THE CONSTITUTIONALITY OF FEDERAL ABROGATION OF STATE CREATED RULES OF PRIVILEGE IN DIVERSITY CASES: PROPOSED FEDERAL RULE OF EVIDENCE 501

I. INTRODUCTION

As long as the jurisdiction of federal courts may be invoked on the basis of diversity of citizenship, there will exist difficult problems in delineating the precise point at which the constitutional[1] mandate of *Erie R.R. v. Tompkins*[2] ends and the power of Congress to provide for the orderly administration of justice in the federal judiciary begins. The recent promulgation by the Supreme Court of the Federal Rules of Evidence[3] raises a multitude of questions in this area.

This note constitutes an inquiry into the rather narrow question of the constitutionality of the treatment the Federal Rules of Evidence would give state created privileges in diversity cases.[4] The analysis found in Parts II and III herein is nevertheless quite relevant to the question of whether promulgation by the Court of rules relating to privileges is beyond the congressional grant of authority found in the Rules Enabling Act.[5] Part IV constitutes an attempt to show that, although privileges are substantive under the analysis submitted in Part II, Congress may constitutionally control rules of privilege in diversity cases if it so desires.

The Federal Rules of Evidence have, to be sure, encountered considerable difficulty in the Congress.[6] At the time of this writing, it is impos-

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[1] For the purposes of this note, it is assumed that the *Erie* doctrine has a constitutional basis. The debate as to whether this is so, and as to whether the tenth amendment is the constitutional basis, has been waged elsewhere. *See, e.g.*, the Friendly, Hill, and Keeffe articles, note 2 *infra.*

[2] 304 U.S. 64 (1938). At a minimum, the *Erie* doctrine incorporates a line of cases including Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Ragan v. Massachusetts Transfer & Warehouse Co., 337 U.S. 530 (1949); Byrd v. Blue Ridge Electric Co-op, Inc., 356 U.S. 525 (1958); Hanna v. Plumer, 380 U.S. 460 (1965). A comprehensive analysis of the *Erie* doctrine is beyond the purview of this article, but many such endeavors are present in the literature. *See, e.g.*, Stason, *Choice of Law Within the Federal System: Erie Versus Hanna*, 52 CORNELL L.Q. 377 (1967); McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884 (1964); Friendly, *In Praise of Erie and of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964); Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427, 541 (1958); Keeffe, *Weary Erie*, 34 CORNELL L.Q. 494 (1949); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946).

[3] Promulgated November 20, 1972, 56 F.R.D. 183, 184 (1972).

[4] The Rules purport to be applicable to all cases tried in federal court. *See* Advisory Committee's Note to Rule 501, 56 F.R.D. 183, 231-32 (1972). The focus of this note is upon those cases in which state law is the law of decision. These will be denominated "diversity cases" herein, although it is to be noted that state law has been held applicable in situations other than true diversity cases. *See* C. WRIGHT, FEDERAL COURTS § 60 (2d ed. 1970).

[5] 28 U.S.C. § 2072 (1970). Since the Act provides that rules promulgated pursuant to it "shall not abridge, enlarge or modify any substantive right," the conclusions reached in Parts II and III, that privileges are substantive and that *Hanna* does not save the Rules from attack, will, if correct, settle the issue relating to the Rules Enabling Act.

[6] *See, e.g.*, 31 CONG. Q. WKLY. REP. 340 (Feb. 17, 1973); 31 CONG. Q. WKLY. REP. 249 (Feb. 3, 1973).

sible to predict whether the Rules will become effective, and, if so, what they will finally include. Federal Rule of Evidence 501, as originally promulgated, will be utilized as a focal point to assist in the inquiry to which this note is directed. The Rule provides as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:
> (1) Refuse to be a witness; or
> (2) Refuse to disclose any matter; or
> (3) Refuse to produce any object or writing; or
> (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.[7]

Rule 501 would thus purport to abrogate in federal diversity actions any state created privileges[8] which are broader in scope[9] than those granted by the Rules.

The practical import of the issue at hand may readily be perceived by noting two of the changes which would occur should the Federal Rules of Evidence take effect. Federal Rule of Evidence 504 would permit, in the physician-patient area, only a privilege between a psychotherapist and his patient.[10] Rule 505 would eliminate the husband-wife privilege of confidential communications, retaining only the right of an accused in a criminal case to prevent his spouse from testifying against him.[11] To the extent that these and other Rules would destroy or limit in diversity cases privileges created by the states, the question arises whether the words of *Erie* are in point:

> Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general" . . . . And no clause in the Constitution purports to confer such a power upon the federal courts.[12]

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[7] 56 F.R.D. 183, 230 (1972).

[8] "Privileges," as the term is used herein, does not include the privilege against self-incrimination, which of course has its own constitutional provision in the fifth amendment. The Advisory Committee also excludes this privilege from its consideration, *see* Advisory Committee's Note to Rule 501, 56 F.R.D. 183, 230 (1972).

[9] Since Rule 501 itself is phrased in terms of narrowing permissible privileges, this note is written in terms of such an effect. The arguments herein respecting this narrowing effect nevertheless have comparable import in those few cases in which the Rules would enlarge an existing privilege; *e.g.*, F.R. Ev. 509 creates a privilege for the "secrets of state" of the federal government.

[10] F.R.Ev. 504(b): "A patient has a privilege to refuse to disclose and to prevent any other preson from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family."

[11] F.R.Ev. 505(a): "An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him."

[12] Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

II. THE PRE-RULES ANALYSIS

A. *Substantive or Procedural?*

The federal courts of appeals have on several occasions considered the nature of state created privileges under the *Erie* doctrine. Each time these courts have held the privileges to be substantive and thereby binding upon the federal courts under this doctrine.[13] The analysis in most circuits was perfunctory.[14] Only the Second Circuit appears to have carefully scrutinized the problem;[15] that court argued that the test of Professors Hart and Wechsler should be applied.[16]

The Hart and Wechsler formulation distinguishes between

> (a) those rules of law which characteristically and reasonably affect people's conduct at the stage of primary private activity and should therefore be classified as substantive or quasi-substantive, and (b) those rules which are not of significant importance at the primary stage and should therefore be regarded as quasi-procedural or procedural.[17]

Under such a test rules of privilege are substantive. The rationale for creating privileges includes a state interest in clothing certain relationships with legally recognized confidentiality.[18] Assuming that privileges actually fulfill this goal, they encourage persons involved in these favored relationships to speak more freely in the context of the relationships. Privileges thus do affect people's conduct at a "primary private activity" period. Numerous commentators have similarly concluded that rules of privilege are substantive in nature.[19]

The value of the Hart and Wechsler formulation of the substance-procedure dichotomy may be demonstrated by examining another test applied in this area. The Supreme Court, in the leading case *Hanna v.*

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[13] *But see* Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960), discussed in text accompany notes 31 and 75 *infra.*

[14] Hyde Construction Co. v. Koehring Co., 455 F.2d 337 (5th Cir. 1972); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); Palmer v. Fisher, 228 F.2d 603 (7th Cir. 1955); Rager, Inc. v. Equitable Life Assur. Soc., 196 F.2d 968 (6th Cir. 1952).

[15] Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551 (2d Cir. 1967); Massachusetts Mutual Life Ins. Co. v. Brei, 311 F.2d 464 (2d Cir. 1962).

[16] Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555 n.2 (2d Cir. 1967); Massachusetts Mutual Life Ins. Co. v. Brei, 311 F.2d 464, 466 (2d Cir. 1962).

[17] H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 678 (1953).

[18] *See* text accompanying note 63, *infra.*

[19] *See, e.g.*, Ladd, *Uniform Evidence Rules in the Federal Courts*, 49 VA. L. REV. 692, 714 (1963); Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction*, 56 COLUM. L. REV. 535, 545-46 (1956); Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 102-09 (1956); Green, *The Admissibility of Evidence Under the Federal Rules*, 55 HARV. L. REV. 197, 208-09 (1941). These articles all antedate *Hanna* and thus do not include the authors' thoughts on the possible impact of that decision upon federal intervention in the privilege area. *See* the discussion in Part III *infra.*

Plumer,[20] recently borrowed a definition of procedure from *Sibbach v. Wilson & Co.*,[21] a case almost as old as *Erie* itself:

> [Procedure is] the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.[22]

The difficulty with such a formulation is that a narrow question relating to the substance-procedure dichotomy, such as that evoked by rules of privilege, does not fit well within the test. Privileges, as will be discussed in more detail later,[23] arise from an effort by a legislature or common law court to clothe certain relationships with confidentiality. Thus it is at least arguable that recognition within a jurisdiction of a privilege creates, as a matter of the substantive law of that jurisdiction, an aura of confidentiality surrounding the privileged relationship. Under this analysis, when a privilege is invoked at trial there may thus be two separate elements of substantive law involved: the privileged relationship, and, for example, the tort claim for which the suit was brought. How, then, shall the *Sibbach* test be applied? From the point of view of the tort claim, the privilege is merely part of the "judicial process for enforcing rights and duties recognized by the substantive [tort] law" of the jurisdiction. But from the point of view of the privileged relationship, the privilege is itself one of the rights recognized by the substantive law of the jurisdiction. Depending entirely upon the perspective of the inquiry, then, a rule of privilege is, or is not, procedural under the *Sibbach* test.

It is interesting at this point to examine the argument proffered by the Advisory Committee relating to rules of privilege and the substance-procedure dichotomy. Against the overwhelming weight of authority indicating that such rules are substantive, the Committee reasons as follows:

> As to the question of "substance," it is true that a privilege commonly represents an aspect of a relationship created and defined by a State. . . . However, in litigation involving the relationship itself, the privilege is not ordinarily one of the issues. . . . The reality of the matter is that privilege is called into operation, not when the relation giving rise to the privilege is being litigated, but when the litigation involves something substantively devoid of relation to the privilege. The appearance of privilege in the case is quite by accident, and its effect is to block off the tribunal from a source of information. Thus its real impact is on the method of proof in the case, and in comparison any substantive aspect appears tenuous.[24]

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[20] 380 U.S. 460 (1965).

[21] 312 U.S. 1 (1941).

[22] Hanna v. Plumer, 380 U.S. 460, 464 (1965), *quoting from* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

[23] *See* text accompanying note 63 *infra*.

[24] Advisory Committee's Note to Rule 501, 56 F.R.D. 183, 233 (1972). The Committee offers the argument as a "significant policy factor," not a constitutional argument, since the Committee earlier assumes that *Hanna* settles the constitutional questions. *See* text accompanying note 61 *infra*.

This cryptic statement does not lend itself to ready analysis, but at least two observations should be made regarding it.

First, the Committee may be falling into the trap of the *Sibbach* test when it argues that the "real impact" of a privilege is on the "method of proof in the case." Again, from the perspective of the claim being litigated in the case, the privilege may appear to be merely a procedural tool. But to state the label, "method of proof," is to state the conclusion; such terminology is singularly unhelpful in the substance-procedure inquiry. The "real impact" of a rule of privilege is as much upon the extra-judicial confidential relationship sought to be protected by the privilege as it is upon the particular trial at which the privilege is invoked.

Second, the Committee emphasizes the fact that a rule of privilege is ordinarily not applied when the litigation involves the confidential relationship itself and that it, therefore, must be procedural. The attorney-client privilege, for example, is not created by the state to protect the client from a later action by the attorney for services rendered. The state in effect balances the need for the privilege against the need of the attorney to recover and decides in favor of the latter.[25] But of what relevance to the substance-procedure inquiry is this exception to the application of rules of privilege? The fact that a state must balance one substantive provision against another, and that it decides in favor of the latter, does not make the former any less substantive in nature. Otherwise, a decision by the state that privilege may be invoked in a suit by an attorney for services rendered would relegate the law of contracts to the domain of procedure. Nor may it be said that the state interest in promoting confidential relationships is limited to cases in which those relationships are the subject of litigation; these are the very cases in which the state, as the Committee notes, tends not to permit the application of rules of privilege. The argument which the Committee offers in the face of substantial authority is, at best, unpersuasive.

B. *State Created Privileges under Rule 43(a)*

Assuming, then, that state created privileges are substantive, is evidence so privileged nevertheless admissible in a diversity case under the present federal evidence rule, Federal Rule of Civil Procedure 43(a)? The Rule is phrased in terms of admissibility, not exclusion, and provides two grounds other than state law upon which evidence may be admitted.[26] Conceivably, if these two alternative grounds of admissibility had sufficient

[25] *See* C. MCCORMICK, EVIDENCE 91 (2d ed. 1972).

[26] F.R. CIV. P. 43(a) provides, in part, as follows:

> All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs. . . .

thrust, Rule 43(a) itself would provide a means of circumventing state created privileges and the constitutional issues discussed in this note would have arisen long before Federal Evidence Rule 501 came upon the scene.

The two alternative grounds of admissibility under Rule 43(a) have no such thrust. The first ground, relating to evidence otherwise admissible under federal statute, invokes no statutes applicable in the privilege area.[27] The second ground, relating to evidence admissible "heretofore" in federal courts sitting as courts of equity, is similarly unhelpful. One commentator has argued that the practice "heretofore" was simply to follow the state rules,[28] while another has concluded that the practice "heretofore" is no longer discernible.[29]

The practice in federal courts to date, as noted earlier,[30] has been to hold rules of privilege binding upon federal courts. The United States Court of Appeals for the Fifth Circuit, in *Monarch Insurance Co. v. Spach*,[31] did avoid application of a state exclusionary rule[32] by application of the second element of Rule 43(a), but, as Professor Wright has observed,[33] the refusal of the court of appeals to apply the state rule in *Spach* actually enhanced the state policy underlying the rule. The Fifth Circuit has, in a recent case, summarily applied a state created privilege.[34]

To the extent that a rule such as Federal Rule of Evidence 501 would purport to alter the federal practice, grounded upon the *Erie* doctrine, of honoring state created rules of privilege, serious constitutional issues arise. One question which arises at this point is whether the dictum of *Hanna v. Plumer*[35] would save such a rule from constitutional attack.

III. THE IMPACT OF HANNA

A. *The Hanna Decision*

It might be expected that the constitutional doubts surrounding any purported federal displacement of state created privileges would not vanish simply by virtue of the context of the federal entry into the field. Nev-

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[27] "Here the practitioner will receive little aid except from the statutes prescribing how proof of public records may be made, and the federal 'shop-book' statute, 28 USC § 1732." 5 J. MOORE, FEDERAL PRACTICE ¶ 43.04, at 1332 (2d ed. 1971) (footnotes omitted).

[28] 5 J. MOORE, FEDERAL PRACTICE ¶ 43.07, at 1356 (2d ed. 1971).

[29] Pugh, *Rule 43(a) and the Communication Privileged Under State Law: An Analysis of Confusion*, 7 VAND. L. REV. 556, 569 (1954).

[30] *See* cases cited in notes 14 and 15 *supra.*

[31] 281 F.2d 401 (5th Cir. 1960). This case is discussed in more detail in the text accompanying note 75 *infra.*

[32] Although the state statute discussed in *Spach* did not actually create a privilege, the Fifth Circuit treated it as such. *See* note 76 *infra.*

[33] C. WRIGHT, FEDERAL COURTS 414 (2d ed. 1970). *See* Monarch Insurance Co. v. Spach, 281 F.2d 401, 412-13 (5th Cir. 1960).

[34] Hyde Construction Co. v. Koehring Co., 455 F.2d 337, 340 (5th Cir. 1972).

[35] 380 U.S. 460 (1965).

ertheless, the Advisory Committee,[36] Professor Wright,[37] and others[38] would appear to argue that the fact that the Federal Rules of Evidence will take effect, if at all, in the same manner as did the Federal Rules of Civil Procedure obviates any constitutional difficulties with the new rules. Citing the leading case *Hanna v. Plumer*,[39] these authorities submit that any rules in effect by virtue of "the triumvirate"[40] are constitutional. Others caution that *Hanna* may not be so broad a grant of authority.[41]

In *Hanna* the defendant in a diversity case, while conceding that service of process by the plaintiff was sufficient to satisfy Federal Rule of Civil Procedure 4(d)(1), argued that the more restrictive state service rule was substantive in nature and therefore should control under the *Erie* doctrine. The United States Court of Appeals for the First Circuit agreed with the defendant's argument that the Massachusetts rule requiring personal service of process upon an executor within one year after he had posted bond served substantive state goals and therefore governed in the case.[42] The Supreme Court based its reversal upon two separate but related modes of analysis.

Under its first mode of analysis, the Court decided that upon the facts of *Hanna*, service of process was procedural, not substantive. The Court was at this point concerned that Rule 4(d)(1) be within the Enabling Act's admonition that rules promulgated by the Court not "abridge, enlarge or modify any substantive right."[43] Using the test of *Sibbach v. Wilson & Co.*[44] to separate substance from procedure, the Court found the rule to be within the Act. The Court went on to say that it was "doubtful" that, under *Erie*, the Massachusetts rule would govern.[45] Later still the Court observed that

> it is difficult to argue that permitting service of defendant's wife to take the place of in-hand service of defendant himself alters the mode of enforce-

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[36] Advisory Committee's Note to F.R. Ev. 501, 56 F.R.D. 183, 232-33 (1972).

[37] Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 572-74 (1967). Professor Wright in this article argues against the entry of the federal government into the privilege area but accepts *Hanna* as alleviating any constitutional problems in such an entry.

[38] *See, e.g.*, Stason, *Choice of Law Within the Federal System: Erie Versus Hanna*, 52 CORNELL L. Q. 377 (1967); McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884 (1965).

[39] 380 U.S. 460 (1965).

[40] That is, the Advisory Committee, the Supreme Court, and Congress.

[41] *See, eg.*., Siegel, *The Federal Rules in Diversity Cases: Erie Implemented, Not Retarded*, 54 A.B.A.J. 172 (1968); Knowlton, *The Impact of Erie Upon the Federal Rules*, 17 S. C. L. REV. 480, 485-86 (1965); Note, 20 STAN. L. REV. 1281, 1284-86 (1968); Note, 42 N.Y.U.L. REV. 1139, 1151-52 (1967).

[42] Hanna v. Plumer, 331 F.2d 157, 159 (1st Cir. 1964), *rev'd*, 380 U.S. 460 (1965).

[43] Rules Enabling Act, 28 U.S.C. § 2072 (1970).

[44] 312 U.S. 1 (1941).

[45] 380 U.S. at 466-67.

> ment of state-created rights in a fashion sufficiently "substantial" to raise the sort of equal protection problems to which the Erie opinion alluded.[46]

It is clear that at this point the Court had resolved the *Hanna* dispute; the Court had twice indicated that an *Erie* problem does not exist in the case, because the rule is procedural. Yet, the Court went on in several paragraphs to provide the dictum which has led many to assume the per se constitutionality of all federal rules.

Under its second mode of analysis, described herein as the *Hanna* dictum, the Court indicated that the *Erie* doctrine is not the appropriate test to apply to a challenged Federal Rule of Civil Procedure[47] and continued with this oft-quoted language:

> When a situation is covered by one of the Federal Rules [of Civil Procedure], the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question trespasses neither the terms of the Enabling Act nor constitutional restrictions.[48]

It is with the support of this language that the Advisory Committee may make the following bold statement:

> [T]he [new federal evidence] rules avoid giving state privileges the effect *which substantial authority has thought necessary and proper.* Regardless of what might once have been thought to be the command of [*Erie*] as to observance of state created privileges in diversity cases, [*Hanna*] is believed to locate the problem in the area of choice rather than necessity.[49]

B. *On Limiting Hanna*

If the *Hanna* dictum were so broad as some would have us believe,[50] there would be little purpose to the present article; the sole question these authorities would raise is whether a rule were in effect as a federal rule. In fact, if *Hanna* is so broad as one commentator argues,[51] *Erie* itself has been overruled, so that there is little with which to attack a rule such as Rule 501 in the first place. It is submitted that these readings of the *Hanna* dictum are too expansive and that *Hanna v. Plumer*, insofar as it relates to the Federal Rules of Evidence, should be read with several limiting factors in mind.

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[46] *Id.* at 469 (footnotes omitted).

[47] *Id.* at 469-70.

[48] *Id.* at 471 (footnotes omitted).

[49] Advisory Committee's Note to Rule 501, 56 F.R.D. 183, 232-33 (1972) (emphasis supplied).

[50] *See* the authorities cited in notes 36 through 38 *supra.*

[51] *See* Stason, *Choice of Law Within the Federal System: Erie Versus Hanna*, 52 CORNELL L.Q. 377 (1967).

First, and perhaps most obvious, it should be remembered that the *Hanna* Court was concerned with the Federal Rules of Civil Procedure, not the Federal Rules of Evidence. The differences between the two are twofold. The Federal Rules of Civil Procedure had been in existence for over a quarter of a century at the time *Hanna* was decided. The Federal Rules of Evidence, on the other hand, are a fresh and untested venture into a field previously left largely to state law. The Civil Rules thus command a degree of respect which the Rules of Evidence will attain, if ever, only after a number of years of use in the federal courts. The other major distinction between the two sets of rules is that by the time of *Hanna* many of the states themselves had stamped the Civil Rules with their approval by adopting the Rules in whole or in part;[52] no such claim may be made at this time regarding the Federal Rules of Evidence. Thus both the age of the Civil Rules and their acceptability to the states may have made the talk in *Hanna* of prima facie constitutionality rather cheap. Such language in connection with the fledgling evidence rules would be another thing entirely.

The second factor to be kept in mind in applying *Hanna* to the Federal Rules of Evidence is that if the *Hanna* dictum is read literally it runs counter to a long-standing rule of constitutional interpretation, that of avoidance of premature and unnecessary decisions.[53] Two of the evils usually associated with such decisions are lack of lower court decisions on the matter and lack of specific fact patterns on which to decide the constitutional issues. Both of these evils exist if the *Hanna* dictum is read to "constitutionalize" anything appearing in the Federal Rules of Evidence. Such an interpretation would mean that the promulgation of federal rules is actually the writing of a textbook on constitutional law, delineating with a single stroke of the pen constitutional boundaries heretofore undefined. The Court has repeatedly refused to permit such premature and unnecessary decisions,[54] and there is no reason, except the unfortunate language in *Hanna*, to assume it intends to retreat from this principle.[55]

The third, and perhaps most important, factor to be kept in mind in applying the *Hanna* dictum to the Federal Rules of Evidence is that it is

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[52] *See, e.g.*, INSTITUTE OF JUDICIAL ADMINISTRATION, FEDERAL RULES OF CIVIL PROCEDURE—IMPACT ON STATE PROCEDURE (A PRELIMINARY SURVEY) (1962); Silverstein, *Adoption of the Federal Rules of Discovery in State Practice*, 11 KAN. L. REV. 213 (1962).

[53] *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). *See also* Baker v. Carr, 369 U.S. 186 (1962); United Public Workers v. Mitchell, 330 U.S. 75 (1947); Muskrat v. United States, 219 U.S. 346 (1911). *See also* Bernard, *Avoidance of Constitutional Issues in the United States Supreme Court: Liberties of the First Amendment*, 50 MICH. L. REV. 261 (1951); Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

[54] *See* cases cited in note 53, *supra.*

[55] Again, it may be that in the context of dealing with the Federal Rules of Civil Procedure the Court was more willing to abandon this principle than it would be in the context of newly promulgated, untested rules.

tied inextricably to the substance-procedure dichotomy. Not only did the Court first decide the issue in *Hanna* on the grounds of this dichotomy,[56] but the Court plainly founded its dictum upon the same:

> For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate *matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.*[57]

The *Hanna* dictum retains the distinction between substance and procedure, and if rules of privilege are not "rationally capable of classification as either," *Hanna* is of no help whatever in supporting the constitutionality of a rule such as Rule 501.

The obvious rejoinder to this observation is that, since the Advisory Committee, the Court, and Congress are comprised of rational men, the Rules, as a joint effort of these groups, must be rationally capable of classification as substantive or procedural.[58] The fallacy in this argument is that it assumes that each of the elements of the "triumvirate" will examine carefully each of the proposed rules from the perspective of whether it is procedural. There is little to suggest that this examination actually occurs. Mr. Justice Douglas, in dissenting from the November 20, 1972, order promulgating the Rules, made the following observations:

> [T]his Court does not write the Rules, nor supervise their writing, nor appraise them on their merits, weighing the pros and cons. The Court concededly is a mere conduit. Those who write the Rules are members of a Committee named by the Judicial Conference. The members are eminent; but *they are the sole judges of the merits of the proposed Rules, our approval being merely perfunctory.* In other words, we are merely the conduit to Congress.[59]

If the members of the Advisory Committee are the "sole judges of the merits of the proposed Rules," it would appear from the Committee's Note to Rule 501 that the Committee has ill-performed its duty respecting the *Hanna* procedural-substantive determination. The Committee, in its only reference to *Hanna* in that Note, makes the following statement:

> Regardless of what might once have been thought to be the command of [*Erie*] as to observance of state created privileges in diversity cases, [*Hanna*] is believed to locate the problem in the area of choice rather than necessity.[60]

This hardly fulfills the *Hanna* expectation that members of the Advisory

[56] *See* the text accompanying notes 43 through 46, *supra.*

[57] 380 U.S. 460, 472 (1965) (emphasis supplied).

[58] *See* Hanna v. Plumer, 380 U.S. 460, 476 (1965) (Harlan, J., concurring).

[59] 56 F.R.D. 183, 185 (1972) (emphasis supplied).

[60] Advisory Committee's Note to F.R. Ev. 501, 56 F.R.D. 183, 232-33 (1972).

Committee, functioning in their capacity as reasonable men, would decide that the Rules are rationally capable of classification as procedural. Rather, it appears from this statement that the Committee read *Hanna* to grant them sweeping authority to write rules of evidence *regardless* of whether the Committee considered them procedural or substantive. Put briefly, if the Committee did not seriously consider whether Rule 501 is capable of classification as procedural, the *Hanna* dictum is not supportive of the Rule's constitutionality.

Against this it might be argued that the Committee, as seen earlier in this note,[61] did proffer an argument that state created privileges are not substantive. The Committee, however, submits this argument only *after* deciding that *Hanna* makes the Committee's decision on the matter a "problem of choice rather than necessity." Furthermore, the argument is submitted by the Committee as a "significant policy factor" in the Committee's choice, not as an argument of constitutional dimensions under *Hanna*. Finally, the argument which the Committee does make is, as has been argued herein,[62] somewhat less than compelling, even under a test of rationality.

The considerations listed above are an indication that *Hanna* writes less than a blank check in the area of the constitutionality of rules created by the "triumvirate." It is not submitted here that Rule 501 would in fact be unconstitutional, but rather that a constitutional challenge to the Rule would not simply evaporate upon the murmuring of the words "*Hanna v. Plumer*." The balance of this note will be devoted to an effort to show, in a manner other than mere reliance upon the *Hanna* dictum, the constitutionality of federal control of privileges recognized in diversity cases.

IV. An Argument in Support of the Constitutionality of Federal Control of Rules of Privilege in Diversity Cases

A. *The Unique Nature of Rules of Privilege*

It is submitted that the conclusion that rules of privilege are substantive does not settle the issue of whether federal control of rules of privilege in diversity cases is constitutional. By examining the nature of rules of privilege and thereby discovering the substantial interest which any system of justice has in whether it shall recognize such privileges, it may be demonstrated that the interest of the federal government in the administration of justice by the judiciary which it has created outweighs even the interests of federalism which lie at the heart of the *Erie* doctrine.

It is at the outset crucial to note the justification commonly given for the creation of rules of privilege. The standard rationale is that a given

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[61] *See* text accompanying notes 24 and 25 *supra*.

[62] *Id.*

legislature or common law court, in creating a privilege, has balanced the value of providing a particular relationship with legally recognized confidentiality against the value of having a full disclosure of evidence in any given case and has decided in favor of providing confidentiality.[63] Clearly, such a decision concerning this "privilege trade-off" has significant ramifications upon the integrity of the court system involved. The more privileges recognized by a court system and the broader the scope accorded those privileges, the greater potentiality for individual injustice in the trial courts of that system.

Viewed in this light, rules of privilege differ significantly from other rules of evidence. The hearsay rule, the exceptions to the hearsay rule, the firsthand knowledge rule, the best evidence rule, and virtually all the other commonly recognized rules of evidence have evolved as attempts to ensure that the trier of fact will have the most reliable evidence before it when resolving a dispute. These evidentiary rules exist to *promote* a fair resolution of the issues at trial, not to deny such a resolution in the name of a "higher" concern. One parallel in the evidentiary field to rules of privilege is the exclusionary rule applied in criminal cases when evidence has been obtained unconstitutionally by the state. The criticisms which have been leveled of late at the exclusionary rule[64] are some indication of the problems which arise when a judicial system recognizes rules of evidence grounded upon a concern other than that of a fair and truthful resolution of the issues at trial.

Nor is the privilege trade-off decision the same, in kind or degree, as other decisions which, although made by the states, have been held to be binding upon the federal courts under the *Erie* doctrine. For example, both the question of whether strict liability in tort is available in a diversity case and the question of whether to apply state statutes of limitation in diversity cases have been held to fall within the dictates of *Erie*.[65] A ques-

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[63] *See, e.g.*, McMann v. SEC, 87 F.2d 377, 378 (1937) (Learned Hand, J.); 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961); Barnhart, *Theory of Testimonial Competency and Privilege*, 4 ARK. L. REV. 377 (1950); McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447 (1938).

The fact that the Advisory Committee performed such a balancing test is evident from the following statement by a member of the Committee:

> [I]f a modern trial is to be in fact a diligent search for truth, with full disclosure of all facts both beneficial and adverse, then there is real doubt whether any privilege to hide the truth should be recognized. Those privileges which remain in the proposed Rules reflect Committee judgment that in some instances the public good is better served by recognizing the transcendant need for confidentiality.

Spangenberg, *The Federal Rules of Evidence—An Attempt at Uniformity in Federal Courts*, 15 WAYNE L. REV. 1061, 1073 (1969).

[64] *See, e.g.*, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Burger, C.J. dissenting).

[65] The question of whether to apply strict liability in tort is a substantive one and is governed by the *Erie* doctrine. *See, e.g.*, Greeno v. Clark Equipment Co., 237 F. Supp. 427, 429-30 (N.D. Ind. 1965). State statutes of limitation have been held to control in diversity cases. *See, e.g.*, Ragan v. Massachusetts Transfer & Warehouse Co., 337 U.S. 530 (1949); Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945).

tion of substantive law, such as whether strict liability in tort exists in a given jurisdiction, relates to what claims are to be recognized. Rules of privilege, on the other hand, relate to what claims, otherwise worthy under the law of the jurisdiction as defined by the lawmakers of that jurisdiction, a party may be able to establish in the individual case. The distinction runs to the heart of the integrity of any judicial system recognizing privileges; on the one hand the litigant is told that he has no recognizable legal claim or defense, while on the other he is told that he has such a claim or defense but simply may not be able to prove it.

The question of the applicability of state statutes of limitation in diversity cases is also distinguishable from the privilege trade-off decision. Statutes of limitation are the result of a legislative balancing of the need to terminate civil liability at some point in time against the right to recover. The difference between this trade-off and the privilege trade-off is that statutes of limitation generally provide the litigant with room to work within their framework, while rules of privilege bar the litigant's right to recover regardless of his own actions. Since the litigant against whom the privilege is invoked may not avoid its application, rules of privilege should be of greater concern to a judicial system than statutes of limitation.

B. *Federal Power to Control Rules of Privilege in Federal Courts*

The above discussion tends to show the unique significance of rules of privilege to any judicial system which recognizes them. Against this background, the question of the degree of control of the federal government over the federal judicial system may be examined. To do this, it is helpful to turn to another Supreme Court decision.

Byrd v. Blue Ridge Rural Electric Co-op[66] was a workman's compensation case arising under a South Carolina statute and reaching federal court as a diversity case. The Supreme Court held that the issue of fact relating to the defense of the electric cooperative, although clearly one for the court under state law, must nevertheless be submitted to the jury since the action was brought in federal court.[67] While expressly declining to ground its decision upon the seventh amendment,[68] the Court indicated that the "federal system is *an independent system for administering justice* to litigants who properly invoke its jurisdiction."[69] Further, the Court found a "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts."[70] The *Byrd* case is thus authority for the proposition that an independent interest of the federal

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[66] 356 U.S. 525 (1958).

[67] *Id.* at 533-40.

[68] *Id.* at 537 n.10.

[69] *Id.* at 537 (emphasis supplied).

[70] *Id.* at 538.

court system may be invoked in a diversity case to avoid a state policy of less than constitutional dimensions.

The privilege trade-off arguably has a greater impact upon the integrity of the federal judicial system than has the judge-jury relationship protected in *Byrd*. The Court in *Byrd* noted numerous factors at work in the federal system which greatly increased the chances that the result of the litigation would be the same whether the fact issue were submitted to the judge or to the jury.[71] The privilege trade-off, on the other hand, is an overt decision accepting the probability that the application of rules of privilege to some cases will cause a result opposite the one which would occur had all relevant facts been divulged at trial. In a system of jurisprudence which places a high value upon the accurate resolution of disputed facts, privileges are thus more central to the integrity of the judicial system than is the judge-jury relationship. In the sense of the relative import, as regards the fact-finding process, of privileges vis-à-vis the judge-jury relationship, *Byrd* is strong authority for finding a federal power to abrogate state created privileges in diversity cases.

The *Byrd* decision is at most only analagous to the privilege question, however. The *Byrd* question of whether the fact issue in that case was to be determined by the court or by the jury was not substantive in the sense that term has been used in this note;[72] *Byrd* was not, therefore, a decision which gave rise to *Erie* considerations. Privileges, it has been argued herein, *are* substantive and therefore fall, initially at least, within the *Erie* doctrine.

Assuming, as was assumed earlier in this note,[73] that *Erie* was a constitutional decision, the question of federal control of privileges in diversity cases nevertheless remains open if an independent constitutional ground exists to permit such control. It is here submitted that the power of Congress to administrate the federal court system, a power which flows naturally from the constitutional grant of authority to Congress to create such a system,[74] constitutes such a ground. The unique nature of rules of privilege, as indicated earlier, relates to the peculiarly significant impact which such rules have upon the integrity of the judicial system which recognizes them. The constitutional power of Congress to administrate the federal judiciary, while not negativing the dictates of *Erie* in the broad sense, should serve to control in a matter which relates so significantly to the integrity of the federal judicial system. The problem of competing constitutional concerns in this area is rather easily resolved if the constitutional basis of *Erie* is the tenth amendment, since that amendment reserves to the states only those powers not expressly delegated the federal

[71] *Id.* at 540.

[72] *See* text accompanying notes 13 through 25 *supra.*

[73] *See* note 1 *supra.*

[74] U.S. CONST. art. I, §8, cl. 9.

government. If *Erie* is based upon a constitutional provision other than the tenth amendment, it would be necessary to balance that other provision against the article I power of Congress in order to resolve the question raised by this analysis of the import of rules of privilege.

After *Byrd* was decided the Fifth Circuit was faced with a problem in many ways similar to the one at hand. In *Monarch Insurance Co. v. Spach*[75] the Court of Appeals confronted the question of whether, under Federal Rule of Civil Procedure 43(a), evidence was admissible in a diversity case even though expressly barred by a statute of the state whose law controlled the decision. The Florida statute in question prohibited the admission of a written statement given by an injured person unless at the time the statement was taken the declarant was provided a copy thereof.[76] Relying heavily upon the *Byrd* decision, the Court of Appeals decided that the federal interests countervailing the state interests should govern. Judge Brown reasoned,

> Not the least of these countervailing considerations is the indispensible necessity that a tribunal, if it is to be an independent court administering law, must have the capacity to regulate the manner by which cases are to be tried and facts are to be presented in the search for the truth of the cause. . . . A United States District Court clothed with a power by Congress pursuant to the Constitution is not a mere adjunct to a state's judicial machinery.[77]

The Fifth Circuit thus found in the federal courts themselves a power to override state rules of privilege.[78] If Rule 501 ever takes effect under the authority of Congress, such an argument will be strengthened.

IV. Conclusion

It has been argued herein that state created rules of privilege, although substantive under the *Erie* doctrine, are of such a nature as to have peculiarly significant ramifications upon the administration of justice in the federal court system and may therefore be controlled by Congress under its constitutional authority to create that system. The Congress, as the constitutional guardian of "an independent system for administering justice to litigants who properly invoke its jurisdiction,"[79] ought not be forced

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[75] 281 F.2d 401 (5th Cir. 1960).

[76] FLA. STAT. ANN. § 92.33 (1959). Although the Florida statute did not create a rule of privilege per se, the court of appeals noted that the policy of the statute was "like that of a confidential privilege," *id.* at 412, and treated the statute as if it created a substantive right under Florida law.

[77] 281 F.2d at 407. The court went on to admit the evidence under the "courts of equity" element of F.R. Civ. P. 43(a); *see* text accompanying note 31 *supra.*

[78] The Second Circuit, citing *Byrd*, has alluded to such an inherent power in the federal courts. Massachusetts Mutual Life Insurance Co. v. Brei, 311 F.2d 463, 466 n.5 (2d Cir. 1962). The limits of relying upon the *Spach* decision have been noted earlier. *See* text accompanying notes 33 and 34 *supra.*

[79] Byrd v. Blue Ridge Rural Electric Co-op, 356 U.S. 525, 537 (1958).

by another constitutional provision to accept the dictates of the states in this unique situation. The hand of *Erie* should not reach so far.

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