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

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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. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 28, 163 N.E.2d 89, 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;[2] prospectivity preserves the rights and expectations of parties who may have relied on the old precedent.[3] 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.[4]

(D.C. Cir. 1972). Finally, a change in law that is given "purely prospective" effect covers only cases arising in the future. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 422 (1964). A related technique is that of "prospective overruling" or "sunbursting," *see* Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932) (Cardozo, J.), by which a court limits a change in law it is making to future cases and perhaps to the case before it. Fairchild, *Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or "Sunbursting,"* 51 Marq. L. Rev. 254, 254 (1968). For discussions of the vocabulary of retroactivity, see Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557, 1557 n.2 (1975); Munzer, *Retroactive Law*, 6 J. Legal Stud. 373, 381-84 (1977); Perrello & Golembiewski, *Retroactivity of California Supreme Court Decisions: A Procedural Step Toward Fairness*, 17 Cal. W. L. Rev. 403, 403-05 (1981).

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].

4. The principal federal retroactivity analyses divide between those used in civil cases, Bradley v. School Bd., 416 U.S. 696, 717-21 (1974) (for cases on appeal); Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971) (for cases at trial stage), and those used in criminal cases. Stovall v. Denno, 388 U.S. 293, 296-97 (1967); Linkletter v. Walker, 381 U.S. 618, 636-38 (1965). In contrast to civil retroactivity analyses, which emphasize blunting the impact of the change in law on the parties, criminal retroactivity analyses emphasize blunting the impact of the change in law on effective law enforcement and the smooth administration of justice. *Compare* Bradley v. School Bd., 416 U.S. 696, 717 (1974) (civil action; concerns for the identity of the parties, their rights and the change's impact on those rights), *and* Chevron Oil Co. v. Huson, 404 U.S. 97, 107-08 (1971) (civil action; expressing concern for inequitable effect of retroactivity on the respondent), *with* Stovall v. Denno, 388 U.S. 293, 297 (1967) (criminal case; expressing concern for law enforcement authorities' reliance on old standards and effect on administration of justice), *and* Linkletter v. Walker, 381 U.S. 618, 636-38 (1965) (criminal case; emphasis on the rule in question: its prior history, purpose and effect, and successful integration into administration of the

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—its 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-

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law). In fact, the dissenters in leading criminal retroactivity cases decry their majority brethren's insensitivity to the effects of their holdings on similarly situated defendants. *E.g.*, Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring and dissenting); Linkletter v. Walker, 381 U.S. 618, 642 (1965) (Black, J., dissenting). For an interesting consolidation of these distinct concerns in civil and criminal federal retroactivity analyses, see Lau v. Nelson, 92 Wash. 2d 823, 826-28, 601 P.2d 527, 529-30 (1979) (en banc), *reviewed by* 55 Wash. L. Rev. 833 (1980).

5. 311 U.S. 538, 543 (1941) ("[U]ntil such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court." (footnote omitted)).

6. *See infra* pt. I.

7. 304 U.S. 64 (1938).

8. *Id.* at 78.

9. 311 U.S. at 543.

10. Nelson v. Brunswick Corp., 503 F.2d 376, 381 n.12 (9th Cir. 1974) (*Vandenbark* justly subject to criticism "because it can lead to a difference in the result obtained in a federal and state court"); [1A pt. 2] J. Moore, Moore's Federal Practice ¶ 0.307[3], at 3104 (2d ed. 1981) ("[C]omplete uniformity cannot emerge from the hard and fast rule of the *Vandenbark* case . . . .").

11. [1A pt. 2] J. Moore, *supra* note 10, ¶ 0.307[3], at 3104-05, *cited with approval in* Nelson v. Brunswick Corp., 503 F.2d 376, 381 n.12 (9th Cir. 1974); *see* Hegger v. Green, 646 F.2d 22, 26 & n.6 (2d Cir. 1981); Downs v. J.M. Huber Corp., 580 F.2d 794, 796 & n.5 (5th Cir. 1978).

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[12] to apply when it is not necessary, a federal court may retool its own "manifest injustice" analysis.[13]

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12. Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 Wayne L. Rev. 317, 321-26 (1967). Judge Wright describes the practical burdens, and intimates the psychological ones, of an *Erie* analysis. *Id.* at 321-22, 324; *see* Passwaters v. General Motors Corp., 454 F.2d 1270, 1277 (8th Cir. 1972).

13. Bradley v. School Bd., 416 U.S. 696, 716-21 (1974); Thorpe v. Housing Auth., 393 U.S. 268, 282 (1969). The "manifest injustice" analysis was designed to treat changes in federal law occurring during the appeal of a case. Bradley v. School Bd., 416 U.S. 696, 711 (1974); *see* Flanigan v. Burlington N. Inc., 632 F.2d 880, 888-89 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981). The analysis has been exercised to the greatest extent in cases involving statutory changes of law. *E.g.*, Eikenberry v. Callahan, 653 F.2d 632, 632-33 (D.C. Cir. 1981) (per curiam) (construing Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (to be codified at 28 U.S.C. § 1331)); Iowa Power & Light Co. v. Burlington N., Inc., 647 F.2d 796, 805-06 (8th Cir. 1981) (construing Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (to be codified in scattered sections of 45 and 49 U.S.C.)), *cert. denied*, 102 S. Ct. 1253 (1982); Iowa Pub. Serv. Co. v. ICC, 643 F.2d 542, 548-49 (8th Cir. 1981) (same); Fox v. Parker, 626 F.2d 351, 352-53 (4th Cir. 1980) (construing Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1976)); Jensen v. Gulf Oil Ref. & Mktg. Co., 623 F.2d 406, 409-13 (5th Cir. 1980) (construing Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (codified at 29 U.S.C. § 623(f)(2) (1976 & Supp. II 1978)); Sikora v. American Can Co., 622 F.2d 1116, 1120 (3d Cir. 1980) (same). To a lesser extent, the "manifest injustice" analysis has been used to analyze changes in administrative regulations, *e.g.*, Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216, 225-29 (6th Cir. 1980) (construing Arbitration or Other Dispute Settlement Procedures, 17 C.F.R. § 180.3 (1981)), *aff'd*, 50 U.S.L.W. 4457 (U.S. May 3, 1982); Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 567 F.2d 1174, 1179-80 (2d Cir. 1977) (same); Coe v. Secretary of HEW, 502 F.2d 1337, 1339 (4th Cir. 1974) (construing 42 C.F.R. §§ 405.126-.128 (1980) (redesignation of 20 C.F.R. §§ 405.126-.128 (1977)), and changes by judicial decision. *E.g.*, O'Byrne v. St. Louis S.W. Ry., 632 F.2d 1285, 1286-87 (5th Cir. 1980) (construing Norfolk & W. Ry. v. Liepelt, 444 U.S. 490 (1980)); Lang v. Texas & P. Ry., 624 F.2d 1275, 1279-80 (5th Cir. 1980) (same); General Beverage Sales Co. v. East-Side Winery, 568 F.2d 1147, 1154 (7th Cir. 1978) (construing Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)). The *Bradley* "manifest injustice" analysis was expressly modeled on the concerns of United States v. Schooner Peggy, 5 U.S. 64, 69, 1 Cranch 103, 110 (1801). 416 U.S. at 717. The analysis is also used by federal district courts in determining appeals from administrative fora. Brown v. General Servs. Admin., 507

I. THE *VANDENBARK* RULE—ABANDONING DELIBERATION IN RETROACTIVITY ANALYSIS

The plaintiff in *Vandenbark v. Owens-Illinois Glass Co.*,[14] 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.[15] Accordingly, the district court dismissed the complaint.[16] During the appeal, an amendment of the Ohio worker's compensation statute[17] and an Ohio Supreme Court decision[18] each effectively gave the plaintiff the cause of action she had failed to state in the district court.[19] The Sixth Circuit refused to apply the intervening changes in Ohio's laws.[20]

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 HEW, 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).

16. Vandenbark v. Owens-Illinois Glass Co., 110 F.2d 310, 311 (6th Cir. 1940), *rev'd*, 311 U.S. 538 (1941).

17. Act of Apr. 30, 1937, 1937 Ohio Laws 268 (codified as amended at Ohio Rev. Code Ann. § 4123.68 (Page 1980)).

18. Triff v. National Bronze & Aluminum Foundry Co., 135 Ohio St. 191, 20 N.E.2d 232 (1939).

19. The statutory amendment added silicosis, one of the diseases sued on by plaintiff, to the schedule of compensable diseases. Act of Apr. 30, 1937, 1937 Ohio Laws 268, 270 (codified as amended at Ohio Rev. Code Ann. § 4123.68 (Page 1980)). The *Triff* decision held that the common-law cause of action for occupational diseases coexisted with any statutory cause of action. 135 Ohio St. at 205, 20 N.E.2d at 236-37.

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.[21] It recognized that the cases decided during the reign of *Swift v. Tyson*,[22] in which it had ignored intervening changes in states' laws, might not be acceptable precedents[23] under the new regime of *Erie Railroad v. Tompkins*.[24] The Court did not devise a new, *Erie*-based rule to handle intervening state law changes. Rather, the Court adopted the "true rule" regarding retroactivity[25] enunciated in the first "opinion of the Court,"[26] *United States v. Schooner Peggy*.[27] In *Schooner Peggy*, a treaty with France was ratified after the circuit court's decision and before that of the Court.[28] In giving retroactive effect to the treaty, thereby reversing the circuit court's decree, the Court sternly pronounced the *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."[29] Chief Justice Marshall also recognized, however, that in cases not involving "great national concerns,"[30] there is a

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shall otherwise require or provide, shall be regarded as rules of decision in *trials at common law* in the courts of the United States in cases where they apply." *Id.* (emphasis added). The emphasized portion of the text was replaced with the words "civil actions."Act of June 25, 1948, ch. 646, § 1652, 62 Stat. 869, 944 (codified at 28 U.S.C. § 1652 (1976)). According to the reviser's notes accompanying the House Report, however, the replacement was intended to bring the Rules of Decision Act's language into line with that used in the Federal Rules of Civil Procedure. H.R. Rep. No. 308, 80th Cong., 1st Sess. app. at 145 (1947), *reprinted in* 1 Legislative History of Title 28, United States Code "Judiciary and Judicial Procedure" § IV (1971); [1A pt. 2] J. Moore, *supra* note 10, ¶ 0.305[1], at 3042-43.

21. 311 U.S. at 543.

22. 41 U.S. (16 Pet.) 1 (1842), *overruled*, Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

23. 311 U.S. at 540-41 & n.9.

24. 304 U.S. 64 (1938).

25. 311 U.S. at 541.

26. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 Cornell L.Q. 186, 193 & n.41 (1959). Prior practice of the Court had been to issue seriatim the opinions of the individual justices. *Id.* at 192.

27. 5 U.S. 64, 68-69, 1 Cranch 103, 110 (1801).

28. 5 U.S. at 67, 1 Cranch at 107. An article of the treaty, providing for the mutual restoration of all captured property not yet definitively condemned, directly conflicted with the circuit court's sentence of condemnation of the schooner, *id.* at 66, 1 Cranch at 106-07, a French trading vessel captured by American sailors for carrying a significant cache of ammunition in addition to its merchandise. *Id.* at 65, 1 Cranch at 105. The ammunition, apparently intended for self-defense, was deemed by the circuit court to present a hazard to peaceful commerce. *Id.* at 66, 1 Cranch at 106.

29. *Id.* at 68, 1 Cranch at 110.

30. *Id.* at 69, 1 Cranch at 110. In speaking of the treaty, Chief Justice Marshall's words belied an incipient "political question" deference on the part of the Court to acts of the executive. "It is certainly true, that the execution of a contract between nations is to be demanded from, and in the general, superintended by, the executive

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.[31] 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 . . . ."[32]

The Court in *Vandenbark*, however, adopted only the *Schooner Peggy* principle to obey the law or deny its obligation,[33] 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."[34] 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.[35] These cases' support for the *Schooner Peggy*

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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.

31. 5 U.S. at 69, 1 Cranch at 110; *see* United States v. Estate of Donnelly, 397 U.S. 286, 295 (1970) (Harlan, J., concurring); Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932) (Cardozo, J.); Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 28-29, 163 N.E.2d 89, 97-98 (1959), *cert. denied*, 362 U.S. 968 (1960); Fitzgerald v. Meissner & Hicks, Inc., 38 Wis. 2d 571, 576-77, 157 N.W.2d 595, 597 (1968). *But see* Smith, *supra* note 3, at 419-20. This compelling need for prospectivity, however, is a matter of judicial policy, not constitutional mandate. *See* Mackey v. United States, 401 U.S. 667, 701 (1971) (Harlan, J., concurring and dissenting); Linkletter v. Walker, 381 U.S. 618, 629 (1965); *cf.* Danforth v. Groton Water Co., 178 Mass. 472, 476-77, 59 N.E.1033, 1034 (1901) (Holmes, C. J.) ("prevailing views of justice" inform decisions on retroactivity). *But see* Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 567 F.2d 1174, 1179 (2d Cir. 1977) (equating one current retroactivity analysis with a "due process inquiry").

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'

(1881); Kibbe v. Ditto, 93 U.S. 674, 677-79 (1876). As these and other cases demonstrate, the Court for many years had been treating state court constructions of statutes of limitation as falling directly within the embrace of the Rules of Decision Act. Leffingwell v. Warren, 67 U.S. (2 Black) 599, 603 (1862); *see* Bauserman v. Blunt, 147 U.S. 647, 652 (1893). Moreover, the statute of limitations at issue in *Kibbe* governed the action in that case for the recovery of real property, an item Justice Story specifically included in his delimitation of the scope of the Rules of Decision Act. Swift v. Tyson, 41 U.S. 1, 12-13, 16 Pet. 1, 18-19 (1842), *overruled*, Erie R.R. v. Tompkins, 304 U.S. 64 (1938); *cf.* Green v. Neal, 31 U.S. 188, 192-93, 6 Pet. 291, 296-97 (1832) (Court dutifully following Tennessee's fitful constructions of adverse possession statute of limitations). The other two cases cited by the Court were unexceptional decisions in which the Court had deferred to a state's highest court's construction of a statute, Sioux County v. National Sur. Co., 276 U.S. 238, 240 (1928), and of the res judicata effect of some of the state court's prior holdings. Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4, 7-8 (1939). Most significantly, none of the cases cited by the Court makes any reference to *Schooner Peggy* or its principle of retroactivity. Considered in conjunction with the exceptional cases noted by the Court earlier in its opinion, 311 U.S. at 541 & n.9, these cases only remotely support the *Schooner Peggy* principle of retroactivity. They could more accurately be described as examples of the Court's equivocal treatment of state court constructions of state statutes and constitutions during the age of *Swift v. Tyson*, 1842-1938.

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*].

38. Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543 (1941).

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,[40] displacing old causes of action,[41] abrogating tort defenses[42] or standards of care,[43] and modifying jury instructions[44] have been given retroactive effect. Circuit courts and Professor Moore have argued that the *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.[45] Preoccupation with *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.[46]

A. *The* Erie *Principle of Uniformity*

In *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."[47] Commentators have debated whether this uniformity is constitutionally compelled.[48] Certain Justices have cited *Erie* as a constitutionally compelled decision.[49] Yet they have avoided pinning

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40. Passwaters v. General Motors Corp., 454 F.2d 1270, 1276-77 (8th Cir. 1972) (strict liability).

41. Robinson v. Shapiro, 646 F.2d 734, 744 (2d Cir. 1981) (loss of consortium in wrongful death actions); Hegger v. Green, 646 F.2d 22, 26 (2d Cir. 1981) (same).

42. Downs v. J.M. Huber Corp., 580 F.2d 794, 795 (5th Cir. 1978) ("no duty" rule in tort actions against land owners); Nelson v. Brunswick Corp., 503 F.2d 376, 381 (9th Cir. 1974) (assumption of risk doctrine).

43. Samuels v. Doctors Hosp., Inc., 588 F.2d 485, 488-89 (5th Cir. 1979) ("locality rule" in medical malpractice suits).

44. Baker 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).

45. *See* Downs v. J.M. Huber Corp., 580 F.2d 794, 796 & n.5 (5th Cir. 1978); Nelson v. Brunswick Corp., 503 F.2d 376, 381 n.12 (9th Cir. 1974); [1A pt. 2] J. Moore, *supra* note 10, ¶ 0.307[3], at 3105; *cf.* Universal Underwriters Ins. Co. v. Wagner, 367 F.2d 866, 875 (8th Cir. 1966) (applying *Erie* without attempting to rebut *Vandenbark*).

46. One commentator criticized *Vandenbark* as a "shocking illustration of the extent to which the Court has carried the rule of the *Erie* case." Broh-Kahn, *Uniformity Run Riot—Extensions of the Erie Case*, 31 Ky. L.J. 99, 107 (1943). Broh-Kahn, the attorney for the respondent in *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 *Vandenbark* rule, have no such opportunity, and are subject to the change in state law without recourse. *Id.* at 108-09.

47. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

48. For a discussion of the constitutional bases of *Erie* and identification of the members of the opposing camps on the issue, see C. Wright, Handbook of the Law of Federal Courts § 56, at 260-61 & nn.15-16 (3d ed. 1976).

49. Rummel v. Estelle, 445 U.S. 263, 303 (1980) (Powell, J., dissenting); Lee v. Runge, 404 U.S. 887, 890 n.3 (1971) (Douglas, J., dissenting); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 411 (1967) (Black, J., dissenting).

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

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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*).

51. *See* Hanna v. Plumer, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring) (referring to Erie as "one of the modern cornerstones of our federalism"); Hill, *The Erie Doctrine and the Constitution*, 53 Nw. U. L. Rev. 427, 427-28 (1958).

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-Paxon 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 *Vandenbark* 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[56] and did not survive the qualifications given it in *Byrd*[57] and *Hanna*.[58] The Court in *Hanna* said "[t]he 'outcome determination' test [of *York*] . . . cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[59] 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*.[60] Several commentators in the wake of *Byrd* doubted the breadth of its precedent,[61] reasoning that the Court's protection of the right to trial by jury in that case was compelled by the seventh amendment,[62] despite the Court's "delicate reference to the Constitution."[63] In a case decided shortly after

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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).

56. *See* H. Hart & H. Wechsler, The Federal Courts and the Federal System 678 (1953) ("no stopping place" to goal of uniformity); Clark, Book Review, 36 Cornell L.Q. 181, 183 (1950) (Judge Clark referring to "drastic logic" in pursuing goal of uniformity of outcome).

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)).

58. 380 U.S. at 468; M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 173 (1980); *see* C. Wright, *supra* note 48, § 55, at 257-58.

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 889.

60. Feinstein v. Massachusetts Gen. Hosp., 643 F.2d 880, 886 n.8 (1st Cir. 1981).

61. Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 Tul. L. Rev. 443, 451 (1962); 43 Minn. L. Rev. 580, 581-82 (1959); *see* Ely, *supra* note 59, at 709; Comment, *Hanna v. Plumer: An Expanded Concept of Federal Common Law—A Requiem for Erie?*, 1966 Duke L.J. 142, 158-59 & nn.73-74; Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the* Erie *Doctrine*, 85 Yale L.J. 678, 691 n.66 (1976).

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.").

63. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 403 n.95 (1964); *see* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 & n.10 (1958).

Byrd,[64] the Court confirmed the suspicions of these early *Byrd* commentators by stating that the decision was based on the seventh amendment.[65] *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.[66]

The *Byrd* test has never been refined by the Court.[67] 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.[68] 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.[69] 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[70] 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.[71] If the answers to the first two inquiries are mixed—for

64. Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962).

65. *Id.* at 360.

66. Almost all Supreme Court cites to *Byrd* concern the right to a jury trial. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 352 (1979) (Rehnquist, J., dissenting); Donovan v. Penn Shipping Co., 429 U.S. 648, 649-50 (1977) (per curiam); Simler v. Connor, 372 U.S. 221, 222 (1963) (per curiam); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 360 (1962); Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273, 278 (1959). *Byrd* was also cited for its evidentiary issue, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 156 (1963), and the federal courts' power to issue habeas corpus writs. Fay v. Noia, 372 U.S. 391, 406 (1963).

67. M. Redish, *supra* note 58, at 175 & n.48.

68. *See* Hanna v. Plumer, 380 U.S. 460, 469 (1965); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536 (1958).

69. 356 U.S. at 535-40. For a discussion of other renditions of the "*Byrd* test," see M. Redish, *supra* note 58, at 175-77.

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.[72]

The *Hanna* test is a simpler analytical construct[73] keyed to the "twin aims" of *Erie*: the "discouragement of forum-shopping and avoidance of inequitable administration of the laws."[74] 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.[75] In addition to being simpler to apply, the *Hanna* test also achieves the aims of the *Byrd* test. A *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 *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 *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.[76] The *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 *Byrd* terms, only if the answers to the first two *Byrd* inquiries were negative, or in some circumstances, mixed.[77] Thus, the

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Redish, *supra* note 58, at 175 (hypothesizing, but not resolving under the *Byrd* test, situation where significant state interest clashes with significant federal interest); *id.* at 201 (resolving situation with form of author's proposed "refined balancing test").

72. *See supra* note 71. Partly because the Court has never refined the complex *Byrd* balancing test, lower federal courts have fashioned their own Rules of Decision Act tests by cannibalizing parts of the *Byrd* and *Hanna* tests. *See* M. Redish, *supra* note 58, at 178-80. The *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.

74. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

75. *Id.* at 468-69 & nn.9 & 11. The language concluding footnote 9 in the *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 *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 *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.[78]

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.*[79] Because *Walker* was indistinguishable[80] from *Ragan v. Merchants Transfer & Warehouse Co.*,[81] 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.[82] Apparently, the Court was unimpressed with criticism[83] 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*,[84] at least in cases not presenting *Byrd*'s narrow issue of the federal interest in submitting disputed issues of fact to a jury.[85]

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

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78. *See supra* note 72 and accompanying text.

79. 446 U.S. 740 (1980); *accord* Kanouse v. Westwood Obstetrical & Gynecological Assocs., 505 F. Supp. 129, 130 (D.N.J. 1981).

80. 446 U.S. at 748.

81. 337 U.S. 530 (1949).

82. 446 U.S. at 753.

83. M. Redish, *supra* note 58, at 172; *see* Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring); Hart, *supra* note 55, at 512-13.

84. M. Redish, *supra* note 58, at 175 n.48; Ely, *supra* note 59, at 717 n.130. *Contra* 44 Tex. L. Rev. 560, 562-63 & n.20 (1966).

85. Kanouse v. Westwood Obstetrical & Gynecological Assocs., 505 F. Supp. 129, 131-32 (D.N.J. 1981); Wheeler v. Shoemaker, 78 F.R.D. 218, 225 (D.R.I. 1978).

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 administration 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 retroactivity 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 analysis 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*

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86. *See* Ely, *supra* note 59, at 717 & n.130; McCoid, *supra* note 50, at 889.

87. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 110-11 (1945); Vandenbark v. 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 (D.N.J. 1981); Sander v. Providence Hosp., 483 F. Supp. 895, 896 (S.D. Ohio 1979). 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 corporation 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. Supp. 1199, 1208-09 (D.N.J. 1981).

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.[91] 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."[92] 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.[93] 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.[94] If lower state courts had not addressed the

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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.

92. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

93. *See* Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967).

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. Crosskey, *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.[95] 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.[96] If it finds such an analysis, the federal court must then apply it exactly as the state's highest court would.[97]

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.[98] 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,[99] however, would dampen any inclination to apply the analysis for its deliberative value.

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court decisions). A federal court will project the deference that a state's highest court would accord to the rulings of its lower courts, and act accordingly. Vestal, *supra* note 90, at 256; *see* Cooper v. American Airlines, Inc., 149 F.2d 355, 359 (2d Cir. 1945), *questioned in* Polk County v. Lincoln Nat'l Life Ins. Co., 262 F.2d 486, 489 (5th Cir. 1959).

95. *See* Downs v. J.M. Huber Corp., 580 F.2d 794, 796 n.3, 796-97 (5th Cir. 1978); Universal Underwriters Ins. Co. v. Wagner, 367 F.2d 866, 875 (8th Cir. 1966). New York's consistency in giving retroactive effect to all kinds of law changes, *see* Hegger v. Green, 646 F.2d 22, 27 & n.6 (2d Cir. 1981), closely approximates a blanket rule. This consistency of result, however, masks the inconsistent use of retroactivity analyses by New York's Court of Appeals. *See* Gurnee v. Aetna Life & Cas. Co., 55 N.Y.2d 184, 192-94, 433 N.E.2d 128, 130-31, 448 N.Y.S.2d 145, 147-48 (1982) (application of federal retroactivity analysis of Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971)); People v. Pepper, 53 N.Y.2d 213, 222, 423 N.E.2d 366, 370, 440 N.Y.S.2d 889, 893 (recognizing a "manifest injustice" exception to retroactivity), *cert. denied*, 102 S. Ct. 510 (1981). This inconsistency makes a federal court's *Erie* analysis more difficult.

96. *See* Lowe's N. Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co., 319 F.2d 469, 472-73 (4th Cir. 1963); Leport v. White River Barge Line, 315 F.2d 129, 130 (3d Cir. 1963); Note, *The Ascertainment of State Law in a Federal Diversity Case*, 40 Ind. L.J. 541, 553 (1965) [hereinafter cited as *Ascertainment of State Law*].

97. *See* [1A pt. 2] J. Moore, *supra* note 10, ¶ 0.309[2], at 3119-20 (describing analogical method of state law ascertainment); *Ascertainment of State Law*, *supra* note 96, at 550-51, 553-54 (discussion of federal courts' application of state law after adopting the judicial attitude and approach of the state court).

98. *See supra* pt. II(B), (C).

99. Wright, *supra* note 12, at 321-22; *cf.* [1A pt. 2] J. Moore, *supra* note 10, ¶ 0.309[2], at 3129 (concluding list of some 15 sources that courts should check with remark that "[h]aving considered all of these things, the federal judge will then decide the case"). Judge Wright recognized that "dangerously low morale" could result were he required to embark on an *Erie* analysis of any complex state issue. Wright, *supra* note 12, at 324. Another circuit judge has taken a more sanguine view of the *Erie* burden of ascertaining state law. *See* Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 Cornell L.Q. 1, 6 (1958). The escape from these burdens through abstention, whereby the court waits for the state's highest court to treat the issue in question, was shut off by an early post-*Erie* case, Meredith v. City of Winter Haven, 320 U.S. 228, 234, 237-38 (1943); *see* Cooper v.

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

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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).

100. "Manifest injustice" is the federal retroactivity analysis applied in civil appeals. *See supra* note 4.

101. 416 U.S. 696 (1974).

102. *Id.* at 698-99. Without any statutory authority to guide it, the district court invoked its general equity power to award attorney's fees to plaintiff-petitioners. Bradley v. School Bd., 53 F.R.D. 28, 33-34, 42-44 (E.D. Va. 1971), *rev'd en banc*, 472 F.2d 318 (4th Cir. 1972), *vacated and remanded*, 416 U.S. 696 (1974). The two previous appeals in the litigation, begun in 1961, concerned the validity of proposed "plans" to effect the desegregation of the Richmond, Virginia public schools. School Board v. Virginia State Bd. of Educ., 412 U.S. 92 (1973) (per curiam), *aff'g by an equally divided Court* 462 F.2d 1058, 1069 (4th Cir. 1972) (district judge lacked the power to order consolidation of neighboring districts under one plan); Bradley v. School Bd., 382 U.S. 103, 103-05 (1965) (per curiam) (remanding case for determination of whether racially based method of assigning teachers rendered desegregation plans inadequate).

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.[106] The presumption can be rebutted, however, by legislative history or express direction that the statute be applied prospectively.[107] Courts generally require that the

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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. 1 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, 268, 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 transcendent 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., 38 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).

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.[108] As in *Bradley*, these legislative sources rarely meet the requirement,[109] and courts consistently proceed to consider whether retroactivity would be manifestly unjust to one of the parties.[110]

The *Bradley* Court synthesized leading prior cases on retroactivity to arrive at three independent[111] "manifest injustice" factors: the

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'manifest injustice' exception to the new rule."). Despite *Bradley*'s presumption that statutory changes should be retroactive, some courts still adhere to the old rule presuming that statutory changes are prospective only. *E.g.*, Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 1079-80 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *In re* Reilly, 442 F.2d 26, 28 (7th Cir.), *cert. denied*, 404 U.S. 854 (1971). Other courts perceive "manifest injustice" as competing with the old presumption against retroactivity. *E.g.*, Iowa Power & Light Co. v. Burlington N., Inc., 647 F.2d 796, 805 & n.13 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1253 (1982). Some courts read *Bradley* as establishing a presumption of prospectivity. *See* Hospital Employees Labor Program v. Ridgeway Hosp., 570 F.2d 167, 169-70 (7th Cir. 1978); Weise v. Syracuse Univ., 522 F.2d 397, 411 (2d Cir. 1975).

108. Sikora v. American Can Co., 622 F.2d 1116, 1129 (3d Cir. 1980) (Adams, J., dissenting); *see* Eikenberry v. Callahan, 653 F.2d 632, 633 (D.C. Cir. 1981)(per curiam). A court at this branch of the analysis may make allowance for less than express legislative command. Gibbons v. Gibbons, 86 N.J. 515, 522-23, 432 A.2d 80, 84-85 (1981). Prior and contemporaneous amendments of the same statute are sometimes reviewed, with differing results. *Compare* Hastings v. Earth Satellite Corp., 628 F.2d 85, 92-93 (D.C. Cir.) (absence of provision barring retroactivity, where prior amendments included such provisions, is tantamount to direction for retroactivity), *cert. denied*, 449 U.S. 905 (1980), *with* Brown v. General Servs. Admin., 507 F.2d 1300, 1306 (2d Cir. 1974) (concurrently amended section of statute directing retroactivity does not mean that sections without such direction are to be applied prospectively), *aff'd*, 425 U.S. 820 (1976). Effective dates of an amendment are not deemed dispositive of the issue of the legislative intent on the retroactivity issue. Jensen v. Gulf Oil Ref. & Mktg. Co., 623 F.2d 406, 409 (5th Cir. 1980). If retroactivity is expressly called for, further analysis is unnecessary, *see* Weisenberger v. Huecker, 593 F.2d 49, 53 (6th Cir.), *cert. denied*, 444 U.S. 880 (1979); Monroe v. County Bd. of Educ., 583 F.2d 263, 264-65 (6th Cir. 1978) (per curiam), although the court may discuss the three "manifest injustice" factors to bolster its finding of retroactivity. *See* Republic Steel Corp. v. Costle, 581 F.2d 1228, 1233 (6th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); Bunch v. United States, 548 F.2d 336, 338-39 (9th Cir. 1977).

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

110. *E.g.*, *id.* at 711; Jensen v. Gulf Oil Ref. & Mktg. Co., 623 F.2d 406, 410-11 (5th Cir. 1980); Sikora v. American Can Co., 622 F.2d 1116, 1122 (3d Cir. 1980); United States v. Fresno Unified School Dist., 592 F.2d 1088, 1093 (9th Cir.), *cert. denied*, 444 U.S. 832 (1979); United States v. Hinds County School Bd., 560 F.2d 619, 622 (5th Cir. 1977); National Consumer Information Center v. Gallegos, 549 F.2d 822, 825-26 (D.C. Cir. 1977). Prior to *Bradley*'s formulation of the "manifest injustice" factors, a court might look to implicit indicia of legislative intent. *See* De Rodulfa v. United States, 461 F.2d 1240, 1247-48 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972).

111. *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); *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.[112] "Manifest injustice" analysis, as described in *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 *Bradley* synthesized,[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.[114] The issues contested in such a case are likely to be of "great national concern,"[115] and retroactivity is considered the most effective implementation of policies underlying the change in law.[116] The second factor, the nature of the rights of

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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 *Chevron* factors must support prospective application of change in law), *rev'd on other grounds*, 101 S. Ct. 2266 (1981).

112. 416 U.S. at 716-17.

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

114. *See* Bradley v. School Bd., 416 U.S. 696, 718 (1974); United States v. Schooner Peggy, 5 U.S. 64, 69, 1 Cranch 103, 110 (1801). A significant number of cases applying "manifest injustice" analysis have involved some governmental entity. *E.g.*, Lawrence v. Staats, 26 Fair Empl. Prac. Cas. (BNA) 1225, 1225 (D.C. Cir. Sept. 11, 1981) (per curiam) (General Accounting Office); Eikenberry v. Callahan, 653 F.2d 632, 633 (D.C. Cir. 1981) (per curiam) (former FBI official); Iowa Power & Light Co. v. Burlington N., Inc., 647 F.2d 796, 800 (8th Cir. 1981) (Interstate Commerce Commission), *cert. denied*, 102 S. Ct. 1253 (1982).

115. Bradley v. School Bd., 416 U.S. 696, 719 (1974) (citing United States v. Schooner Peggy, 5 U.S. 64, 69, 1 Cranch 103, 110 (1801)).

116. *See* Iowa Power & Light Co. v. Burlington N., Inc., 647 F.2d 796, 805 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1253 (1982). Aside from the school desegregation issue in *Bradley*, other "great national concerns" calling for retroactive application have been environmental control, *cf.* Republic Steel Corp. v. Costle, 581 F.2d 1228, 1233-34 (6th Cir. 1978) (retroactive application of Clean Water Act of 1977, Pub. L. No. 95-217, § 309(a)(5)(B), 91 Stat. 1566, 1593 (codified at 33 U.S.C. § 1319(a)(5)(B) (1976 & Supp. II 1978))), *cert. denied*, 440 U.S. 909 (1979), effective commerce, *cf.* Iowa Power & Light Co. v. Burlington N., Inc., 647 F.2d 796, 805 (8th Cir. 1981) (healthy railroad system a national concern), *cert. denied*, 102 S. Ct. 1253 (1982), the enforcement of civil rights, *e.g.*, Eikenberry v. Callahan, 653 F.2d 632, 636 (D.C. Cir. 1981) (per curiam); Fox v. Parker, 626 F.2d 351, 353 (4th Cir. 1980), and the elimination of discrimination in education, United States v. Hinds County School Bd., 560 F.2d 619, 622 (5th Cir. 1977), and elimination of discrimination on the basis of age, Sikora v. American Can Co., 622 F.2d 1116, 1131 (3d Cir. 1980) (Adams, J., dissenting); *see* Bunch v. United States, 548 F.2d 336, 338-40 (9th Cir. 1977), sex, United States v. Fresno Unified School Dist., 592 F.2d 1088, 1090, 1094 (9th Cir.), *cert. denied*, 444 U.S. 832 (1979), and physical handicap. *Cf.* C & P Tel. Co. v. Director, Office of Workers' Compensation Programs, 564 F.2d 503, 510, 512

the parties, becomes relevant only when a financial transaction defines the rights of the parties.[117] Thus, a change in law defeating expectations of funding or reimbursement is typically suited to prospective effect.[118] The retroactivity inquiry focuses on the third fac-

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(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).

117. *E.g.*, Jensen v. Gulf Oil Ref. & Mktg. Co., 623 F.2d 406, 413 (5th Cir. 1980) (pension plan); Sikora v. American Can Co., 622 F.2d 1116, 1122-23 (3d Cir. 1980) (same); National Consumer Information Center v. Gallegos, 549 F.2d 822, 826 (D.C. Cir. 1977) (funding of nonprofit organization); Coe v. Secretary of HEW, 502 F.2d 1337, 1340 (4th Cir. 1974) (medicare reimbursement). One criterion for assessment of whether rights have matured is the extent of a party's reliance on precedents. *See* Sikora v. American Can Co., 622 F.2d 1116, 1122-23 (3d Cir. 1980); Republic Steel Corp. v. Costle, 581 F.2d 1228, 1234 (6th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 567 F.2d 1174, 1179-80 (2d Cir. 1977). As for the reasonableness of the reliance, a court will examine the signals given by judicial and administrative interpretations of the law prior to its change. Jensen v. Gulf Oil Ref. & Mktg. Co., 623 F.2d 406, 411-13 (5th Cir. 1980). One party's rights might vest under the old law if the other party fails to take timely advantage of a subsequent change in law. *E.g.*, Arkoosh v. Dean Witter & Co., 571 F.2d 437, 438-39 (8th Cir. 1978) (per curiam) (party waiting for results of arbitration before asserting rights under new regulation voiding pertinent arbitration clauses); Grace Towers Tenants Ass'n v. Grace Hous. Dev. Fund Co., 538 F.2d 491, 496 (2d Cir. 1976) (dilatory prosecution by party standing to gain by retroactivity may argue for prospective application of change in law).

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.[119] 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.[120] 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.[121] 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).

119. Bradley v. School Bd., 416 U.S. 696, 720-21 (1974).

120. *See id.*

121. *See id.* at 720. If, however, the litigation is at an advanced stage at the time of the change in law and retroactive application of the change would require the relitigation of already litigated issues, then prospective application of the change is recommended. *See* Iowa Power & Light Co. v. Burlington N., Inc., 647 F.2d 796, 806 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1253 (1982); Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 567 F.2d 1174, 1180 n.6 (2d Cir. 1977); *cf.* Chevron Oil Co. v. Huson, 404 U.S. 97, 99, 108 (1971) (noting effect of change in law, though not occurring during appellate process, on advanced stage of litigation); Lawrence v. Staats, 26 Fair Empl. Prac. Cas. (BNA) 1225, 1226-27 (D.C. Cir. Sept. 11, 1981) (per curiam) (prospective effect given to prevent return to "square one"). *But cf.* Crouse-Irving Memorial Hosp. v. Axelrod, 82 A.D.2d 83, 86, 442 N.Y.S.2d 338, 340 (1981) (no injustice in requiring party "to appeal administratively in a case . . . pending for five years"). Consideration of the stage to which an adjudication has advanced is not new to retroactivity analysis. *See* Berkovitz v. Arbib & Houlberg, Inc., 230 N.Y. 261, 270, 130 N.E. 288, 290 (1921) (Cardozo, J.).

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

The advantage of "manifest injustice" analysis over *Erie* analysis lies in the nature of their respective factual determinations. Under

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Power Generation & Transmission Co., 646 F.2d 779, 783-84 (2d Cir. 1981) (intervening change in circumstances makes remand the appropriate appellate response). Changes in law that are naturally suited to retroactivity include changes in remedies or procedure. *See, e.g.*, Sampeyreac v. United States, 32 U.S. 140, 151, 7 Pet. 222, 239 (1833); Overseas African Constr. Corp. v. McMullen, 500 F.2d 1291, 1297 (2d Cir. 1974); *cf.* Bunch v. United States, 548 F.2d 336, 339-40 (9th Cir. 1977) (amendments to age discrimination statute do not create new rights but simply create new procedures and remedies to enforce preexisting right to be free from discrimination on basis of age). *But see* Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 1080-81 (D.C. Cir.) (retroactive application of change in procedure may be inappropriate at late stage of litigation), *cert. denied*, 429 U.S. 820 (1976), *cited with approval in* Lawrence v. Staats, 26 Fair Empl. Prac. Cas. (BNA) 1225, 1227 (D.C. Cir. Sept. 11, 1981) (per curiam). Other changes naturally suited to retroactivity include changes expressly aimed at correcting a prior erroneous interpretation of a statute by the reviewing court, *see* Coca-Cola Co. v. FTC, 642 F.2d 1387, 1390 (D.C. Cir. 1981); Republic Steel Corp. v. Costle, 581 F.2d 1228, 1231 (6th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979), and changes that extinguish or confer subject matter jurisdiction. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981); Eikenberry v. Callahan, 653 F.2d 632, 633 (D.C. Cir. 1981)(per curiam); United States v. Elrod, 627 F.2d 813, 819 (7th Cir. 1980). *But see* Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 790-91 (2d Cir. 1980) (Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.), not intended to confer jurisdiction in cases pending when enacted), *cert. denied*, 449 U.S. 1080 (1981); McSparren v. Weist, 402 F.2d 867, 876-77 (3d Cir. 1968) (rule abolishing "manufactured diversity jurisdiction" to have retroactive effect only if statute of limitations has not run), *cert. denied*, 395 U.S. 903 (1969). For an interesting treatment of these points, which is likely to be controverted, see Gager v. White, 53 N.Y.2d 475, 488-89, 425 N.E.2d 851, 856-57, 442 N.Y.S.2d 463, 468-69 (1981) (retroactive effect to be given Rush v. Savchuk, 444 U.S. 320 (1980), only respecting those defendants who contested the quasi-in-rem jurisdiction asserted over them under the discredited doctrine of Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966)). Changes in law naturally suited to prospectivity are those which create new substantive rights. On this theory, courts have generally given such effect to those provisions of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (1976)), which extended coverage of Title VII to previously exempt entities. *E.g.*, Monell v. Department of Social Servs., 532 F.2d 259, 261-62 (2d Cir. 1976) (prospective effect to municipalities' coverage), *rev'd on other grounds*, 436 U.S. 658 (1978); Weise v. Syracuse Univ., 522 F.2d 397, 410-11 (2d Cir. 1975) (prospective effect to abrogation of educational institutions' immunity). *Contra, e.g.*, Brown v. General Servs. Admin., 507 F.2d 1300, 1306 (2d Cir. 1974) (retroactive effect to federal employees' coverage), *aff'd*, 425 U.S. 820 (1976). *See generally* Hospital Employees Labor Program v. Ridgeway Hosp., 570 F.2d 167, 170 (7th Cir. 1978) (substitution of federal cause of action for state cause of action deemed an unforeseen obligation warranting prospective application). Changes in statutes of limitations that would leave a party with no legal means of redress invite prospective application. Chevron Oil Co. v. Huson, 404 U.S. 97, 108 (1971); Ralpho v. Bell, 569 F.2d 607, 616 n.51 (D.C. Cir. 1977); *cf.* Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 1080 (D.C. Cir.) (prospectivity saves litigation steps), *cert. denied*, 429 U.S. 820 (1976). *But see* Gager v. White, 53 N.Y.2d 475, 484, 487, 425 N.E.2d 851, 854, 856, 442 N.Y.S.2d 463, 466, 468 (1981) (problem of jurisdiction's constitutional infirmity outweighs limitations problem).

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,[123] 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

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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").