federal appellate court’s treatment of a particular change in state law can never rise to the level of precedent because its legal life span is measured by the finite time litigants subject to it remain in the appellate process. Therefore, a change in state law during a diversity appeal need not be uniformly treated in federal and state courts. This suspension of the Erie principle opens up alternative methods by which the federal appellate court can determine the effect that it should give a change in state law. A court may recommission an Erie analysis for the purpose of injecting deliberation into the determination. Alternatively, should Erie analysis be perceived as too burdensome to apply when it is not necessary, a federal court may retool its own “manifest injustice” analysis.


I. The Vandenbark Rule—Abandoning Deliberation in Retroactivity Analysis

The plaintiff in Vandenbark v. Owens-Illinois Glass Co., a diversity case, sought recovery for occupational diseases she allegedly contracted while employed in defendant's glass factory. At the time, Ohio provided neither statutory coverage of, nor a common-law cause of action for, the occupational diseases at issue. Accordingly, the district court dismissed the complaint. During the appeal, an amendment of the Ohio worker's compensation statute and an Ohio Supreme Court decision each effectively gave the plaintiff the cause of action she had failed to state in the district court. The Sixth Circuit refused to apply the intervening changes in Ohio's laws.

F.2d 1300, 1306 (2d Cir. 1974), aff'd, 425 U.S. 820 (1976). If a change in law occurs during the district court proceedings, but is not raised until appeal, any benefits from the change in law may be deemed to have been waived. Grace Towers Tenants Ass'n v. Grace Hous. Dev. Fund Co., 538 F.2d 491, 495 (2d Cir. 1976). Contra Coe v. Secretary of HEO, 502 F.2d 1337, 1339 (4th Cir. 1974).

14. 311 U.S. 538 (1941).
15. Id. at 539. The plaintiff in Vandenbark was initially in limbo. It was Ohio's settled law that an employer's compliance with the terms of the worker's compensation statute withdrew from his employees the common-law right to recover for occupational diseases. The statute, however, enumerated only certain occupational diseases and did not cover those contracted by plaintiff. Vandenbark v. Owens-Illinois Glass Co., 110 F.2d 310, 312 (6th Cir. 1940), rev'd, 311 U.S. 538 (1941).
20. 110 F.2d at 314. The court noted that changes in statutes are presumed to be prospective in their effect unless there is contrary legislative intent, which was not discernible in the Ohio amendment. Id. at 313-14. It further implied that the statutory change in question, by altering substantive rights rather than mere procedural or remedial rights, required prospective effect. Id. at 314. Focusing on the judicial change of law, the court also expressed concern that it would upset "rights ... accrued under a particular state of . . . decisions." Id. at 312; see Corbin, The Laws of the Several States, 50 Yale L.J. 762, 769 (1941) ("And were not Vandenbark's rights and the Glass Company's duties determined by the law as . . . made [prior to the overruling decision]?"). Finally, the court said that the Rules of Decision Act did not require it, an appellate court, to follow the changes in Ohio's laws. 110 F.2d at 312-13. At the time, the text of the Rules of Decision Act supported the court's position. Judiciary (Rules of Decision) Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (current version at 28 U.S.C. § 1652 (1976)). The Act provided: "The laws of the several states, except where the constitution, treaties, or statutes of the United States..."
The Supreme Court reversed.\textsuperscript{21} It recognized that the cases decided during the reign of \textit{Swift v. Tyson},\textsuperscript{22} in which it had ignored intervening changes in states' laws, might not be acceptable precedent\textsuperscript{23} under the new regime of \textit{Erie Railroad v. Tompkins}.\textsuperscript{24} The Court did not devise a new, \textit{Erie}-based rule to handle intervening state law changes. Rather, the Court adopted the "true rule" regarding retroactivity\textsuperscript{25} enunciated in the first "opinion of the Court," \textit{United States v. Schooner Peggy}.\textsuperscript{27} In \textit{Schooner Peggy}, a treaty with France was ratified after the circuit court's decision and before that of the Court.\textsuperscript{28} In giving retroactive effect to the treaty, thereby reversing the circuit court's decree, the Court sternly pronounced the \textit{Schooner Peggy} principle: "[I]f, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."\textsuperscript{29} Chief Justice Marshall also recognized, however, that in cases not involving "great national concerns,"\textsuperscript{30} there is a
compelling need to preserve through prospectivity the rights and expectations of parties who conducted their affairs in reliance on previously established, but now changed, precedent. Thus, he significantly insulated the harsh principle of retroactivity with a caveat: "[I]n mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties . . . ."

The Court in Vandenbark, however, adopted only the Schooner Peggy principle to obey the law or deny its obligation, disposing of the Schooner Peggy caveat to struggle against retroactivity: "It is true this Court . . . expressed a caution against retrospective operation between private parties but the [Schooner Peggy] principle quoted has found acceptance in a variety of situations." Here the Court's disingenuousness was remarkable. The principal cases it claimed supported the Schooner Peggy principle were cases involving state statutes or local laws. These cases' support for the Schooner Peggy of each nation . . . ." Id. at 68, 1 Cranch at 109. See generally Baker v. Carr, 369 U.S. 186, 211-12 (1962) (discussing foreign relations and the unique demand for a "single-voiced statement of the Government's views"). In Schooner Peggy, the Chief Justice also recognized the primacy of the legislative branch's role in the matter: "[I]f the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation." 5 U.S. at 69, 1 Cranch at 110. See generally Carrington, Political Questions: The Judicial Check on the Executive, 42 Va. L. Rev. 175, 197-200 (1956) (discussion of the executive's treaty power and the Senate's role in checking it). Thus, Schooner Peggy, along with its contemporary, Marbury v. Madison, 5 U.S. 87, 1 Cranch 137 (1803), foreshadowed the emergence of the "political question" doctrine. Carrington, supra, at 176 n.3.


32. 5 U.S. at 69, 1 Cranch at 110.

33. 311 U.S. at 541 (quoting United States v. Schooner Peggy, 5 U.S. 64, 68, 1 Cranch 103, 110 (1801)).

34. Id. at 542.

35. See Corbin, supra note 20, at 775 n.16. In this part of its opinion the Vandenbark Court cited five principal cases which it claimed supported the Schooner Peggy principle. 311 U.S. at 542 & nn.12-15. Three of the five cases dealt with intervening state court decisions construing statutes of limitation. Bauserman v. Blunt, 147 U.S. 647, 658-59 (1893); Moores v. National Bank, 104 U.S. 625, 629
principle would thus be more accurately described as a fortuitous by-product of adherence to the *Swift v. Tyson*\(^{36}\) principle of deference to states' written or local laws.\(^{37}\) By excising the *Schooner Peggy* caveat, the *Vandenbark* Court disposed of the deliberative dimension to its retroactivity analysis. Without insulation, the *Schooner Peggy* principle became a universal, inflexible rule of retroactivity.

**II. The *Erie* Principle of Uniformity—Its Inapplicability to Changes in State Law During Diversity Appeals**

The *Vandenbark* Court sacrificed the *Schooner Peggy* caveat to struggle against retroactivity because it perceived a sterner mandate in *Erie*'s principle of uniformity.\(^{38}\) This sacrifice of deliberativeness in the name of *Erie* has been reenacted in the many cases following the *Vandenbark* rule of automatic retroactivity.\(^{39}\) Changes in states'

---

\(^{36}\) 41 U.S. 1, 16 Pet. 1 (1842), overruled, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). *Swift* required the federal courts to conform their decisions only to state court constructions of "positive statutes," and other inherently local matters, such as rights and titles to real property. *Id.* at 12-13, 16 Pet. at 18-19. As for matters of "general commercial law," the federal courts were as competent, both in the judicial and non-judicial sense, to determine what the law was or should be. *Id.*

\(^{37}\) But see Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 915 (1962) (Court's observation of support in cited cases for *Schooner Peggy* principle deemed correct) [hereinafter cited as *Prospective Overruling*].


\(^{39}\) But see *Universal Underwriters Ins. Co. v. Wagner*, 367 F.2d 866, 875 (8th Cir. 1966) (*Vandenbark* yields to the *Schooner Peggy* caveat regarding private party status of litigants).
laws introducing new causes of action,\textsuperscript{40} displacing old causes of action,\textsuperscript{41} abrogating tort defenses\textsuperscript{42} or standards of care,\textsuperscript{43} and modifying jury instructions\textsuperscript{44} have been given retroactive effect. Circuit courts and Professor Moore have argued that the \textit{Erie} policy of uniformity, however, requires a federal appellate court in diversity cases to determine whether the state would apply the change in law retroactively or prospectively and to rule accordingly.\textsuperscript{45} Preoccupation with \textit{Erie} has distracted attention from the necessary appraisal of whether this policy of uniformity is in fact relevant to changes in state law occurring during diversity appeals.\textsuperscript{46}

\textbf{A. The \textit{Erie} Principle of Uniformity}

In \textit{Erie}, Justice Brandeis succinctly stated the principle of uniformity of state and federal adjudications of state-created rights: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any [diversity] case is the law of the State."\textsuperscript{47} Commentators have debated whether this uniformity is constitutionally compelled.\textsuperscript{48} Certain Justices have cited \textit{Erie} as a constitutionally compelled decision.\textsuperscript{49} Yet they have avoided pinning

\begin{itemize}
\item \textsuperscript{40} Passwaters \textit{v.} General Motors Corp., 454 F.2d 1270, 1276-77 (8th Cir. 1972) (strict liability).
\item \textsuperscript{41} Robinson \textit{v.} Shapiro, 646 F.2d 734, 744 (2d Cir. 1981) (loss of consortium in wrongful death actions); Hegger \textit{v.} Green, 646 F.2d 22, 26 (2d Cir. 1981) (same).
\item \textsuperscript{42} Downs \textit{v.} J.M. Huber Corp., 580 F.2d 794, 795 (5th Cir. 1978) ("no duty" rule in tort actions against land owners); Nelson \textit{v.} Brunswick Corp., 503 F.2d 376, 381 (9th Cir. 1974) (assumption of risk doctrine).
\item \textsuperscript{43} Samuels \textit{v.} Doctors Hosp., Inc., 586 F.2d 485, 488-89 (5th Cir. 1979) ("locality rule" in medical malpractice suits).
\item \textsuperscript{44} Baker \textit{v.} Outboard Marine Corp., 595 F.2d 176, 181-82 (3d Cir. 1979) (in products liability case, charge to jury that liability depends on product's being "unreasonably dangerous" is improper).
\item \textsuperscript{45} See Downs \textit{v.} J.M. Huber Corp., 580 F.2d 794, 796 & n.5 (5th Cir. 1978); Nelson \textit{v.} Brunswick Corp., 503 F.2d 376, 381 n.12 (9th Cir. 1974); [1A pt. 2] J. Moore, \textit{supra} note 10, ¶ 0.307[3], at 3105; cf. Universal Underwriters Ins. Co. \textit{v.} Wagner, 367 F.2d 866, 875 (8th Cir. 1966) (applying \textit{Erie} without attempting to rebut \textit{Vandenbark}).
\item \textsuperscript{46} One commentator criticized \textit{Vandenbark} as a "shocking illustration of the extent to which the Court has carried the rule of the \textit{Erie} case." Broh-Kahn, \textit{Uniformity Run Riot—Extensions of the \textit{Erie} Case}, 31 Ky. L.J. 99, 107 (1943). Broh-Kahn, the attorney for the respondent in \textit{Vandenbark}, makes a compelling equal protection argument in his article. Unlike state court litigants who can argue the validity of the overruling decision before the court that delivered it, federal diversity litigants, under the \textit{Vandenbark} rule, have no such opportunity, and are subject to the change in state law without recourse. \textit{Id.} at 108-09.
\item \textsuperscript{47} \textit{Erie} R.R. \textit{v.} Tompkins, 304 U.S. 64, 78 (1938).
Erie to a specific provision of the Constitution, such as the tenth amendment. 50 This avoidance indicates that the Court considers the Erie principle of uniformity as executing the policies of federalism generally reflected in the Constitution's allocation of law-creating functions between state and federal authority. 51 This avoidance has also necessitated designing and deploying tests to achieve the desired uniformity.

B. The Appropriate Test of Erie Uniformity

Three tests of Erie's uniformity principle have evolved since the case was decided: the "outcome determinative" test, formulated in 1945 in Guaranty Trust Co. v. York; 52 the "balancing" test, formulated thirteen years later in Byrd v. Blue Ridge Rural Electric Cooperative, Inc.; 53 and in 1965, the "modified outcome determinative test" of Hanna v. Plumer, 54 the last such test designed by the Court. 55 It is

50. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Justice Brandeis referred to the "unconstitutionality of the course pursued" under the doctrine of Swift v. Tyson. Erie R.R. v. Tompkins, 304 U.S. 64, 77-78 (1938). Later in the opinion, Justice Brandeis attempted to clarify his earlier statement, only to introduce the possible tenth amendment presence in the Court's holding: "In disapproving that doctrine [of Swift] we do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 . . . . We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which . . . are reserved by the Constitution to the several States." Id. at 79-80. Two commentators have considered whether Erie is based on the fifth amendment. Leathers, Erie and Its Progeny As Choice of Law Cases, 11 Hous. L. Rev. 791, 795-96 (1974) (identifying fifth amendment's equal protection component in Erie); McCoid, Hanna v. Plumer: The Erie Doctrine Changes Shape, 51 Va. L. Rev. 884, 889-90 (1965) (rejecting due process presence in Erie).


52. 326 U.S. 99 (1945). In Guaranty, the Court faced a choice between applying the state statute of limitations, which most likely would bar the action, and the equitable doctrine of laches, which might not. Id. at 101; C. Wright, supra note 48, § 55, at 256. Under this test, a state rule had to be applied instead of a competing federal rule if it would lead to a substantially different outcome in the case.

53. 356 U.S. 525 (1958). The plaintiff in Byrd was injured in his work as a lineman for a construction contractor hired by defendant to lay and connect power lines. Id. at 526-27. One of the defendant's affirmative defenses was that, under the applicable worker's compensation statute, plaintiff was effectively its statutory employee whose exclusive remedy was under the statute. Id. at 527. A relevant state court decision, Adams v. Davison-Paxson Co., 230 S.C. 532, 96 S.E.2d 566 (1957), had indicated that the issue of a worker's status as a statutory employee was to be determined as a matter of law by the trial court judge, not the jury. Id. at 543, 96 S.E.2d at 571. Adams was handed down pending Byrd's appeal to the Court, 356 U.S. at 534 n.6, but there was no discussion of the constraint imposed by Vandenberg to follow intervening state court decisions.

54. 380 U.S. 460 (1965). In Hanna, a personal injury action, plaintiff had served the executor of defendant's estate by leaving a copy of the summons and complaint
generally agreed that the York test overemphasized uniformity of outcome and did not survive the qualifications given it in Byrd and Hanna. The Court in Hanna said "[t]he 'outcome determination' test has been read without reference to the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." This qualification of the York test signifies that strict uniformity of outcome is not an end in itself, but the means to achieve important policies.

It is not entirely clear, however, whether the Byrd test, a complex balancing of the state and federal interests implicated in the choice-of-law decision, has survived Hanna. Several commentators in the wake of Byrd doubted the breadth of its precedent, reasoning that the Court's protection of the right to trial by jury in that case was compelled by the seventh amendment, despite the Court's "delicate reference to the Constitution." In a case decided shortly after

with the executor's wife at his personal residence. Id. at 461. This service was proper according to Federal Rule of Civil Procedure 4(d)(1), but improper according to the Massachusetts rule, still in effect, which dictated personal service upon an executor or administrator. Mass. Ann. Laws ch. 197, § 9 (Michie/Law. Co-op. 1981).

55. A fourth test of Erie's principle of uniformity was devised by Justice Harlan in his concurring opinion in Hanna. Under this test, a federal rule would be applicable only if the alternative state rule was not one that governed individuals' planning of primary private conduct. 380 U.S. at 474-75 (Harlan, J., concurring); see Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 505 (1954).


57. 356 U.S. at 537-38; see Monarch Ins. Co. v. Spach, 281 F.2d 401, 406 (5th Cir. 1960) ("Whatever else [Byrd] is thought to do, it certainly amplifies ... that all does not necessarily fall in the path of uniformity of result." (footnote omitted)).


59. 380 U.S. at 468 (footnote omitted). Forum shopping was not intrinsically mischievous; it only became so when the forum shopper maneuvered the litigation into the federal court and achieved the favorable result he knew he could not have achieved in the state's courts. See Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 710 (1974); McCoid, supra note 50, at 869.


62. U.S. Const. amend. VII ("In Suits at common law ... the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.").

Byrd, the Court confirmed the suspicions of these early Byrd commenters by stating that the decision was based on the seventh amendment. Byrd is rarely cited for any proposition other than that a state rule must yield to the federal court's interest in protecting the individual's right to trial by jury.

The Byrd test has never been refined by the Court. Its fate is perhaps best determined by comparing it to the Hanna test. Both tests strive to maintain an equilibrium between the federal interest in having federal law applied and a state interest in having its law applied. The Byrd test, however, is far more complicated. Carried to its logical conclusion, it involves a balancing of the answers to three inquiries: whether the state rule is "bound up" in the rights and obligations underlying the controversy; whether the result of applying the federal rule would substantially differ from the result of applying the state rule; whether the federal rule evinces some federal interest.

This third inquiry encompasses a range of intensity of federal interests that depends on the answers to the first two inquiries. Negative answers to the first two inquiries all but eliminate the need to identify a federal interest. The federal interest in applying a convenient or economical rule would suffice. Affirmative answers to the first two inquiries necessitate that an especially intense federal interest be found in the third inquiry in order for a federal rule to be applied. If the answers to the first two inquiries are mixed—for

65. Id. at 360.
67. M. Redish, supra note 58, at 175 & n.48.
69. 356 U.S. at 535-40. For a discussion of other renditions of the "Byrd test," see M. Redish, supra note 58, at 177-77.
70. See M. Redish, supra note 58, at 195-96. Professor Redish identifies a federal "cost avoidance" interest that can, "[c]onsonant with the policies underlying Erie and the Rules of Decision Act," justify a departure from a state rule containing a significant state interest. Id. at 195.
71. Cf. 356 U.S. at 537 (Court identifying "affirmative countervailing" federal interest in distribution of "trial functions between judge and jury"). In Byrd, the Court answered negatively the first inquiry of its test. Id. at 536. Thus, it is not certain whether the "affirmative countervailing" interest it isolated would still tip the balance in favor of applying the federal rule had the first inquiry of the test been answered positively—that is, had the Court determined that the state rule was "bound up" in the underlying rights and obligations of the parties. See generally M.
example, the state rule is not "bound up" but a substantially different result is probable if it is not applied—then the intensity of the federal interest in applying its own rule is reduced to some undefined, intermediate range.\(^7\)

The \textit{Hanna} test is a simpler analytical construct\(^7\)\(^3\) keyed to the "twin aims" of \textit{Erie}: the "discouragement of forum-shopping and avoidance of inequitable administration of the laws."\(^7\)\(^4\) Using this construct, a court determines not just whether one of the litigants was a forum shopper, but also whether its choice of federal law will set a precedent that promotes forum shopping in future cases presenting the same issue of law, thereby facilitating the inequitable administration of the laws.\(^7\)\(^5\) In addition to being simpler to apply, the \textit{Hanna} test also achieves the aims of the \textit{Byrd} test. A \textit{Hanna} test would not allow a policy-laden state rule, "bound up" in the underlying rights and obligations of the parties, to be superseded by a competing federal rule. A federal alternative to this kind of state rule would be perceived by a court using the \textit{Hanna} test as more likely to promote forum shopping than a federal alternative to a state rule not entangled in underlying rights and obligations. Nor would the \textit{Hanna} test allow the application of a federal rule if the substantially different results it might produce would prompt prospective litigants to choose the federal forum over the state forum.\(^7\)\(^6\) The \textit{Hanna} analysis, therefore, would allow the application of a federal rule only if it would not lead to forum shopping or the correlative inequitable administration of law, or in \textit{Byrd} terms, only if the answers to the first two \textit{Byrd} inquiries were negative, or in some circumstances, mixed.\(^7\)\(^7\) Thus, the

---

72. See supra note 71. Partly because the Court has never refined the complex \textit{Byrd} balancing test, lower federal courts have fashioned their own Rules of Decision Act tests by cannibalizing parts of the \textit{Byrd} and \textit{Hanna} tests. See M. Redish, supra note 58, at 178-80. The \textit{Byrd} test is vulnerable to criticism not only on the grounds of its complexity, but also on the grounds of its subjectivity. See C. Wright, supra note 48, at 275.

73. M. Redish, supra note 58, at 172, 187, 189.


75. Id. at 468-69 & nn.9 & 11. The language concluding footnote 9 in the \textit{Hanna} opinion demonstrates that the Court looks beyond the litigants before it, and questions how its choice of federal law would affect prospective plaintiffs: "[The question under \textit{Erie} is] whether application of the [state] rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court." One commentator has suggested that the Court effectively disposed of the \textit{Byrd} balancing test in footnote 9. M. Redish, supra note 58, at 178.

76. See supra notes 74-75 and accompanying text.

77. See supra notes 69-72 and accompanying text.
advantage of the *Hanna* analysis is that it does not necessitate the cumbersome identification and weighing of state and federal interests that *Byrd* requires. *Hanna's* comparative simplicity partially explains why the Court has given so little currency to the *Byrd* test.\(^7\)

A final indication that *Hanna* has supplanted the *Byrd* test came in 1980 when the Court reaffirmed the *Hanna* test in *Walker v. Armco Steel Corp.*\(^7\)\(^9\) Because *Walker* was indistinguishable\(^8\)\(^0\) from *Ragan v. Merchants Transfer & Warehouse Co.*,\(^8\)\(^1\) the Court simply decided it on the basis of stare decisis. The Court confirmed its holding, however, by examining the result the *Hanna* test would have produced if applied.\(^8\)\(^2\) Apparently, the Court was unimpressed with criticism\(^8\)\(^3\) of its preoccupation with *Hanna's* "twin aims" test. Thus, the Court's treatment of *Byrd* and *Hanna*, and the fact that the *Hanna* test amply and more easily satisfies the concerns of the *Byrd* test, suggest that the *Byrd* test has not survived *Hanna*,\(^8\)\(^4\) at least in cases not presenting *Byrd's* narrow issue of the federal interest in submitting disputed issues of fact to a jury.\(^8\)\(^5\)

### C. Inapplicability of the *Erie* Uniformity Principle to State Law Changes

When a federal appellate court in diversity cases uses a retroactivity analysis different from that used by a state, it risks treating the change in state law differently from the way the state would treat it. Whether inconsistent treatment of changes in state law is tolerable under *Erie* must be judged from two perspectives: that of the litigant who gains by the inconsistent treatment of the change in law, and that of the potential litigant observing this gain.

It is unlikely that a litigant could make a conscious decision to take advantage of an appellate retroactivity analysis. Such a decision would have to have been made at the commencement of the suit and been based on the calculation that the law would change during the pendency of a potential appeal in the case. The forum shopper *Erie* sought to discourage, however, was not a seer. Instead, he relied on

---

\(^7\) See supra note 72 and accompanying text.


\(^8\)\(^0\) 446 U.S. at 748.

\(^8\)\(^1\) 337 U.S. 530 (1949).

\(^8\)\(^2\) 446 U.S. at 753.


\(^8\)\(^4\) M. Redish, *supra* note 58, at 175 n.48; Ely, *supra* note 59, at 717 n.130.


the law as it existed at the commencement of the suit and maneuvered
the litigation into the federal forum because it was likely to use its own
judgment in resolving the issues in controversy. 86

Erie's concern for the inequitable administration of the law is not
implicated in appellate retroactivity analyses. Inequitable administra-
tion of the law connotes a continuity or pattern of different results
that makes the federal courts more attractive to the forum shopper. 87
Consistent use of different retroactivity analyses would induce forum
shopping only if the different results reached were attributable to the
different analyses being used. The results of a deliberative retroactiv-
ity analysis, however, are heavily dependent upon the nature of the
change and the identity of the parties: therefore, no reliable pattern
emerges to guide the forum shopper. 88 Nor does a retroactivity analy-
sis offer any greater promise of an advantage to the potential litigant
than to one already in the judicial process: The potential litigant is
subject to the law as changed. 89

III. DELIBERATIVE OPTIONS TO THE VANDENBARK RULE

Because appellate retroactivity analyses, including the Vandenbark
rule, do not risk the kind of inconsistent adjudications that worry
Erie, 90 Erie analysis need not be applied. This is not to say that Erie

86. See Ely, supra note 59, at 717 & n.130; McCoid, supra note 50, at 889.
Owens-Illinois Glass Co., 311 U.S. 538, 543 (1941); Erie R.R. v. Tompkins, 304 U.S.
64, 74-78 (1938); 2 W. Crosskey, Politics and the Constitution in the History of the
United States 903 (1953); Hart, supra note 55, at 505.
88. In contrast, state rules on some issues are consistently applied by federal
courts to discourage forum shopping. One example is state rules that require the
arbitration of medical malpractice claims before judicial action can be taken on
them. E.g., Woods v. Holy Cross Hosp., 591 F.2d 1164, 1168-69 (5th Cir. 1969);
Kanouse v. Westwood Obstetrical & Gynecological Assocs., 505 F. Supp. 129, 130-32
Another example is state door closing statutes, see Feinstein v. Massachusetts Gen.
Hosp., 643 F.2d 880, 888 (1st Cir. 1981) (dictum), which require a foreign corpora-
tion to register with a state before it can sue in the state's courts. E.g., Woods v.
Interstate Realty Co., 337 U.S. 535, 538 (1949); Baron & Co. v. Bank of N.J., 504 F.
89. Under Justice Harlan's test of the Erie principle of uniformity, see supra note
55, an appellate retroactivity analysis is not one that confounds individuals' attempts
to plan their "primary private activity." It could be argued that an individual, in
conforming his conduct to a state standard, assumes that the effect given to a change
in that state standard will be determined by the state's retroactivity analysis. This
assumption, however, would only remotely guide one in his planning of primary
private conduct.
90. See Vestal, Erie R.R. v. Tompkins: A Projection, 48 Iowa L. Rev. 248, 264-
71 (1963). In the latter part of his article, Professor Vestal reviews those cases
following Byrd that have attempted to identify countervailing federal considerations
that justify a departure from Erie uniformity. He concludes that these cases do not
analysis has no utility in this context. It does remedy Vandenbark's reflexive and non-deliberative approach to the retroactivity question. A court's desire to effect this remedy, however, may not be strong enough to overcome its contentment with Vandenbark's easy rule of automatic retroactivity. In this situation, where the federal court's mind is willing, but flesh weak, "manifest injustice" analysis may prove to be a valuable alternative. It would be less onerous than Erie analysis in that it allows the federal court to determine on its own what effect to give to an intervening change in state law.

A. Erie Retroactivity Analysis

Erie referred to the application of state law "declared by its Legislature in a statute or by its highest court." Thus, if a state's legislature or its highest court had decided whether the change in law should be given retroactive or prospective effect, that decision would become the basis of the federal court's decision and Erie analysis would end. Absent this definitive word, a court would proceed to a review of any intermediate or trial court treatment of the change's retroactivity or prospectivity. If lower state courts had not addressed the

represent a "repudiation of Erie, but simply a recognition that the policy of that case is inappropriate in certain situations." Id. at 271. But see Comment, State or Federal Law in Federal Courts: The Rise and Fall of Erie, 42 Miss. L.J. 89, 99 (1971) (concluding that Byrd and Hanna are not instructive unless federal interest is tied to a federal rule or the Constitution).

91. See Downs v. J.M. Huber Corp., 580 F.2d 794, 796-97 (5th Cir. 1978). The Downs court linked the Vandenbark rule with an Erie analysis of a change in Texas law that abolished the "no duty" defense in tort actions against landowners. Id. at 795, 796-97. The court deliberatively assessed prior Texas case law, concluding that it gave ample warning that the "no duty" defense was about to be abandoned. Id. at 797.

94. See West v. American Tel. & Tel. Co., 311 U.S. 223, 236-37 (1940). The analysis at this juncture has undergone considerable refinement since the Court first decided that the federal court in diversity cases was bound to follow lower state court decisions, even those of a state's trial court. Fidelity Union Trust Co. v. Field, 311 U.S. 169, 178-79 (1940); H. Hart & H. Wechsler, supra note 56, at 628. Field laid down the general principle that "in the absence of more convincing evidence of what the state law is, [the decision of an intermediate state court] should be followed by a federal court in deciding a state question." 311 U.S. at 178; accord Stoner v. New York Life Ins. Co., 311 U.S. 464, 467-68 (1940); West v. American Tel. & Tel. Co., 311 U.S. 223, 236-38 (1940); Six Cos. v. Joint Highway Dist., 311 U.S. 180, 188 (1940). These "311 U.S." cases have been subject to censure. Judge Friendly referred to them as "excesses" and "outrages." Friendly, supra note 63, at 400, 401. The Field decision has been hardest hit. See 2 W. Crosse, supra note 87, at 922-29; Broh-Kahn, supra note 46, at 106-07; Corbin, supra note 20, at 766-70, 775. See generally Hart, supra note 55, at 510 & n.68 ("second rate justice" administered by federal court if it is bound to follow intermediate state court decisions); Vestal, supra note 90, at 256 (noting trend in federal courts to use discretion in following lower state
issue, the federal court would further inquire whether the state had adopted a blanket rule of retroactivity or prospectivity. Absent a general rule, the federal court would finally resort to prior state court treatments of changes in law to ascertain what retroactivity analysis, if any, the state has applied. If it finds such an analysis, the federal court must then apply it exactly as the state's highest court would.

The chances of Erie retroactivity analysis being adopted are slight. Uniformity between state and federal adjudications need not control how an intervening change in state law is applied. A court may nevertheless view Erie analysis as a way to impart deliberation to the retroactivity issue. The vicarious aspects of Erie's fact determination process and the burdens they entail, however, would dampen any inclination to apply the analysis for its deliberative value.
B. "Manifest Injustice" Analysis

If only lower state courts had spoken on the issue of the retroactivity or prospectivity of a particular change in state law, the burdens of 
_Erie_ analysis would begin to become pronounced. These burdens could be avoided and due deliberation, side-stepped in _Vandenbark_, could be given to the retroactivity question, if the federal court were to use its familiar "manifest injustice" analysis of intervening changes in federal law.\(^{100}\)

This analysis was formulated in _Bradley v. School Board_,\(^ {101}\) a school desegregation suit in which the lone issue before the Court was an award of attorney's fees.\(^ {102}\) While the case was pending appeal to the Fourth Circuit, Congress for the first time authorized awards of reasonable attorney's fees to successful plaintiffs in school desegregation suits.\(^ {103}\) The Court analogized this intervening congressional amendment to the intervening treaty in _Schooner Peggy_.\(^ {104}\) It expressly modeled its manifest injustice analysis on both the principle of _Schooner Peggy_ and its admonition to struggle against retroactivity.\(^ {105}\) Manifest injustice analysis begins with a presumption that retroactive effect should be given to any change in federal law that

---

\(^{100}\) American Airlines, Inc., 149 F.2d 355, 359 (2d Cir. 1945); Clark, _State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins_, 55 Yale L.J. 267, 293 (1946).


\(^{103}\) Emergency School Aid Act of 1972, Pub. L. No. 92-318, tit. VII, § 718, 86 Stat. 354, 369 (codified at 20 U.S.C. § 1617 (1976)). The Fourth Circuit reversed the district court's award, finding that the congressional amendment was inapplicable and that the district court exceeded its authority in granting the fees. 472 F.2d at 330, 331-32. On the same day as the _Bradley_ decision, the Fourth Circuit in _Thompson v. School Bd._, 472 F.2d 177 (4th Cir. 1973) (en banc and per curiam), limited the effect of the statutory authorization for attorney's fees to services rendered after its effective date. _Id._ at 178; _accord_ _Henry v. Clarksdale Mun. Separate School Dist._, 480 F.2d 583, 585 (5th Cir. 1973) (per curiam). This was a typical response to the question of the retroactivity of attorney's fees legislation. _See Matthews v. Walter_, 512 F.2d 941, 946 (D.C. Cir. 1975).

\(^{104}\) United States v. _Schooner Peggy_, 5 U.S. 64, 67, 1 Cranch 103, 107 (1801).

\(^{105}\) 416 U.S. at 711-16.
occurs while a case is pending appeal.\textsuperscript{106} The presumption can be rebutted, however, by legislative history or express direction that the statute be applied prospectively.\textsuperscript{107} Courts generally require that the

\textsuperscript{106} Id. at 711. For many years, presumptions in retroactivity analyses depended on the source of the change in law. Changes by judicial decision were considered properly retroactive according to the Blackstonian theory that judges do not make law, but only declare what the law has always been. I W. Blackstone, Commentaries *69-70. According to this view, a judicial decision discarding old precedent and establishing a new one represented not a change in law, but a change in perception of the law. The law "was conceived of as having always been there, waiting just to be correctly stated." People v. Morales, 37 N.Y.2d 262, 263, 333 N.E.2d 339, 343, 372 N.Y.S.2d 25, 30 (1975); accord Swift v. Tyson, 41 U.S. 1, 12, 16 Pet. 1, 18 (1842), overruled, Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Freeman, The Protection Afforded Against the Retroactive Operation of an Overruling Decision, 18 Colum. L. Rev. 230, 232-33 (1918). This conception of the law as an eternal principle is classical in origin, see Fairchild, supra note 1, at 254, and perhaps even traceable to the Platonic allegory of the cave. Plato, The Republic bk. VII, at 208 (B. Jowett trans. Dolphin bks. ed. 1960); see Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 365 (1932). Justice Holmes rejected this conception of a transcendental law when he wrote that "[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified." Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). Statutory changes were considered properly prospective, Greene v. United States, 376 U.S. 149, 160 (1964) (citing Union P.R.R. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913)); 2 Sutherland, supra note 3, § 41.04, at 252; see United States v. Heth, 7 U.S. 239, 248, 3 Cranch 399, 413 (1806); County Bd. of Supervisors v. Breese, 171 Neb. 37, 42-43, 105 N.W.2d 478, 482 (1960); Fox v. Snow, 6 N.J. 12, 14, 76 A.2d 877, 878 (1950) (per curiam), on the theory that a legislative body "should not 'adjudicate' the rights of known individuals." Adams Nursing Home, Inc. v. Mathews, 548 F.2d 1077, 1080 (1st Cir. 1977). The judicial theory of retroactivity had undergone considerable erosion by the time of the Bradley decision, Stason, Choice of Law Within the Federal System: Erie versus Hanna, 52 Cornell L.Q. 377, 385 n.27 (1967); Prospective Overruling, supra note 37, at 911; cf. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940) ("[A]ll-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." (footnote omitted)); Schettler v. County of Santa Clara, 74 Cal. App. 3d 990, 997, 141 Cal. Rptr. 731, 735 (1978) (rule of retroactivity of judicial decisions subject to considerations of "fairness and public policy"); Fitzgerald v. Meissner & Hicks, Inc., 88 Wis. 2d 571, 575-76, 157 N.W.2d 595, 596-97 (1968) (listing recognized exceptions to Blackstonian theory of retroactivity), due to the recognition that judges do make law. E.g., Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting); 2 J. Austin, Lectures on Jurisprudence § 919 (R. Campbell ed. n.d.); Corbin, supra note 20, at 773. The theory regarding the prospectivity of statutory changes gave way to the recognition that some statutory changes are best given retroactive effect, especially when they are ameliorative in nature. Gibbons v. Gibbons, 86 N.J. 515, 522-23, 432 A.2d 80, 84-85 (1981). For a discussion of the erosion of the rule that statutory changes should act only prospectively, see Sikora v. American Can Co., 622 F.2d 1116, 1125-29 (3d Cir. 1980) (Adams, J., dissenting).

\textsuperscript{107} Bradley v. School Bd., 416 U.S. 696, 711 (1974); see Sikora v. American Can Co., 622 F.2d 1116, 1127 (3d Cir. 1980) (Adams, J., dissenting) ("[T]he Court appears to have abandoned the presumption of prospectivity, adopted instead a rule of presumed retroactivity, and incorporated the prospectivity presumption into a
indication of prospectivity be clearly stated.\textsuperscript{108} As in \textit{Bradley}, these legislative sources rarely meet the requirement,\textsuperscript{109} and courts consistently proceed to consider whether retroactivity would be manifestly unjust to one of the parties.\textsuperscript{110}

The \textit{Bradley} Court synthesized leading prior cases on retroactivity to arrive at three independent\textsuperscript{111} "manifest injustice" factors: the

\begin{quote}
'manifest injustice' exception to the new rule.
\end{quote}


109. 416 U.S. at 715-16, 716 n.22.


111. \textit{See} 416 U.S. at 718-21; Jensen v. Gulf Oil Ref. & Mktg. Co., 623 F.2d 406, 411 (5th Cir. 1980); Sikora v. American Can Co., 622 F.2d 1116, 1122 (3d Cir. 1980); \textit{cf.} Desist v. United States, 394 U.S. 244, 249 (1969) (only if purpose of new rule is not served by retroaction are other factors called into play); Holzsager v. Valley Hosp., 646 F.2d 792, 797 (2d Cir. 1981) (failure of proof in one prong of
nature and identity of the parties, the nature of their rights, and the nature of the impact of the change in law on those rights.\textsuperscript{112} "Manifest injustice" analysis, as described in \textit{Bradley}, requires the application of all three factors. Courts typically, however, focus on one of the three factors in making determinations, and use the other two factors merely to confirm the result reached. The predominant factor will be the one that is based on that case, among the leading retroactivity cases \textit{Bradley} synthesized,\textsuperscript{113} the facts of which most closely resemble those of the case before the court. The first factor, the nature and identity of the parties, is most relevant when one of the parties is a governmental or public entity.\textsuperscript{114} The issues contested in such a case are likely to be of "great national concern,"\textsuperscript{115} and retroactivity is considered the most effective implementation of policies underlying the change in law.\textsuperscript{116} The second factor, the nature of the rights of

\textit{Chevron} analysis is fatal to rebuttal of presumption of retroactivity); Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 1289-90 (7th Cir. 1980) (all three \textit{Chevron} factors must support prospective application of change in law), \textit{rev'd on other grounds}, 101 S. Ct. 2266 (1981).

\textsuperscript{112} 416 U.S. at 716-17.

\textsuperscript{113} See id. at 717. The major retroactivity cases the \textit{Bradley} Court focused on were Thorpe v. Housing Auth., 393 U.S. 268 (1969), Creene v. United States, 376 U.S. 149 (1964), and United States v. Schooner Peggy, 5 U.S. 64, 1 Cranch 103 (1801).


the parties, becomes relevant only when a financial transaction defines the rights of the parties. Thus, a change in law defeating expectations of funding or reimbursement is typically suited to prospective effect. The retroactivity inquiry focuses on the third fac-

(D.C. Cir. 1977) (purpose of amendment, to encourage hiring of the partially disabled by reducing employers' exposure to liability, frustrated by prospective application). Such "great national concerns" can also be implicated in actions between private parties. Bradley v. School Bd., 416 U.S. 696, 718 (1974) (quoting United States v. Schooner Peggy, 5 U.S. 64, 69, 1 Cranch 103, 110 (1801)). In such a case a court will balance the need to advance matters of "great national concern" against the need to protect through prospectivity the rights and expectations of private parties. E.g., Jensen v. Gulf Oil Ref. & Mktg. Co., 623 F.2d 406, 411 (4th Cir. 1980); Sikora v. American Can Co., 622 F.2d 1116, 1122 & n.9 (3d Cir. 1980); id. at 1131 (Adams, J., dissenting); cf. Eikenberry v. Callahan, 653 F.2d 632, 636 (D.C. Cir. 1981) (per curiam) ("A suit against a former FBI official for violation of appellant's civil rights is not the sort of 'mere private case'[] between individuals' contemplated by the Court."). The import of "great national concerns" is not peculiar to "manifest injustice" analysis, see, e.g., NLRB v. St. Luke's Hosp. Center, 551 F.2d 476, 484 (2d Cir. 1976) (extension of National Labor Relations Act of 1935, § 2(2), 29 U.S.C. § 152(2) (1976), to nonprofit hospital employees implicates "national policy"); South Terminal Corp. v. EPA, 504 F.2d 646, 680 (1st Cir. 1974) ("[M]inor reallocations, not going to the heart of the bargain, are sometimes permitted to effect an overriding public purpose.").), or to changes occurring during the appellate process. See Fairfax Nursing Center, Inc. v. Califano, 590 F.2d 1297, 1299, 1302 (4th Cir. 1979); Adams Nursing Home, Inc. v. Mathews, 548 F.2d 1077, 1080-82 (1st Cir. 1977).


118. National Consumer Information Center v. Gallegos, 549 F.2d 822, 826 (D.C. Cir. 1977); Coe v. Secretary of HEW, 502 F.2d 1337, 1340 (4th Cir. 1974). Previous judgments and interim orders in the same litigation do not create protectable expectations, according to courts that have applied "manifest injustice" analysis. See Republic Steel Corp. v. Costle, 581 F.2d 1228, 1234 (6th Cir. 1978), cert. denied, 440 U.S. 909 (1979); United States v. Hinds County School Bd., 560 F.2d 619, 622-23 (5th Cir. 1977); cf. SEC v. Chenery Corp., 332 U.S. 194, 200-01 (1947) (no vested right in prior administrative order); United States v. Fresno Unified School Dist., 592
tor, the impact of the change in law on the rights of the parties, when the change in law imposes a new obligation. Because a party must model his behavior on what is defined as proper conduct when he acts, a new obligation that redefines proper conduct may only be applied prospectively. When the new obligation does not redefine proper conduct, retroactive effect is fitting because the parties need not have realigned their conduct to accommodate it. For example, retroactive application of a new obligation that the defendant pay attorney's fees was held proper in Bradley because the obligation "would [not] have caused the [defendant] to order its conduct so as to render this litigation unnecessary and thereby preclude the incurring of such costs."122

F.2d 1088, 1094 & n.3 (9th Cir.) (no vested right to be sued in a particular manner). cert. denied, 444 U.S. 832 (1979). But see Iowa Power & Light Co. v. Burlington N., Inc., 647 F.2d 796, 806 (8th Cir. 1981) (right to ship coal at rate agreed in ICC proceeding matured at time of decision). cert. denied, 102 S. Ct. 1253 (1982); National Consumer Information Center v. Gallegos, 549 F.2d 822, 826-27 (D.C. Cir. 1977) (NCIC right to funding by the OEO attached and was not lost retroactively as of date of congressional amendment).

120. See id.

122. 416 U.S. at 721; accord Fox v. Parker, 626 F.2d 351, 353 (4th Cir. 1980); King v. Greenblatt, 560 F.2d 1024, 1025 n.2 (1st Cir. 1977), cert. denied, 438 U.S. 916 (1978); Wallace v. House, 538 F.2d 1139, 1147-48 (5th Cir. 1976), cert. denied, 431 U.S. 965 (1977); cf. Adams Nursing Home, Inc. v. Mathews, 548 F.2d 1077, 1081 (1st Cir. 1977) (similar test used when change not occurring during appellate review); Overseas African Constr. Corp. v. McMullen, 500 F.2d 1291, 1297-98 (2d Cir. 1974) (obligation reasonably expectable; no "manifest injustice" analysis used). Other methods, less elaborate but no less reliable than the "manifest injustice" analysis, have been developed to resolve the retroactivity question. A court may simply remand a case for further proceedings in light of the change in law, assuming without deciding its retroactive effect. See Thorpe v. Housing Auth., 393 U.S. 268, 272-73 (1969); Minnesota v. National Tea Co., 309 U.S. 551, 555-56 (1940); Cazad v. Chesapeake & O. Ry., 622 F.2d 72, 75-76 (4th Cir. 1980); Grow v. Smith, 511 F.2d 1146, 1149-50 (9th Cir. 1975); cf. New England Merchants Nat'l Bank v. Iran
Erie analysis, a federal court must first ascertain the applicable state retroactivity analysis, if any exists. If it isolates such an analysis, the federal court must view the facts of the case as would the state's highest court using that analysis. Thus, Erie analysis requires the resolution of a question of law, followed by the resolution, complicated by a vicarious aspect, of questions of fact. In contrast, "manifest injustice" analysis presents no problems of ascertainment or vicarious resolution. The court can immediately proceed to the factual questions raised by its familiar "manifest injustice" analysis and resolve them using its own, unborrowed judgment.

Conclusion

The Vandenbark Court's allegiance to Erie was understandable. Erie's dramatic restoration of the integrity of state law in diversity cases had made the Court circumspect in its treatment of state law. But the Court failed to grasp that Erie's principle of uniformity does not control the disposition of state law changes during diversity appeals. Extending the principle of uniformity to an area in which it had no place, the Court contributed to the irrepressible myth, giving Erie contours as undefined and oppressive in their lack of definition, as those of the doctrine of Swift v. Tyson that Erie discredited. By importing "manifest injustice" analysis into the diversity context, a court would strengthen the principle of uniformity by delimiting its scope. It would also revive the struggle against retroactivity, advocated by Chief Justice Marshall in United States v. Schooner Peggy and carried on in current federal retroactivity analyses, but needlessly abandoned by the Vandenbark Court. Although the analysis might recommend the same retroactive effect to a change in state law that would be dictated by the Vandenbark rule, at least the court would have the latitude to give prospective effect to the change in law when justice and good sense call for it. Moreover, the federal court litigant, no less entitled to a deliberative analysis of the retroactivity issue than his state court counterpart, would hear the sounds of the struggle against retroactivity, not just the idle clipping of scissors and broad strokes of the paste pot's brush.124

Michael J. Lonergan

123. The phrase was coined by Dean Ely. Ely, supra note 59, at 697-98.
124. Cf. Corbin, supra note 20, at 775 (court "must use its judicial brains, not a pair of scissors and a paste pot").