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The Repressible Myth of Shady Grove

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THE REPRESSIBLE MYTH OF *SHADY GROVE*

*Kevin M. Clermont**

This Article untangles the effects of the Supreme Court's latest word on the Erie *doctrine, by taking the vantage point of a lower court trying to uncover the logical implications of the Court's new pronouncement. First,* Shady Grove *lightly confirms the limited role of constitutional constraints. Second, it sheds only a little light on judicial choice-of-law methodology. Third, by contrast, it does considerably clarify the conflict between Federal Rules and state law: if a Rule regulates procedure, then it is valid and applicable without exception in all federal cases, to the extent of its coverage; in determining the Rule's coverage, federal courts should, when alternative readings are defensible, read it to minimize its intrusion on substantive rights (that is, they should construe a Rule in a fashion that includes considering the impact on the generalized congressional and state interests in regulating substance, but they should not adopt a narrowed construction just to avoid conflict with the state's interests peculiarly in play in the particular situation presented by the case at bar). In the end,* Shady Grove *has not fundamentally altered* Erie*, but it mercifully makes the current interpretation more comprehensible.*

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* Ziff Professor of Law, Cornell University. I especially want to thank Earl Doppelt '77 for research help rendered decades ago on *Erie*, and Haijing Bai '12 and Andy Orr '12 for help in bringing the subject up to date. For very useful comments on this Article, I also thank Joe Bauer, Mike Dorf, Allan Ides, Tom Rowe, Adam Steinman, and Cathie Struve. Finally, I dedicate this Article to Benjamin Kaplan, a great man.

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INTRODUCTION

Endless writing on the subject of the *Erie*[1] doctrine has produced strikingly little agreement. One of the few undisputed points is oddly this: the most influential article ever written on the subject was John Hart Ely's *The Irrepressible Myth of* Erie.[2] In the latest word of the Supreme Court on the topic, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[3] his classic article was one of only two *Erie* articles

1 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

2 John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974); *see* Darrell N. Braman, Jr. & Mark D. Neumann, *The Still Unrepressed Myth of* Erie, 18 U. BALT. L. REV. 403, 405 (1989) (describing "Ely's seminal article" as "an article that is widely regarded as the definitive examination of the *Erie* doctrine"); Robert J. Condlin, *"A Formstone of Our Federalism": The* Erie/Hanna *Doctrine and Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 476–77 (2005) (noting judges' treatment of Ely's article as a "shrine of our federalism" and calling the article the "best English translation" of *Erie*).

3 130 S. Ct. 1431 (2010). In *Shady Grove*, the plaintiff sought to recover interest due by state statute for late payment of insurance benefits, doing so by means of a federal class action—thereby trying to join its individual claim for about $500 with many others to create a single diversity action for more than five million dollars. *See*

cited in the Justices' opinions and the only one cited more than once.[4]

In that article, focusing exclusively on the corner of federal actions based on diversity jurisdiction,[5] but being in a special position to perceive the lessons of the recent *Hanna v. Plumer*[6] case, Professor Ely brilliantly dissected the hitherto amorphous unity that had been the *Erie* doctrine. He saw it to pose a set of three distinct questions arising under the Constitution, the Rules of Decision Act (RDA),[7] and the Rules Enabling Act (REA)[8]—concerning, respectively, the Congress's power to make the vertical choice of state or federal law, the federal courts' choice of law when unguided by statute or Rule, and those courts' choice of law when a Federal Rule was on point.[9] The doctrine's structure was never the same thereafter.

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id. at 1436–37. N.Y. C.P.L.R. 901(b) (McKinney 2009) prohibits a class action to recover a "penalty" such as statutory interest, apparently for fear of annihilating the defendant. Accordingly, the lower federal courts applied the state prohibition to this case. *See* 130 S. Ct. at 1437. But the Supreme Court narrowly reversed, through a fractured set of opinions. *See id.* at 1436 (syllabus) ("Justice Scalia announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II-A, an opinion with respect to Parts II-B and II-D, in which the Chief Justice, Justice Thomas, and Justice Sotomayor join, and an opinion with respect to Part II-C, in which the Chief Justice and Justice Thomas join."); *id.* at 1448 (Stevens, J., concurring in part and concurring in the judgment) (explaining that Justice Stevens joined Parts I and II-A of the Court's opinion, but otherwise concurred in the judgment). In the end, Federal Rule 23 applied to permit the class action. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 380 F. App'x 96, 97 (2d Cir. 2010) (remanding for further proceedings), *remanded to* No. 06-CV-1842 NG JO, 2010 WL 2629734, at *3 (E.D.N.Y. June 28, 2010) (denying motion to stay discovery).

4 *See Shady Grove*, 130 S. Ct. at 1452 n.7, 1454, 1457 (Stevens, J., concurring); *id.* at 1466 (Ginsburg, J., dissenting). Tellingly, these cites came from the Justices in disagreement with the direction of the law. The other article cited, *id.* at 1448 (Scalia, J., plurality opinion), was by former Scalia clerk Bradford R. Clark, Erie*'s Constitutional Source*, 95 CALIF. L. REV. 1289 (2007). Also, Ely's article was the only one cited by Brief for Petitioner at 12–13, 26, 40, 47, *Shady Grove*, 130 S. Ct. 1431 (No. 08-1008). The other briefs discussed the article, while citing a handful of other secondary authorities but only in passing. *See, e.g.*, Brief for Respondent at 23–24, *Shady Grove*, 130 S. Ct. 1431 (No. 08-1008); Brief of Amici Curiae The Partnership for New York City, Inc. et al. in Support of Respondent at 15, *Shady Grove*, 130 S. Ct. 1431 (No. 01-1008).

5 *See* Ely, *supra* note 2, at 737 n.226. I set the subject in its broader context, regarding the fundamental relation of federal and state law throughout a federal system, in Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1 (2006). My attempt was to reestablish the unity of *Erie*, but without the pre-Ely amorphousness.

6 380 U.S. 460 (1965) (Warren, C.J.). Ely had been Chief Justice Warren's law clerk when the Court decided *Hanna*.

7 28 U.S.C. § 1652 (2006).

8 28 U.S.C. § 2072.

9 *See* Ely, *supra* note 2, at 697–98.

By contrast, the answers he gave to the three questions[10] were not completely satisfying.[11] In any event, his efforts failed to put the questions to rest, either for lower courts or for scholars.[12] His article ended up being influential more for structure than for content.

After Ely, the *Erie* doctrine continued its evolution. The law today is that the Constitution or Congress may make a definitive choice of law. Otherwise, the vertical choice of law is left to the courts' methodology. The seeming exception is that federal law prevails when a Federal Rule covers the matter. Beyond those generalities, however, debate rages as to the details.

Shady Grove is the Supreme Court's latest contribution to that debate. As always, the latest word has caused a stir, and once again created hope of finally settling at least some of Ely's questions. But in my belief, the newest case does little to move the *Erie* doctrine. It does not say much as to definitive doctrine, and only partly because of its splintered opinions. It will find any greatness more in the world of

10 The answers he gave to the three questions were these: First, the Constitution's restriction on congressional choice of state or federal law was so loose as to be a matter of "functional irrelevance," because a federal statute could choose federal law for diversity actions on any matter "arguably procedural." *Id.* at 698, 706. Second, by command of the RDA, a diversity court should choose state law whenever its nonapplication would produce an outcome differing with state citizenship in circumstances sufficiently troubling to constitute a "material unfairness." *Id.* at 714 n.123. Third, there was one exception to the RDA command, which came by command of the later REA, that called for federal law when "the matter in issue is covered by a Federal Rule." *Id.* at 698. However, he modified that last sweeping bow to federal law by resurrecting the second sentence of the REA, 28 U.S.C. § 2072 (1970) ("Such rules shall not abridge, enlarge or modify any substantive right . . . .") (current version at 28 U.S.C. § 2072(b) (2006)). On a case-by-case basis, varying state by state, he would apply the otherwise applicable state law if it had in part a substantive purpose. Thus, in the realm of the Federal Rules there was for Ely a different line drawn between state and federal law, one that involved a substance/procedure distinction rather than *Erie*'s outcome-determinative line—although like *Erie* it applied in light of the particular case's specifics. *See* Ely, *supra* note 2, at 724–27, 733–38.

11 *See* Richard W. Bourne, *Federal Common Law and the* Erie-Byrd *Rule*, 12 U. BALT. L. REV. 426, 465 (1983) (arguing that "the Ely thesis is flawed in . . . serious ways"); Donald L. Doernberg, *The Unseen Track of* Erie Railroad*: Why History and Jurisprudence Suggest a More Straightforward Form of* Erie *Analysis*, 109 W. VA. L. REV. 611, 659–63 (2007) (pointing out the flaws).

12 *See* Braman & Neumann, *supra* note 2, at 405–06 (lamenting that the lower courts overwhelmingly do not follow Ely's approach); Condlin, *supra* note 2, at 477–80 (criticizing civil procedure casebooks for overwhelmingly failing to adopt what he sees as Ely's obviously right view of the *Erie* methodology and their going off instead for many pages in the wrong direction).

class action practice. Any great significance attributed to *Shady Grove* in the *Erie* debate is a myth.[13]

Nevertheless, *Shady Grove*, when read along with the Court's preceding major case entitled *Gasperini v. Center for Humanities, Inc.*,[14] does point in the right direction for answering Ely's questions. On some of the questions, it conforms to and affirms an emerging consensus. Yet on others, it serves to show that certain issues remain quite open. So, study of *Shady Grove*'s setting in the *Erie* doctrine is worthwhile, even if not paradigm shifting.

I. THE CONSTITUTION

The role of the Constitution in the current operation of the *Erie* doctrine has, rather unusually, generated the least disagreement. The reason is that it properly plays a small role, verging on an irrelevant one. The doctrinal battles have instead raged in a realm far from the theoretical limits imposed by the Constitution. Thus, those otherwise important limits remain vague.[15]

A. Condition of Prior Law

1. Institutional Framework on Vertical Choice of Law

To understand as a whole the big picture of choice of law within federalism, one must first reconsider the institutional structure, including the constitutional and congressional powers to limit judicial choice of law. The federal government may make the choice between state and federal law by its ordinary hierarchy of lawmakers: the federal Constitution at the top, Congress (or its authorized administrative delegate), or the federal courts by default. If the Constitution or Congress expressly or impliedly made the choice of law, that choice is binding on the federal courts. Only in the absence of such a constitutional or congressional directive must the federal courts decide whether state or federal law applies.

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13 *See* Howard M. Wasserman, *The Irrepressible Myth of* Klein, 79 U. CIN. L. REV. (forthcoming 2011) (manuscript at 2 & nn.1–2), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1009&context=howard_wasserman (cataloguing the popularity of the myth trope in law reviews, although those myths are of the irrepressible variety).

14 518 U.S. 415 (1996).

15 For additional citations for the following abbreviated *Erie* summary, see generally KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE § 3.2 (2d ed. 2009), discussing the choice between state and federal law, and Clermont, *supra* note 5, discussing the reverse-*Erie* doctrine.

The Constitution, in addition to authorizing the making of federal law, could itself have dictated that federal law govern particular points, and of course any such choices are binding. An example is the Seventh Amendment's guarantee of trial by jury: the constitutional jury right directly governs in all federal court cases,[16] although not in the state courts.[17] Most often, however, the Constitution did not so dictate that federal law must apply.

Where the Constitution did not choose federal law, the Constitution might have instead prohibited the federal authorities from choosing to apply too much federal law. That is, the Constitution could choose state law, by prohibiting or simply by not authorizing the making of federal law. Indeed, it generally did so in establishing the limited federal government.[18]

In many circumstances, however, the Constitution did not choose, leaving Congress able to make a valid choice by statute in favor of federal law or of state law. That is, within the just-described constitutional limits lying at the two extremes, the Constitution neither chose federal law nor dictated state law, and so left Congress free to choose between federal and state law. In particular, Congress can choose the law for actions litigated in federal court, and its choice whether express or implied will bind the federal courts.[19] If Congress chooses the applicable law, the only vertical choice-of-law question remaining for the courts is whether the congressional choice was con-

16 *See* Simler v. Connor, 372 U.S. 221, 222 (1963) (per curiam) (holding the Seventh Amendment applicable in a diversity case).

17 Although the Supreme Court has held most of the rights in the Bill of Rights to be fundamental enough for the Fourteenth Amendment to guarantee against invasion by the states, the Seventh Amendment right to a civil jury has not been one of those. *See, e.g.*, Walker v. Sauvinet, 92 U.S. 90, 92–93 (1876); Melancon v. McKeithen, 345 F. Supp. 1025, 1027 (E.D. La. 1972), *aff'd mem. sub nom.* Davis v. Edwards, 409 U.S. 1098 (1973), Hill v. McKeithen, 409 U.S. 943 (1972), *and* Mayes v. Ellis, 409 U.S. 943 (1972). That is to say, the Seventh Amendment applies to actions in the federal courts, but not to state court actions. *But cf.* McDonald v. City of Chi., 130 S. Ct. 3020, 3035 n.13 (2010) (throwing the old cases into doubt and opening the door slightly to incorporating the Seventh Amendment).

18 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 3.1, at 234 (3d ed. 2006) (explaining the doctrine of limited federal legislative authority).

19 *Compare, e.g.*, FED. R. EVID. 302 (legislating that state law governs some presumptions in federal court), *with, e.g., id.* R. 407 (legislating that federal law governs admissibility in federal court of subsequent remedial measures). The Rules of Evidence, which were actually a federal statute, provide a nice source for comparable examples.

stitutionally valid, because the Constitution imposes the only bounds on the congressional power.[20]

If Congress opts for the *choice of federal law* and hence preempts state law, it usually specifies the *content of that federal law*,[21] but it sometimes delegates to the federal courts the task of generating part or all of that federal law.[22] It is important to keep clear this distinction between choosing the applicable law and making up its content. Nonetheless, Congress's powers to choose and to make federal law are equivalent.

Only in the absence of both a constitutional and a congressional directive can the federal courts validly choose to apply federal or state law. The federal courts are not then determining whether preexisting federal law already covers the question—because if the law did, the courts would not be dealing with a situation of silence by the lawmakers above the courts in the lawmaking hierarchy. Instead, the courts must look at federalism policies somehow to decide if federal law should govern. If so, and because that federal law does not already exist, the courts then must create the federal law, most often by analogy or adoption. That is, once the courts choose federal law, they must extend federal law by creating specialized federal common law, which thereafter exists and applies by stare decisis.[23]

It is useful to recognize that the federal courts' *choice-of-law power* therefore equates to a *lawmaking power*. The outer boundary on the federal courts' power to choose federal law equates to a judicial lawmaking power because, whenever the federal courts choose on their own to apply federal law, there is no federal law and so they are extending and hence making federal law.[24] Therefore, the same constitutional limit applies to both powers.[25]

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20 *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 27 (1988) ("If Congress intended to reach the issue before the district court, and if it enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter . . . .").

21 *E.g.*, FED. R. EVID. 601 (competency).

22 *E.g.*, *id.* R. 501 (privilege).

23 For a synopsis of the *Erie* doctrine's application to federal common law, see CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 60 (6th ed. 2002).

24 *See id.* § 60, at 415.

25 *See Stewart Org.*, 487 U.S. at 27; Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404–05 (1967).

2. Constitutional Limits on Federal Lawmaking

Accordingly, the federal legislature and also (when that legislature is silent) the federal courts can choose and make federal law, subject to the constitutional limit on each of them. Those limits, although rooted in federalism, permit significant lawmaking activity by the federal government.

Yet limits must have some teeth, however stubby. Therefore, it is worth considering what their bite is. Here we enter a more controversial realm, as we turn to the role of the Constitution in producing the *Erie Railroad Co. v. Tompkins* decision itself and to the significance of the *Erie* decision in verbalizing the theoretical limits on federal lawmaking power. I readily admit that many contesting views exist,[26] even as I offer the following summary of my views in which I shall minimize the constitutional restrictions.[27]

The *Erie* case, overruling *Swift v. Tyson*,[28] concerned only the power appropriated by the federal court system in the realm of general common law.[29] In *Swift*, Justice Story had read the RDA to be nonbinding in the case at bar, doing so by adopting a narrow reading of the statute's phrase "laws of the several states."[30] Then, in the vacuum beyond such "laws," Justice Story had claimed for the federal courts the power to create federal common law.[31] In *Erie*, Justice Brandeis addressed and condemned only this judicially assumed power.[32] Thus, in my view, *Erie* did not hold anything with respect to

26 *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 563 (6th ed. 2009) ("From the time of its rendition to the present day, controversy has surrounded the scope and meaning of Erie as a constitutional holding.").

27 Some theorists give the Constitution a bigger role. For example, Professor Steinman reads Article III's reference to the "judicial power *of the United States*" to prohibit federal judicial lawmaking that affects substantive rights if the only constitutional authority is to adjudicate the particular case within federal jurisdiction. Adam N. Steinman, *What Is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 316–22 (2008) (quoting U.S. CONST. art. III, § 1 (emphasis added)). Recognizing that his constitutional restriction is broader than necessary to explain *Erie*'s result, he argues that the restriction is nevertheless necessary to keep the federal courts from doing an end-run on the REA by adopting procedure as common law even though it tramples state substantive interests. *See id.* at 309–11. But the subconstitutional restrictions of the *Erie* doctrine more than suffice to keep the courts in check. In any event, no case has ever applied his restriction.

28 41 U.S. (16 Pet.) 1 (1842).

29 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72–80 (1938).

30 *See Swift*, 41 U.S. (16 Pet.) at 18–19.

31 *See id.* at 19; *infra* note 45.

32 *See Erie*, 304 U.S. at 78–80.

the scope of the *power of Congress.* More to the immediate point, *Erie* never explicated the power of Congress to mandate federal law that would be applicable only in federal court.[33]

Indeed, it is clear that under Articles I and III, including the Necessary and Proper Clause,[34] Congress has broad power so to lawmake for application only in the federal courts (e.g., evidence law).[35] The limit on that lawmaking power remains largely unexplored in any authoritative way.[36] For regulating procedure, Congress could rely on its authority to establish the inferior federal courts.[37] It apparently could then prescribe any provision that was "arguably" procedural.[38]

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33 Justice Brandeis does speak at one point, in describing the legal background, of Congress's power to declare substantive law. It seems, though, that there he was speaking of the law applicable in all courts, and not specifically of its power to declare law for application only in the federal courts. *See id.* at 78.

34 U.S. CONST. art. I, § 8, cl. 18.

35 *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 27 (1988) (discussing lawmaking for diversity cases); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404–06 (1967) (discussing lawmaking for federal cases involving arbitration agreements in maritime transactions or in interstate or foreign commerce).

36 *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202–03 (1956) (holding that state law applies on enforceability of agreements to arbitrate not covered by the narrowly read Federal Arbitration Act, thus ducking the constitutional question).

37 *See* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 n.3 (1987) ("Article III of the Constitution, augmented by the Necessary and Proper Clause of Article I, § 8, cl. 18, empowers Congress to establish a system of federal district and appellate courts and, impliedly, to establish procedural Rules governing litigation in these courts. In the Rules Enabling Act, Congress authorized this Court to prescribe uniform Rules to govern the 'practice and procedure' of the federal district courts and courts of appeals." (citing 28 U.S.C. § 2072) (1982)); *Erie,* 304 U.S. at 92 (Reed, J., concurring in part) ("The line between procedural and substantive law is hazy, but no one doubts federal power over procedure." (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825))).

38 *See Stewart Org.,* 487 U.S. at 27; Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("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."). Ely's focus, when he accepted the "'arguably procedural, ergo constitutional'" test as the constitutional limit, was on Congress's power to grant diversity jurisdiction and hence to legislate procedural law for use in diversity cases. *See* Ely, *supra* note 2, at 698, 700, 704, 706, 720 (emphasis omitted) (quoting *Hanna,* 380 U.S. at 476 (Harlan, J., concurring)). This congressional power is an important one, but it constitutes only a small part of the big picture of the relevant constitutionalism. Ely's focus was too narrow in five dimensions: (i) Congress might find authority to choose federal law in other clauses of Article I, such as the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3; (ii) congressional authority might be subject to other limitations emanating from other clauses, such as the equal protection component of the Fifth Amendment; (iii) authority of

Additionally, Congress could rely on any of its other enumerated powers.[39] Presumably, when relying mainly on the Necessary and Proper Clause, it would exceed its constitutional powers by legislating in areas of extremely high state interest (e.g., title to real estate). That is to say, Congress can use only reasonable means to effectuate its granted powers, and cannot unreasonably affect those primary decisions concerning human conduct that the Constitution did not subject to federal legislation and so reserved to the states. This limit is not a perpetuation of the state enclave theory.[40] It is implicit in the very structure of the Constitution establishing a limited federal government.

As to the *power of the federal courts*, Article III's reference to the "judicial power" as extending to cases within federal jurisdiction signifies the federal courts' constitutional power to create some law in the limited areas of high federal interest (e.g., admiralty). But the federal courts would unconstitutionally exceed their power by lawmaking in areas of very high state interest (e.g., charitable immunity in torts), whether the state interest finds expression in state statutory law or in state decisional law. In other words, the constitutional power implicit in Article III's reference to the "judicial power" has a constitutional limit. *Erie* so held, while leaving that limit vague.[41] It is helpful to envisage this scheme as having a core of high federal interest and a roughly circular boundary at some distance around the core, albeit a boundary inevitably ill-defined, beyond which lie matters that the federal courts' lawmaking power cannot constitutionally reach.

Because the *Erie* Court treated the limit on judicial power, but not the limit on congressional power, the relation between the two

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and limitations on the federal courts' choice of federal law require attention separate from Congress's power; (iv) congressional and judicial authority to choose state law for federal courts and its limitations require attention separate from their choice of federal law; and (v) all these questions need reconsideration in connection with legislative and judicial choice of law in state court under the so-called reverse-*Erie* doctrine and in other settings. *See generally* Clermont, *supra* note 5 (discussing the reverse-*Erie* doctrine).

39 *See Prima Paint Corp.*, 388 U.S. at 405 ("Rather, the question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative."); Allan Ides, *The Supreme Court and the Law to Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the* Erie *Doctrine and Related Problems*, 163 F.R.D. 19, 76–79 (1995).

40 *See* Ely, *supra* note 2, at 700–03.

41 *See Erie*, 304 U.S. at 78–80; Henry J. Friendly, *In Praise of* Erie *—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 395 (1964); Jason Wojciechowski, *Federalism Limits on Article III Jurisdiction*, 88 NEB. L. REV. 288, 291–96 (2009).

limits remained unstated. Nonetheless, it would seem that the boundary demarking constitutionally permissible matters for the federal courts to reach with federal common law is more restrictive than the boundary restraining federal legislators' reach by statute.[42] The lawmaking function of Congress to create federal law for application in federal court is thus more expansive, permitting greater intrusion into matters of state interest. The reason that Congress may validly opt for federal law more often than the federal courts could is that under our constitutional structure Congress should be the more active articulator of federal interests, while the courts must steer clear of blatantly formulating policy. And, of course, in practice Congress may be less systematic and rational than the courts.[43] In my imagery, then, the circular boundary on congressional reach lies outside the boundary on the judiciary.

In any event, those boundaries lie far out, giving federal lawmakers plenty of freedom to choose federal law for federal court. Yet, today state law undeniably applies in many situations where such application is not constitutionally compulsory and so where the federal authorities could make federal law. The important line between federal and state law, which specifies the law actually applicable in federal cases, lies well within those constitutional boundaries. The reason is that the federal government defers to state law by declining as a matter of comity to exercise the full extent of its constitutional powers. Drawing the actual line between federal and state law is the point of the subconstitutional construct comprising *Erie*'s case progeny treated in the next Part of this Article.

In sum, Congress and the federal courts could resolve any doubts in the hard cases under current doctrine either way—in favor of federal law or, for that matter, in favor of the state law—without substantial fear of unconstitutional usurpation or derogation of state or federal powers. They truly are choosing the law. Congress and the federal courts are largely free, as far as constitutional powers go, to

42 *See* Clark, *supra* note 4, at 1290–302; Friendly, *supra* note 41, at 394–98; Paul J. Mishkin, *Some Further Last Words on* Erie *—The Thread*, 87 HARV. L. REV. 1682, 1683 (1974). *But see* Craig Green, *Repressing* Erie *'s Myth*, 96 CALIF. L. REV. 595, 615 (2008) (arguing that if any constitutional restrictions exist at all, they are the same for Congress and federal courts); Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 38 PEPP. L. REV. (forthcoming 2012), *available at* http://ssrn.com/abstract=1803458 (similar).

43 Incidentally, specific constitutional provisions, most importantly the Due Process Clause of the Fifth Amendment, along with its equal protection ingredient, might further limit slightly the powers of Congress and the federal courts to choose to create a distinctive federal law solely for use in federal court. *Cf.* Ely, *supra* note 2, at 706 n.77 (discussing political constraints on Congress).

rationalize and rework the *Erie* doctrine. In this sense, the Constitution does not enter into solving the usual choice-of-law problem under *Erie*.

B. *Contribution of* Shady Grove

Just as in every other *Erie* case, the Constitution is not front and center in *Shady Grove*. That in itself is mildly confirmatory of the above account. The new case's more specific comments are more solidly confirmatory:

> *Erie* involved the constitutional power of federal courts to supplant state law with judge-made rules. . . . Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters "rationally capable of classification" as procedure.[44]

II. THE "UNGUIDED *ERIE* CHOICE"[45]

By contrast, the methodology for judicial choice of law knows little but disagreement. Here is the precise question that has produced a staggering divergence of views: when neither the Constitution nor

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44 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (Scalia, J., plurality opinion) (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965)); *see id.* at 1449, 1451 (Stevens, J., concurring in the judgment) (conceding that "Congress may have the constitutional power to prescribe procedural rules that interfere with state substantive law in any number of respects" and that "Congress may have the constitutional power 'to supplant state law' with rules that are 'rationally capable of classification as procedure' "). The dissent by Justice Ginsburg suggests no disagreement as to the role of the Constitution.

45 *Hanna*, 380 U.S. at 471. I here abandon Ely's corresponding heading of "The Rules of Decision Act," *see* Ely, *supra* note 2, at 707, because the process here is judicial choice of law, not statutory command. *See* Steinman, *supra* note 27, at 264 n.133, 326–27. The RDA merely declares the status quo, while incorporating by reference the principles that the more recent *Erie* jurisprudence has continued to define. I make this comparatively fine point in a footnote rather than in the text because it does not substantially affect this Article's legal analysis.

The standardless RDA in fact fails to tell the courts *when* to apply state law. Happily, the RDA's key exception ("except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide") not only accommodates express federal constitutional and statutory directives but also preserves in their absence a judicial choice-of-law power otherwise required or provided by the whole federal constitutional and statutory scheme. 28 U.S.C. § 1652 (2006). So, if Congress has not made the choice of law by a statute more specific than the RDA, then the RDA leaves the courts free to make the choice under the *Erie* doctrine. The RDA thus provides that state law presumptively applies in federal court—applying except when the Constitution, a treaty or federal statute, or the judicially developed choice-of-law technique displaces it.

Moreover, the RDA is by no means universally controlling. It apparently does not apply to the District of Columbia or the territories, even though *Erie* principles do apply. *See* Waialua Agric. Co. v. Christian, 305 U.S. 91, 109 (1938); Lee v. Flintkote Co., 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979). Courts do not invoke the RDA in nondiversity cases. *See* Holmberg v. Armbrecht, 372 U.S. 392, 395 (1946). State courts of course do not invoke it when applying federal law. *See* Felder v. Casey, 487 U.S. 131 (1988). Yet *Erie* principles control across-the-board. What this means is that the RDA fails to give a handle on most of the *Erie* megadoctrine. *See generally* Clermont, *supra* note 5 (discussing reverse-*Erie* judicial choice-of-law methodology). That fact probably explains why the RDA plays such a bigger role in academic commentary than in actual judicial decisions.

It is even possible to argue that the RDA's words "laws of the several states" retain a narrow meaning. 28 U.S.C. § 1652. *Swift* read them to mean state legislation and local usages, but not general common law. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18–19 (1842). *Swift* went on to claim for the federal courts a broad lawmaking power with respect to general common law. *See id.* The *Erie* case stated its view that as a matter of statutory construction this narrow reading of "laws of the several states" had been erroneous, but under the dictates of stare decisis it left that construction intact. *See Erie*, 304 U.S. at 77–78. In the realm of general common law outside the RDA, *Erie* invoked the Constitution to strike down the judicial practice under *Swift* and then began the subconstitutional process of shaping a new judicial practice under the *Erie* regime. In sum, *Erie* arguably left undisturbed *Swift*'s narrow reading of the RDA. *Cf.* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1515 (1984) (arguing that the RDA did not forbid federal courts from making general common law, which "did not come within the scope either of [the RDA] or of the *lex loci* principle from which the [RDA] was derived").

However, any such narrowness of the RDA's coverage is without practical significance. The reason is that the RDA is merely declarative of the rule that would exist in its absence. *See* Guar. Trust Co. v. York, 326 U.S. 99, 103–04 (1945) (deeming the RDA "merely declaratory of what would in any event have governed the federal courts," and so extending the same approach to equity suits); *Erie*, 304 U.S. at 72 (observing that the courts' approach outside the RDA is the same as their approach under the RDA); Mason v. United States, 260 U.S. 545, 559 (1923) ("The statute, however, is merely declarative of the rule which would exist in the absence of the statute."). Therefore, the prevailing restrictions on the federal courts' exercise of power in the realm of general common law are equivalent to the congressionally imposed restrictions on their power in the realm of state legislation and local usages for the cases covered by the RDA. That is, courts' power in the uncovered realm is the same as their power in the realm covered by the RDA. So, today nothing turns on how broadly or narrowly one reads the RDA.

Nevertheless, this realization that the old statutory reading of "laws of the several states" could be left undisturbed helps to clarify the *Erie* decision itself. This key insight—that *Erie* faced a judicially assumed power that could be struck down without declaring unconstitutional the plain or construed meaning of any congressional directive—explains how Justice Brandeis (much to Justice Butler's distress, *see Erie*, 304 U.S. at 88–90 (Butler, J., dissenting)) was able to avoid compliance with the statute requiring certification to the Attorney General when the constitutionality of an act of Congress is drawn in question, now 28 U.S.C. § 2403(a). It also explains Justice

Congress has determined the law applicable to a new situation—when neither has spoken on choice of law and when the federal courts have not formerly settled the question—how does, and should, a federal court exercise its residual choice-of-law power?[46]

A. Condition of Prior Law

With recognition that disagreement extends to the descriptive level as well as every other level, my view is that in practice the courts evaluate (1) the state's interests, in light of all legitimate policies reflected by the content of its law, in having its legal rule applied in federal court on this particular issue, in order to see if those interests equal or outweigh the net sum of (2) the federal interests in having federal law govern, which are called affirmative countervailing considerations and which include such concerns as maintaining a simple and uniform federal procedure and indulging the federal policy in favor of the jury, and (3) the negative federal interest in avoiding the forum-shopping and inequality effects of any outcome-determinative difference between state and federal law. After performing this balance, the courts apply the law of the sovereign whose policies would be more impaired by nonapplication.[47]

Obviously, this approach draws on the interest analysis of the *Byrd* formula,[48] but with its outcome-determinative element replaced by

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Brandeis's qualification in closing: "In disapproving that [*Swift*] doctrine we do not hold unconstitutional [the RDA] or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." *Erie*, 304 U.S. at 79–80. In other words, Congress had not enacted the federal common law, nor had Congress told the federal courts to create it, so *Erie* did not pass on Congress's power to do either such thing.

46 *See generally* CLERMONT, *supra* note 15, § 3.2(A)(3) (discussing judicial choice-of-law techniques).

47 *See, e.g.*, Masino v. Outboard Marine Corp., 652 F.2d 330, 331 (3d Cir. 1981) (expressly applying Byrd v. Blue Ridge Rural Electric Coop., 356 U.S. 525 (1958)); Davis v. Piper Aircraft Corp., 615 F.2d 606, 612 (4th Cir. 1980); Miller v. Davis, 507 F.2d 308, 314 (6th Cir. 1974); Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1262–63, 1281–99 (1999); Doernberg, *supra* note 11, at 644–59; Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 359–61 (1977). *But cf.* CLERMONT, *supra* note 15, § 3.2(C) (contrasting my preferred methodology).

48 *See Byrd*, 356 U.S. at 535–40 (interpreting the competing laws by balancing state interests against federal interests in order to see how far federal law should extend in light of its purposes).

Hanna's quite proper refinement of that element.[49] The normative reason to turn to *Byrd* is that *Erie* is best viewed as a megadoctrine of cooperative federalism, calling for comity when either sovereign is determining the appropriate reach of state and federal laws.[50] *Erie* alluded to many sovereign interests beyond similarity of outcome. The necessary accommodation of all those interests must proceed by balancing.[51]

Balancing here means the contextualized exercise of judgment in the face of competing interests.[52] Admittedly, there can be an emptiness in principles that call for balancing, such as a principle saying that the distribution of powers to federal and state governments must be kept in balance.[53] But balancing can be an intelligible standard of decision that avoids arbitrariness, as long as it contains comprehensible content for conceptualizing and resolving conflicts. The *Erie* balance is not an empty metaphor and is instead an intelligible standard for choice of law, because it provides a "specification" of interests to put on the scales for weighing and then prescribes a "criterion" in terms of the resulting position of the scales for reaching an outcome.[54]

Just as obviously, the criticism this approach most often meets is that *Byrd*'s balancing of state and federal interests did not survive *Hanna*.[55] The comeback is that this is simply untrue. First, *Hanna* did not say it was overruling *Byrd*, and instead cited it twice for support.[56] Second, the passage of *Hanna* most inconsistent with the *Byrd* holding lies in a footnote to dicta.[57] Third, the focus of those dicta was to

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49 *See Hanna*, 380 U.S. at 468 ("The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.").

50 *See* Clermont, *supra* note 5, at 43.

51 *See id.* at 14–17, 41–45.

52 *See* Vicki C. Jackson, Printz *and* Testa*: The Infrastructure of Federal Supremacy*, 32 IND. L. REV. 111, 136–40 (1998).

53 *See* Robert Justin Lipkin, *Federalism as Balance*, 79 TUL. L. REV. 93, 109 (2004) ("This Article shows that conceptualizing 'federalism as balance' relies on only an unanalyzed, unexplicated, intuitive sense of balance totally devoid of even minimal precision and lucidity for the purposes of describing, explaining, and justifying federalism.").

54 *See id.* at 103–05, 124, 164; Paul-Erik N. Veel, *Incommensurability, Proportionality, and Rational Legal Decision-Making*, 4 LAW & ETHICS HUM. RTS., iss. 2, art. 2 (2010), http://www.bepress.com/lehr/vol4/iss2/art2 (demonstrating means of weighing incommensurable values).

55 *See, e.g.*, Ely, *supra* note 2, at 717 & n.130. *But cf. id.* at 708 n.86, 714 n.124 (allowing for some balancing).

56 *See* Hanna v. Plumer, 380 U.S. 460, 466 n.5, 467 (1965).

57 *See id.* at 468 n.9.

straighten out an error of the old outcome-determinative test, not to inter *Erie*'s greater concern with meshing state and federal interests.[58] Fourth, subsequent lower court cases continued regularly to cite *Byrd*, often in a way essential to their results.[59] Fifth, the Supreme Court in *Gasperini* applied *Byrd* to reach its result that the federal government's interests in controlling its courts' standard of appellate review outweighed New York's substantive interests.[60] It resurrected *Byrd*'s term of "essential characteristic" of the federal system, which means nothing more than an affirmative countervailing consideration of sufficient weight to overcome the interests in favor of applying state law.[61]

For those scholars who hold the view that *Byrd* is not central to the unguided *Erie* choice, the appropriate methodology most often is an outcome-determinative test, now refocused by *Hanna* on the avoid-

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58 *See id.* at 465–69.

59 *See, e.g.*, Szantay v. Beech Aircraft Corp., 349 F.2d 60, 66 (4th Cir. 1965) (applying federal law in the face of a state door-closing statute). This post-*Hanna* case nicely demonstrated the inadequacy of the outcome-determinative test as a stand-alone test. Under *Hanna*, the outcome-determinative effect of a door-closing statute, or more precisely the concern about forum shopping, would have seemed to call for application of the state law. However, a closer examination of the interests involved showed that no state interests were at stake, the state statute apparently expressing only the desire to keep such a lawsuit between nonresidents off the state court docket; by contrast, significant federal interests in providing a forum would have been defeated by application of the state law. *See id.* at 64–66. Hence, *Szantay*'s refusal to apply the state door-closing statute rested on the court's attention to these affirmative countervailing federal considerations, an attention authorized by *Byrd* but not by *Hanna*. *See id.*

Of course, after *Hanna* many other lower court opinions mouthed the *Hanna* dicta. But they might have been doing so only to invoke a convenient and approved route to a predetermined result. What is striking about the *Erie* cases, in the Supreme Court and the lower courts, is that they almost all come to the seemingly right result on the facts. They do so by an intuitive sense of the compromise that federalism requires. As long as intuition and *Hanna*'s "twin aims" point the same way, the courts simply quote *Hanna*. When intuition and *Hanna* diverge, the courts begin to sound more *Byrd*-like.

60 *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 431–36 (1996) (citing *Byrd* repeatedly while holding in a diversity case, first, that New York's tort reform interests called for applying its intrusive new trial standard for setting aside a jury verdict in the federal district court, but, second, that federal interests called for applying the deferential federal standard of appellate review in the federal court of appeals); *id.* at 432 (citing *Byrd* for the proposition that the "'outcome-determination' test was an insufficient guide in cases presenting countervailing federal interests").

61 *See id.* at 431 (quoting Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958)).

ance of forum shopping and unequal treatment.[62] This, then, is the biggest battle of *Erie*: interest analysis (including effect on outcome) or the outcome-determinative test alone?

B. Contribution of Shady Grove

In the Supreme Court majority's view, the situation in *Shady Grove* called for the application of a Federal Rule.[63] Thus, the Court shed no light on *Erie*'s biggest battle over the unguided choice, besides passing references in dicta to the outcome-determinative test.[64]

The Second Circuit, however, had held unanimously in *Shady Grove* that Rule 23 did not cover the matter at hand, and so it had to perform an unguided *Erie* choice of law before deciding in favor of state law.[65] It sided with those who look beyond outcome-determination. "[T]he test of whether application of a rule is outcome affective 'was never intended to serve as a talisman.'"[66] Further, "[f]ederal courts will not apply a state rule if it would threaten '[a]n essential characteristic of [the federal court] system.'"[67]

Likewise, Part I of Justice Ginsburg's *Shady Grove* dissent read Rule 23 narrowly, thus throwing the case to an unguided *Erie* choice.[68] In her Part II she performed that choice by stressing *Hanna*'s outcome-determinative test.[69] But in closing, she expanded the inquiry to consideration of federal affirmative countervailing considerations, thus recalling her resurrection of *Byrd* in *Gasperini*.[70]

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62 *See, e.g.*, Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 998–1002, 1014–15 (1998); Steinman, *supra* note 27, at 264–69, 324.

63 *See infra* Part III.B.

64 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (Scalia, J., plurality opinion); *id.* at 1448 n.2 (Stevens, J., concurring).

65 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 549 F.3d 137, 143–45 (2d Cir. 2008), *aff'g* 466 F. Supp. 2d 467, 471–73 (E.D.N.Y. 2006) (holding also that Rule 23 did not cover the matter at hand, and that the unguided (and largely unexplained) *Erie* choice of law went in favor of state law), *rev'd*, 130 S. Ct. 1431 (2010).

66 *Id.* at 143 (quoting Hanna v. Plumer, 380 U.S. 460, 466–67 (1965) (quoting *Byrd*, 356 U.S. at 537)).

67 *Id.* (quoting, with alterations, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 431 (1996) (quoting *Byrd*, 356 U.S. at 537)).

68 *See Shady Grove*, 130 S. Ct. at 1460–69 (Ginsburg, J., dissenting).

69 *See id.* at 1461, 1469, 1471–72.

70 *See id.* at 1472 n.14 ("There is no question that federal courts can 'give effect to the substantive thrust of [the state statute] without untoward alteration of the federal scheme for the trial and decision of civil cases.'" (quoting *Gasperini*, 518 U.S. at 426 (Ginsburg, J.))); Richard D. Freer & Thomas C. Arthur, *The Irrepressible Influence of*

III. THE FEDERAL RULES REALM[71]

The great exception to the preceding choice-of-law scheme is where a Federal Rule covers the matter at hand. Here federal law has broad applicability.

A. Condition of Prior Law

1. *Sibbach-Hanna*

Federal law should prevail if a Federal Rule covers the matter, according to the holding of *Hanna*.[72] All agree that *Hanna* held that any pertinent Rule will apply, even in diversity cases, as long as it is valid under the REA and under the Constitution.[73]

For a Rule to be valid under the REA, it must "really" regulate procedure, according to the earlier *Sibbach v. Wilson & Co.*[74] case.[75] Because the Constitution's "arguably procedural" test[76] is less demanding than the REA's "really procedural"[77] test, a Rule normally need pass only the REA test.

The REA had delegated the power to the Supreme Court to prescribe general court rules on "the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."[78] The REA test could have been very demand-

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Byrd, 44 CREIGHTON L. REV. 61, 75–76 (2010) (explicating the role of *Byrd* in Justice Ginsburg's *Shady Grove* opinion).

71 I abandon Ely's heading of "The Rules Enabling Act," *see* Ely, *supra* note 2, at 718, because again the process here is judicial choice of law, not implied statutory command, *see* Clermont, *supra* note 5, at 14 n.58 (arguing at length that the REA itself did not dictate the across-the-board applicability of the Rules in every diversity case). That distinction does not affect this Article's legal analysis, because the structure of the analysis is the same for federal statutes and Federal Rules. When Congress does make a choice of law by statute, the *Erie* analysis proceeds as it does for a Rule, with the question being validity rather than applicability. *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 26–27 (1988); *infra* note 113.

72 *See* Hanna v. Plumer, 380 U.S. 460, 469–74 (1965) (applying FED. R. CIV. P. 4 to provide the manner of service of process in a diversity case).

73 *See Gasperini*, 518 U.S. at 427 n.7.

74 312 U.S. 1 (1941).

75 *Id.* at 14 (approving validity of FED. R. CIV. P. 35 on physical examinations as part of discovery).

76 *See supra* note 38 and accompanying text.

77 *See Sibbach*, 312 U.S. at 14.

78 Act of June 19, 1934, Pub. L. No. 73-415, § 1, 48 Stat. 1064, 1064 (current version at 28 U.S.C. § 2072 (2006)).

ing if it had worked out to require a Rule not to affect substantive law. But most observers agree that it has not worked out that way.[79]

Instead, the *Sibbach* Court read the REA to impose a loose test.[80] First, the Court said that it read the Act's first sentence to limit the Rules to procedural matters, while reading the second sentence as an emphatic definition of procedural matters to mean nonsubstantive law: "Hence we conclude that the [REA] was purposely restricted in its operation to matters of pleading and court practice and procedure. Its . . . provisos or caveats emphasize this restriction. The first is that the court shall not 'abridge, enlarge, nor modify substantive rights,' in the guise of regulating procedure."[81] Second, the briefs show that the parties explicitly posed as an issue for the Court the meaning of the REA's second sentence,[82] and the Court engaged in attentive construction to decide that "the phrase 'substantive rights' [is] confined to rights conferred by law to be protected and enforced in accordance with the adjective law of judicial procedure," that is, substantive law.[83] The determinative line bounding procedure being obviously ambigu-

79 *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 318–19 (4th ed. 2003); Bauer, *supra* note 47, at 1252–54; *cf.* LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 465–68, 472–73 (3d ed. 2004) (agreeing with this reading of *Sibbach*, while holding out hope for some other restriction on rulemaking vis-à-vis Congress); Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 48 (1998) (trying to reinvigorate the REA's second sentence, but conceding: "Conventional wisdom says that the Rules Enabling Act's . . . proscription against Rules affecting substantive rights is a dead letter." (footnore omitted)).

80 RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 27–28 (10th ed. 2010), outlines Justice Roberts's reasoning thus:

> The major premise of his syllogism is that all rules that deal with procedure are valid, because Congress in the Rules Enabling Act delegated to the Supreme Court the power to make rules throughout the whole realm of procedure; thus, the Court reads narrowly the Act's limitation on the Court's power, reading the reference to "substantive rights" to mean only substantive law, i.e., things other than procedure.

Derivation of Roberts's major premise essentially entailed divining congressional will. Roberts offered three arguments in support of his reading of the Rules Enabling Act. First, in demarking the Supreme Court's authority Congress must have meant to draw the line between substantive law and procedure, because any other division would "invite endless litigation and confusion worse confounded." *Sibbach*, 312 U.S. at 14. Second, Congress intended that a comprehensive system of court rules be adopted, and therefore envisaged that "the whole field of court procedure be regulated." *Id.* Third, the Federal Rules as promulgated by the Court did in fact cover the whole field of procedure, and Congress took no action to "veto their going into effect." *Id.* at 15.

81 *Sibbach*, 312 U.S. at 10.

82 *See infra* note 135.

83 *Sibbach*, 312 U.S. at 13.

ous, the REA's second sentence explained that Congress meant it in the specific sense of contradistinction to substance. Congress was saying that the rulemaking could cover procedure, but go no farther! By those observations the Court avoided treating the REA's second sentence as surplusage, and gave it instead both explanatory and emphatic roles. Third, the dissent saw the Court to be codifying "an analytic determination whether the power of examination here claimed is a matter of procedure or a matter of substance," which would be "mutually exclusive categories."[84]

The result of *Sibbach* was to bestow validity, and applicability by virtue of *Hanna*, as long as the Rule is procedural. In other words, the REA created two bins marked procedure and substantive law, and as long as a promulgated Rule falls into the procedural bin it is valid and applicable in all federal cases.[85] Here procedure, in opposition to substantive law, means the societal process for submitting and resolving factual and legal disputes over the rights and duties recognized by substantive law, which rights and duties concern primary conduct in the private and public life that transpires essentially outside the courthouse or other forum.[86] Although the *Sibbach* Court's test requires more than the Rule be arguably procedure—it must be really procedure—a valid Rule can incidentally affect substantive rights.

> Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights.[87]

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84 *Id.* at 17 (Frankfurter, J., dissenting).

85 *See* 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4508, at 223 (2d ed. 1996) ("Implicit in the Court's opinion in Sibbach is the assumption that matters of procedure and matters of substance are, in the words of the dissent, 'mutually exclusive categories with easily ascertainable contents,' and that categorization controls questions concerning the validity of the Civil Rules under the statute." (quoting *Sibbach*, 312 U.S. at 17 (Frankfurter, J., dissenting))).

86 *See Sibbach*, 312 U.S. at 14 ("The test must be whether a rule really regulates procedure,—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."); *cf.* Jay Tidmarsh, *Procedure, Substance, and* Erie, 64 VAND. L. REV. 877 (2011) (proposing a novel definition of procedure as any means for turning an uncertainly valued claim into a thing of certain value).

87 Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946); *see* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987) ("The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substan-

Indeed, the *Hanna* Court further discouraged the lower courts from entertaining any attack on validity by its observation that striking down a Rule would require finding that "the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."[88]

So, that was *Sibbach.* The *Hanna* holding made validity the sole test for the Rules, without any backup testing under *Erie* for applicability in a particular case.[89] The motivation for this approach was that testing the applicability of the Rules under the unguided *Erie* test on a case-by-case basis would eviscerate the Rules, including Rules on such central matters as discovery.[90]

Thus, the *Sibbach* pillar tests leniently for validity, and the *Hanna* pillar dictates consequent applicability. "Validity" means the wholesale determination that a Rule passes muster under the REA for all cases. "Applicability" means the retail determination that the Rule should govern in the particular case consistently with *Erie.* The "*Sibbach-Hanna*" test as an ensemble effectively insulates the Rules from attack, whether a general offensive or an attack in a specific case. Yet one can, of course, criticize either pillar of this subdoctrine.

First, *Sibbach* was perhaps not good statutory construction of the REA.[91] But its reading, which yielded the procedural/substantive test of validity, was a defensible reading of the statute. *Sibbach* was consistent with the separation-of-powers policies at play, even if it disregarded competing state interests; recall that the REA was allocating

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tive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules.").

88 Hanna v. Plumer, 380 U.S. 460, 471 (1965); *see Burlington,* 480 U.S. at 6 ("Moreover, the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, see 28 U.S.C. § 2072, give the Rules presumptive validity under both the constitutional and statutory constraints.").

89 *See Hanna,* 380 U.S. at 467–74.

90 *See id.* at 473–74 (using the word "disembowel").

91 *See* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 25–26 (2010); Stephen B. Burbank, *The Rules Enabling Act of 1934,* 130 U. PA. L. REV. 1015, 1108, 1189 (1982) (acknowledging that the REA's second sentence was surplusage but, based on legislative history and separation-of-powers concerns, still reading the REA to prohibit Rules having a predictable and identifiable impact on substantive rights); *cf.* Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation,* 93 MINN. L. REV. 26, 29–31 (2008) (developing an approach to construction that would permit rules to impact substantive rights if and only if they did so incidentally).

lawmaking power between Congress and Court, without concern for the later-decided *Erie*'s federalism policies.[92] The resultant simplicity and practicality yielded effective, vibrant, and uniform Rules.[93] In any event, stare decisis now protectively cloaks this reading of the REA.[94]

Second, the *Hanna* Court declared, by somewhat unclear reasoning, the whole *Erie* line of cases inapposite when a Rule is on point.[95] *Hanna* then is the case, not *Sibbach*, that slighted *Erie*'s federalism concerns. One cannot help but be shocked by the possibility of an extreme outcome: any state law treating what a Rule covers, no matter how substantive the state law looks or feels, is inapplicable. Nevertheless, *Hanna* was defensible from the policy viewpoint of fostering the strong federal interest in shielding the Rules.[96] Also, stare decisis now protects the holding.[97]

There persisted nonetheless a temptation, supported by some good reasons, to argue that a controlling Rule, validly promulgated for all cases, should still be tested under *Erie* for applicability in a particular case. In other words, because it seemed somehow strange to read *Hanna* as harshly saying "valid procedure, ergo applicable,"[98] it seemed natural to say that a "controlling and valid" Rule that pre-

92 *See* Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's* "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 1012, 1016–19; Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 289, 298. *But see* Ely, *supra* note 2, at 698, 718–38 (looking at federalism to invigorate the REA's second sentence for case-by-case application).

93 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1447 (2010) (Scalia, J., minority opinion, as Justice Sotomayor did not join Part II-C of his opinion) ("The more one explores the alternatives to *Sibbach*'s rule, the more its wisdom becomes apparent.").

94 *See* Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 551–54 (1991); Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 & n.3 (1987) (recognizing that the REA test is more restrictive than the constitutional test); *Hanna*, 380 U.S. at 464–65; Schlagenhauf v. Holder, 379 U.S. 104, 113 (1964). Of course, many lower court cases have embraced this reading of the REA too. *See infra* notes 101–102 and accompanying text.

95 *See Hanna*, 380 U.S. at 469–70 (condemning "the incorrect assumption that the rule of *Erie R. Co. v. Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure").

96 *See id.* at 472–73 ("'One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules.'" (quoting Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963))).

97 *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996) ("It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law."); *Burlington*, 480 U.S. at 4–5.

98 *See* Olympic Sports Prods., Inc. v. Universal Athletic Sales Co., 760 F.2d 910, 916 (9th Cir. 1985) (involving FED R. CIV. P. 41(b)).

sumptively applies nationwide in all cases may still be "inapplicable" in a particular case when strong state substantive interests conflict with the Rule.[99] Therefore, it became reasonable to say that the propriety of this extra *Erie* inquiry remained an open question in the period after *Hanna* and before *Shady Grove.*

An alternative approach distinguishable from this additional testing under *Erie,* but working to the same end, would be to accept what Ely suggested: he would have looked to the REA's second sentence, performing case-by-case testing of validity that looked for impact on the particular state's substantive purposes.[100] That is, rather than relying on a gap in *Hanna* to apply *Erie* precedents in support of the Rule's *inapplicability,* this alternative invented a gap in *Sibbach* to apply the REA in support of the Rule's *invalidity.* Frustration with the *Hanna* holding prompted this rethinking of *Sibbach.* This approach had little case support,[101] and indeed serious case opposition.[102] So, it

99 *See* Shaner v. Caterpillar Tractor Co., 483 F. Supp. 705, 709 (W.D. Pa. 1980) ("It is manifest to us that if we were to give Rules 17(a) and 19 precedence over the substantive law of Pennsylvania in the matter before us we would be ignoring completely the principles of *Erie* and *York.*"). *Compare* Morel v. DaimlerChrysler AG, 565 F.3d 20, 25 (1st Cir. 2009) (alternative holding) (balancing federal and state interests when a valid Rule covered relation-back), *and* Marshall v. Mulrenin, 508 F.2d 39, 44–45 (1st Cir. 1974) (applying more permissive state law in the face of the conflicting FED. R. CIV. P. 15(c), which has since been amended), *with* Welch v. La. Power & Light Co., 466 F.2d 1344, 1345–46 (5th Cir. 1972) (declining to apply state law less permissive than FED. R. CIV. P. 15(c)).

100 *See* Ely, *supra* note 2, at 698, 718–38; *see also supra* note 10.

101 "Like the Supreme Court, most lower federal courts have not decided many *Erie* issues with reference to the Rules Enabling Act's substantive rights provision." 17A JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 124.04[2], at 124-30 (Daniel R. Coquillette et al. eds., 3d ed. 2010); *see* 19 WRIGHT, MILLER & COOPER, *supra* note 85, § 4509 (yearning for a second-sentence approach, but admitting the case law stands in the way). Only a few lower court cases have suggested vaguely that they are taking this route. *See* Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 407 F.3d 34, 47–49 (2d Cir. 2005) (involving FED. R. CIV. P. 17(a)); McCollum Aviation, Inc. v. Cim Assocs., Inc., 438 F. Supp. 245, 247–48 (S.D. Fla. 1977) (involving FED. R. CIV. P. 17(b)); *cf.* Exxon Corp. v. Burglin, 42 F.3d 948, 950–52 (5th Cir. 1995) (upholding FED. R. APP. P. 38). *Compare* Douglas v. NCNB Tex. Nat'l Bank, 979 F.2d 1128, 1130 (5th Cir. 1992) (invoking this approach for FED. R. CIV. P. 13(a)), *with* Chapman v. Therriault, No. Civ. 97-372-SD, 1998 WL 1110691, at *2 (D.N.H. Apr. 13, 1998) (rejecting this approach for FED. R. CIV. P. 13(a)).

102 *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442–43 (2010) (Scalia, J., plurality opinion); Boggs v. Blue Diamond Coal Co., 497 F. Supp. 1105, 1118–22 (E.D. Ky. 1980) (refuting acutely the Ely approach); *see also supra* note 94.

took some imagination to contend that the propriety of this alternative also remained an open question before *Shady Grove.*

2. Federal Rules' Scope

Accepting *Sibbach-Hanna* at face value means that if a Rule "covers the point in dispute,"[103] it will apply in any federal case, because the only test is validity and that test is far from rigorous. Consequently, a critical question boils down to whether the Rule covers the point in dispute.[104] So, how to read the Rules? Unfortunately, the Court vacillated, leaving the question open before *Shady Grove.*

Most commentators ignore *Hanna*'s contribution itself to this debate, having been misled by the Court into thinking that Rule 4 unquestionably covered the manner of service of process on an executor and so displaced the competing Massachusetts statute in a diversity case.[105] Judge Bailey Aldrich, who had been the author of the opinion reversed in *Hanna,*[106] later explained with some bitterness that the separate state statute on executors was not a service-of-process provision at all and that the actual Massachusetts service-of-process provisions in fact allowed the same kind of service as did Federal Rule 4.[107] Instead, the state statute on executors was a supplement to the statute of limitations, requiring definitive personal notice within a fixed period of time, just as "snow and ice" statutes often do, to free the executor to make distributions at the earliest possible moment.[108] Thus the *Hanna* Court, albeit an apparently unaware Court, provided support for reading Rules broadly, doing so by reading Rule 4 broadly to cover notice-giving even beyond service of process.[109]

Since *Hanna,* the Court has given great deference under stare decisis to prior readings of a Rule's scope.[110] But the Court has also

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103 Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 27 (1988).

104 *See* 17A MOORE, *supra* note 101, § 124.03; 19 WRIGHT, MILLER & COOPER, *supra* note 85, § 4510.

105 *See* Hanna v. Plumer, 380 U.S. 460, 462 n.1 (1965).

106 *See* Hanna v. Plumer, 331 F.2d 157 (1st Cir. 1964) (Aldrich, J.), *rev'd,* 380 U.S. 460 (1965).

107 *See* Marshall v. Mulrenin, 508 F.2d 39, 41–44 (1st Cir. 1974) (Aldrich, J.).

108 *See id.* at 42–43.

109 *See Hanna,* 380 U.S. at 470.

110 *See* Walker v. Armco Steel Corp., 446 U.S. 740 (1980) (reading FED. R. CIV. P. 3 narrowly, to reaffirm Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949), which held that a state statute governs when an action is deemed commenced for statute-of-limitations purposes). The Court noted:

> This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a "direct collision" with state law. The Federal Rules should be given their plain meaning. If a direct collision with

told the lower courts to read the Rules broadly as a matter of first impression. The *Burlington Northern Railroad Co. v. Woods*[111] case said: "The initial step is to determine whether, when fairly construed, the scope of Federal Rule 38 is 'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law."[112] As the Court explained in *Stewart Organization, Inc. v. Ricoh Corp.*, it meant nothing special by its talk of "collision": "This question involves a straightforward exercise in statutory interpretation to determine if the [Rule] covers the point in dispute."[113]

Then, the Court's inclination reversed when Justice Ginsburg gave Rule 59 a crabbed reading in *Gasperini*.[114] The Rule authorized a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."[115] She sculpted the Rule by concluding that it did not specify a standard of decision for the trial judge's review of jury decisionmaking.[116] Her concern was that in diversity cases the states might have strong substantive interests wrapped up in their new trial standards. "Federal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies."[117]

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state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies.

Id. at 750 n.9.

111 480 U.S. 1 (1987).

112 *Id.* at 4–5 (quoting *Walker*, 446 U.S. at 749–50 & n.9) (broadly reading FED. R. APP. P. 38); *see id.* at 7 (asking alternatively whether "the Rules occupy the Alabama statute's field of operation").

113 Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 26 (1988) (discussing the analogous problem of determining the scope of a federal statute); *cf. id.* at 26 n.4 ("Our cases at times have referred to the question at this stage of the analysis as an inquiry into whether there is a 'direct collision' between state and federal law. See, e.g., *Walker v. Armco Steel Corp.*, 446 U.S., at 749; *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). Logic indicates, however, and a careful reading of the relevant passages confirms, that this language is not meant to mandate that federal law and state law be perfectly coextensive and equally applicable to the issue at hand; rather, the 'direct collision' language, at least where the applicability of a federal statute is at issue, expresses the requirement that the federal statute be sufficiently broad to cover the point in dispute. See *Hanna v. Plumer*, *supra*, at 470. It would make no sense for the supremacy of federal law to wane precisely because there is no state law directly on point.")

114 *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7, 437 n.22 (1996).

115 FED. R. CIV. P. 59(a)(1) (providing, as amended in 2007: "for any reason for which a new trial has heretofore been granted in an action at law in federal court").

116 *See Gasperini*, 518 U.S. at 433–34.

117 *Id.* at 427 n.7.

Although she wrote those words over Justice Scalia's fervent dissent,[118] he later seemed to fall in line when he gave Rule 41(b) a strangely narrow scope in *Semtek*,[119] reading it to have no res judicata component and explaining that he did so in order to avoid impinging on substantive rights[120] and producing an outcome-determinative effect.[121] Apparently, his concern was that treating res judicata by Rule would have taken rulemaking into what theorists had always considered to be dangerously substantive waters.[122]

A very open question before *Shady Grove*, then, was how to go about reading the Rules' coverage, the preliminary step to sweeping aside any clashing state law. Simply put, the Court's cases were in conflict, and the reason for conflict was readily diagnosable:

> The apparent inconsistency between these decisions is the product of the use of conflicting canons of construction. On the one hand, the Court has asserted that federal statutes and the Federal Rules should not be given unnecessarily narrow interpretations. However, the Court also seeks to be sensitive to state interests to

118 *See id.* at 467–69 (Scalia, J., dissenting); *see id.* at 468 ("[I]t is undeniable that the Federal Rule is 'sufficiently broad to cause a direct collision with the state law or, implicitly, to control the issue before the court, thereby leaving no room for the operation of that law.'" (quoting Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987)) (internal quotation marks omitted)).

119 *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–06 (2001).

120 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999) (adopting a cautious reading of FED. R. CIV. P. 23(b)(1)(B) in order to avoid potential conflict with the REA). Although *Ortiz* and *Semtek* referred to the REA's second sentence, that second sentence merely restates the basic REA test for validity that a Rule regulate procedure, as *Shady Grove* would reaffirm. Thus, *Ortiz* and *Semtek* said that courts should take the REA into account in how to read a Rule, but they did not thereby resurrect the REA's second sentence as a new limit on the Rules' validity. *But see* Steinman, *supra* note 27, at 269–73, 287–97, 324 n.427 (acknowledging that *Sibbach* negated any effect of the REA's second sentence, but seeing cases like *Ortiz* and *Semtek* as arguably resurrecting it).

121 *Cf.* Hanna v. Plumer, 380 U.S. 460, 473 (1965) ("[A] court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts, *Sibbach* v. *Wilson & Co.*, *supra*, at 13–14 . . . .").

122 "From their inception, the Federal Rules have been subject to persistent doubts about whether they can determine issues of preclusion." Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent* Erie *Decisions*, 92 VA. L. REV. 707, 724 (2006); *see id.* at 708 (criticizing the "artificially narrow interpretation" of the Rules in *Gasperini* and *Semtek*).

ensure that unnecessary clashes between state and federal law may be avoided.[123]

B. Contribution of Shady Grove

A sketch of the Court's reasoning in *Shady Grove* will serve as a map for the following discussion of its contribution to the *Erie* doctrine in the Federal Rules realm:

> The Court's major premise was that in federal court a valid Rule would trump state law covering the same matter by virtue of *Hanna*.[124]
>
> Its minor premise was that Rule 23 is valid under *Sibbach*; the Rule covers maintainability of class actions; and New York's section 901(b) prohibition on recovery of penalties by class action[125] clashes by covering the same matter.[126]
>
> The syllogistic conclusion then was that Rule 23 applied to permit this class action for penalties.

1. *Sibbach-Hanna*

Shady Grove may not say much for eternity, but it does say that the unadorned *Sibbach-Hanna* test, so protective of the Federal Rules, is the law. And its saying so represents a majority position. This result is a big deal in a practical sense, but I think that it reflects mainly an affirmation of existing law.[127] I shall explain its endorsement of *Sibbach* and *Hanna* separately.

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123 Bauer, *supra* note 47, at 1247–48; *cf. id.* at 1243–48, 1252–54, 1264–65 (suggesting the use of "false conflict" methodology to reconcile the two lines of cases and to avoid an unnecessarily broad reading of the Rules in the future); Joseph P. Bauer, *Shedding Light on* Shady Grove*: Further Reflections on the* Erie *Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939 (2011) (building on his approach to criticize the outcome in *Shady Grove*). The more recent *Ortiz* and *Semtek* cases have added the REA-related sensitivity concerning congressional interests to the last sentence quoted in the text.

124 *See infra* text accompanying notes 143–49.

125 *See* N.Y. C.P.L.R. 901(b) (McKinney 2009) ("[A]n action to recover a penalty . . . may not be maintained as a class action.").

126 *See infra* text accompanying notes 128–32.

127 *See supra* notes 101–02 and accompanying text. As summed up before *Shady Grove*: "The Rule need only be valid under the Constitution, as very broadly read in *Hanna*, and under the Rules Enabling Act, as very permissively interpreted in *Sibbach v. Wilson & Co.* This '*Hanna-Sibbach*' test effectively insulates the Federal Rules from attack." CLERMONT, *supra* note 15, § 3.2(A)(3)(e), at 153 (footnote omitted).

a. *Sibbach* Pillar

As to the *Sibbach* pillar of validity, Justice Scalia, speaking for Chief Justice Roberts and Justices Thomas and Sotomayor, was most explicit. Part II-B of his plurality opinion resoundingly reaffirmed *Sibbach.*[128] If a Rule regulates procedure—"'the manner and the means'" of enforcing rights and duties, as opposed to altering the rights and duties that constitute substantive law[129]—the Rule is valid even if it "affects a litigant's substantive rights."[130] Although Rule 23 clearly affects substantive rights by upholding claims that litigants would not otherwise pursue, it is valid.[131] The reason is that the validity test is lenient: "Applying that test, we have rejected every statutory challenge to a Federal Rule that has come before us."[132]

Justice Stevens also found Rule 23 to be valid.[133] But he went his own way on how to read the REA. He alone would have given an effect to the REA's second sentence.[134] He would have used it to perform case-by-case testing of validity that looks for impact on the particular state's provisions that are intertwined with the state's substantive law.[135] His reading not only would be messy to administer, but also

128 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1444 (2010) (Scalia, J., plurality opinion).

129 *Id.* at 1442 (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 446 (1946)).

130 *Id.*

131 *See id.* at 1443.

132 *Id.*

133 *See id.* at 1457–60 (Stevens, J., concurring in the judgment).

134 *See id.* at 1452–53.

135 *See id.* at 1448–55; *supra* note 99 and accompanying text. Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The* Shady Grove *Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041 (2011), supports the Stevens reading of the REA's second sentence. Professor Ides clarifies that the critical juncture for taking their position is to opt for the view that *Sibbach* did not decide the second sentence's meaning. *See id.* at 1050–55. He rests that assertion on the thought that Hertha Sibbach admitted Federal Rule 35 was procedural and so never argued the contrary Illinois law to be substantive. *See id.* at 1053. But in fact her central argument was that the procedural Rule 35 violated the REA's second sentence protection of substantive rights. *See* Brief in Support of Petition for Writ of Certiorari at 16, 23–29, 47, Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (No. 28). The *Sibbach* Court rejected this argument and fixed the meaning of the second sentence. *See supra* note 80 and accompanying text.

Indeed, Justice Stevens mischaracterized Hertha Sibbach's arguments. *See Shady Grove*, 130 S. Ct. at 1454 & n.11 (Stevens, J., concurring in the judgment) (misunderstanding also that some of the quotations from the briefs related to her ever-overlooked RDA argument). In actuality, her arguments were sophisticated. She argued that clearly the Rules could not touch substantive law. *See* Brief in Support of Petition for Writ of Certiorari, *supra*, at 20. She said that procedure and substantive law "over-

would inject a federalism test into a statute aimed at separation of powers.[136]

The dissent, by Justice Ginsburg for Justices Kennedy, Breyer, and Alito, signified assent to the plurality's understanding of *Sibbach* mainly by silence. And silence leaves in place the seventy years of *Sibbach*-based precedents. To my mind, however, the dissent implicitly assented to the plurality's understanding, when in construing Rule 23 it referred to the REA but never questioned the Rule's validity.[137] As a

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lap." *Id.* at 22. But she contended that the REA's second sentence went far enough to prohibit even procedural Rules that impinged on substantively important rights. *See id.* at 23–29. She claimed substantiveness here by looking at the state's law: the best proof is that she argued that Rule 35 was invalid for federal courts in states forbidding physical examinations, but valid elsewhere. *See id.* at 16, 47. In short, the "right not to be compelled to submit to a physical examination [is] a 'substantive' right." Reply to Brief of Respondent at 2, *Sibbach*, 312 U.S. 1 (No. 28). So, among the arguments that the *Sibbach* Court rejected was the Stevens-Ides view that a Rule deemed procedural at the federal level still must not impinge on matters deemed substantive at the state level.

Nevertheless, the Stevens-Ides view will prove the most popular view among academics, as they yearn to accommodate state interests despite the attendant complexities. *See, e.g.*, Thomas D. Rowe, Jr., *Sonia, What's a Nice Person Like You Doing in Company Like That?*, 44 CREIGHTON L. REV. 107 (2010). Professor Rowe proceeds in the belief that only a "politically accountable" branch of the federal government should be able to impinge on state substantive interests. *Id.* at 107. Thus, he wishes to revive the REA's second sentence for the "vanishingly rare" cases where it should override a Federal Rule. *Id.* at 111. Then, if desirable, Congress could take positive action to enact the impinging federal provision. *See id.* at 110 n.13. My lonely voice would respond that the Court has in fact held that Congress already delegated the authority to adopt nationwide procedure, even if we academics may dislike that holding.

136 *See supra* text accompanying notes 83–92.

137 *See Shady Grove*, 130 S. Ct. at 1461 (Ginsburg, J., dissenting). Because the plurality's position plausibly claimed to conform to preexisting law, and independently because eight Justices seemed to assent to the plurality's statement of *Sibbach*, the common argument found in *Bearden v. Honeywell International Inc.*, No. 3:09-1035, 2010 WL 3239285, at *10 (M.D. Tenn. Aug. 16, 2010), that Justice Stevens's lone position has become controlling as "'the narrowest grounds'" supporting the position of concurring Justices on "a fragmented Court," Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)), is seriously off base. Applying *Marks* presents problems, including that in *Shady Grove* the word "narrowest" has no clear meaning. *See* Grutter v. Bollinger, 539 U.S. 306, 325 (2003) ("It does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.'" (quoting Nichols v. United States, 511 U.S. 738, 745–46 (1994))); Joseph M. Cacace, Note, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *Doctrine After* Rapanos v. United States, 41 SUFFOLK U. L. REV. 97, 131 (2007) ("[L]ower courts should take care to apply *Marks* only to those cases in which the concurring opinions are logically nested such that an implicit

matter of logic, one could argue that the dissent never had to reach the REA's meaning—but with Justice Stevens vocally raising the point upon a 4-1-4 split vote, it would be more than strange for Justice Ginsburg to abdicate a majority position by failing to reach a point on which she shared to any degree Justice Stevens's view. Tellingly, Justice Stevens appeared to read Justice Ginsburg to agree with Justice Scalia, rather than with him, on the *Sibbach* point.[138]

The key to understanding the Court's view of *Sibbach* is to recognize that its sole test is a not-too-demanding test, which asks only if the rule "really regulates procedure."[139] If so, the Rule is valid and applies in all federal cases across the nation. Justice Scalia captured this essential point nicely:

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majority exists in support of a narrow legal proposition."). In any event, *Marks* certainly did not mean to give a concurring Justice the power to hijack the law. "When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be." King v. Palmer, 950 F.2d 771, 781–82 (D.C. Cir. 1991) (en banc) (opining also that "the narrowest opinion . . . must embody a position implicitly approved by at least five Justices who support the judgment").

Nonetheless, one cannot add the dissenters' votes to the plurality view to get a majority opinion on the *Sibbach* pillar. In a system where appellate judges generally vote on outcomes, rather than on issues, the plurality opinion is nothing more than a plurality opinion. *See* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1 (1993); Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. 75 (2003). By observing that at least eight Justices might be in agreement on how to read *Sibbach*, I mean only to suggest that, in the future, judges might consider that fact as an argument on whether to abide by the traditional reading of *Sibbach*.

138 *See Shady Grove*, 130 S. Ct. at 1456–57 (Stevens, J., concurring in the judgment). In this passage he faulted Justice Ginsburg's approach. He said she read Rule 23 narrowly by looking at state interests. *Id.* at 1456 ("I understand the dissent to find that Rule 23 does *not* govern the question of class certification in this matter because New York has made a substantive judgment that such a class should not be certified, as a means of proscribing damages."). He explained she was wrong because, if a Federal Rule is on point, you should not look at state interests as you would under the RDA, *id.* ("The dissent would apply the Rules of Decision Act inquiry under *Erie* even to cases in which there is a governing federal rule, and thus the Act, by its own terms, does not apply."), but instead you should apply the REA, *id.* at 1457 ("The question is only whether the Enabling Act is satisfied."). Yet she refused to use the second sentence of the REA. *Id.* ("If my dissenting colleagues feel strongly that § 901(b) is substantive and that class certification should be denied, then they should argue within the Enabling Act's framework."). By trying to construe Rule 23 away, and in refusing to utilize the REA's second sentence, she apparently conceded that on matters within Rule 23's coverage, it governs. *Id.* ("Otherwise, 'the Federal Rule applies regardless of contrary state law.'" (quoting Justice Ginsburg herself in Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996))).

139 *Sibbach*, 312 U.S. at 14.

> In sum, it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule. We have held since *Sibbach*, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure. If it does, it is authorized by § 2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights.[140]

What he was saying is that *Sibbach* does not look to the nature or purpose of the state law, but only to the nature of the Federal Rule. The question is whether the Rule is substantive or procedural. The REA's second sentence imposes no additional restriction. If the Rule is procedural, it is valid (and will survive a "facial challenge"). And it is valid once and for all, applicable in any federal case (and immune to any "as-applied challenge").

This approach has the advantage of conforming to precedent, and it shelters good rulemaking. Another argument in its favor is that a ready cure for any rarely occurring problem with a particular result lies with the rulemaker (or Congress), which can rewrite any Rule perceived to be overly intrusive. The champions of allowing as-applied challenges to the Rules need to acknowledge that this cure already exists.

Moreover, those champions need to remember that here the system's project is no more momentous than determining the law to govern procedure in federal court. I agree that federal procedure's intrusion on substantive concerns is important. But not only may Congress override any troublesome Rule, but the states could pursue their substantive goals effectively by formulating their substantive law with the knowledge that the Federal Rules will apply in federal court.[141] A uniform set of Federal Rules could thus have beneficial consequences for procedure in federal court, without necessarily dictating any nonincidental impact on substantive rights.

So, should the system address the federal-procedure project by opening the possibility of a challenge to the Rules as applied in every case (with the result being a somewhat variegated procedure), or

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140 *Shady Grove*, 130 S. Ct. at 1444 (Scalia, J., plurality opinion) (citations omitted).

141 *See* Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. (forthcoming 2011) (manuscript at 42, 63), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1772249 (arguing that "a uniformly applied set of Federal Rules would put state lawmakers on notice of the procedures to be used in diversity cases and allow them to formulate their substantive law accordingly" and that this would "encourage state lawmakers to act openly through the substantive law rather than manipulate outcomes with special procedures").

should it address the project on a system-wide basis (with facial challenges allowed and redrafting always possible)? By a cost-benefit analysis, the constraint on substantive intrusion arguably should operate at the nationwide level, just as the Court has said that Congress directed.[142] The REA stands for the proposition that a uniform set of Federal Rules is the given, the backdrop for the other governmental actors' decisions.

b. *Hanna* Pillar

As to the *Hanna* pillar of applicability, even Justice Stevens concurred in the plurality opinion.[143] This made Justice Scalia's Part II-A into a majority opinion. Indeed, the dissent expressly agreed as to *Hanna*.[144]

The majority opinion's introduction was explicit:

> The framework for our decision is familiar. We must first determine whether Rule 23 answers the question in dispute. If it does, it governs—New York's law notwithstanding—unless it exceeds statutory authorization or Congress's rulemaking power. We do not wade into Erie's murky waters unless the federal rule is [noncontrolling] or invalid.[145]

The majority then spent most of its *Hanna* discussion rebutting any thought of applying a backup *Erie* test of applicability.[146] Once a federal court has decided that a Rule is valid and on point, local or peculiar circumstances are irrelevant. The holding of *Shady Grove* is that henceforth lower courts must resist any yearning to defer to *Erie* impulses in the face of a controlling Rule.[147] Any contrary tempta-

142 Of course, one could come out differently upon weighing the benefits and costs of allowing as-applied challenges. *See* Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1203–18 (2011) (acknowledging the redrafting cure, but still calling for as-applied challenges). My concern here is mainly to explain what the Court decided in *Shady Grove*, rather than making policy decisions.

143 *See Shady Grove*, 130 S. Ct. at 1448, 1456–57, 1459 (Stevens, J., concurring). Although Justice Stevens would have looked to state interests in determining validity, he would do this under the REA, rather than by applying *Erie*. *See supra* notes 133–135 and accompanying text.

144 *See id.* at 1461 (Ginsburg, J., dissenting) ("If a Federal Rule controls an issue and directly conflicts with state law, the Rule, so long as it is consonant with the Rules Enabling Act, applies in diversity suits." (citing Hanna v. Plumer, 380 U.S. 460, 469–74 (1965)).

145 *Id.* at 1437 (Scalia, J., majority opinion) (omitting citations to Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987); *Hanna*, 380 U.S. at 463–64, 469–71).

146 *See id.* at 1437–42.

147 *See id.* at 1442.

tion—to decide that a controlling Rule should not apply because *Erie* calls for deference to a particular state substantive law's purpose or effect—is now a forbidden desire.[148]

The key to understanding the Court's view of *Hanna* is to recognize that the sole test for the Rules is the validity test. Accordingly, in another part of his opinion, Justice Scalia again rejected arguments about the substantiveness of New York's particular statute:

> The fundamental difficulty with . . . these arguments is that the substantive nature of New York's law, or its substantive purpose, *makes no difference.* A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes).[149]

What he was saying is that once the Rule surmounts the *Sibbach* hurdle, the testing is over. The substantive nature or purpose of the state law does not matter under *Hanna.*

c. Summary

I read *Shady Grove* to mean that, at least for all but the now-retired Justice Stevens, *Sibbach-Hanna* lives: if the pertinent Federal Rule regulates procedure, then it is valid and applicable in all federal cases. Period. The play comes in fixing the Rule's scope.

2. Federal Rules' Scope

The *Sibbach-Hanna* test makes the Rules' range of coverage into a critical question. The Court's various opinions therefore had to treat this question. The holding thereon came in Justice Scalia's Part II-A, which was a majority opinion. Part II-A, indeed, treated all of the Court's reasoning except for the *Sibbach* pillar.

a. Three Opinions

Deferring to precedent, Justice Scalia conceded that in reading an ambiguous Rule, which Rule 23 supposedly is not, courts should adopt the alternative reading that avoids violation of the REA and avoids substantial differences between state and federal litigation.[150] The Court concluded that Rule 23 covers the whole matter of

148 *See id.* at 1439–41.

149 *Id.* at 1444 (Scalia, J., plurality opinion).

150 *See id.* at 1441–42 & n.7 (Scalia, J., majority opinion). Perhaps his concession was begrudging, but the precedent did include his *Semtek* opinion.

"whether a class action may be maintained."[151] In particular, Rule 23(a) and (b), by providing which cases could be "maintained" as a class action, unambiguously covers the matter of "eligibility" for class treatment, a matter on which the defendant had unsuccessfully argued that the courts should look to state law.[152]

Justice Stevens concurred in Justice Scalia's opinion to produce a majority opinion on this point. Justice Stevens agreed that Rule 23 covered the matter at hand.[153] He went beyond that point to argue generally for fairly reading any Rule to see if it overlaps the state law, with courts exhibiting sensitivity to the minimization of conflict with the REA and to protection of important state interests and regulatory policies.[154]

The dissent in fact sounds much the same, albeit with an implicit spirit not at all begrudging as to comity. It went about reading Rule 23 with a sensitivity to the REA and state interests.[155] Prior law "counsels us to read Federal Rules moderately and cautions against stretching a rule to cover every situation it could conceivably reach."[156]

The dissent, of course, came to a conclusion different from the majority's rejection of state law. In Justice Ginsburg's view, Rule 23 covers just certifiability and other procedural aspects, but not remedy.[157] "Sensibly read, Rule 23 governs procedural aspects of class litigation, but allows state law to control the size of a monetary award a class plaintiff may pursue."[158] Given this restriction on the Rule, a state remedial law could apply in tandem with Rule 23's procedure. Thus, although the Justices more or less shared a verbal agreement on how to proceed, the Court split 5-4 on the application of state law.

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151 *Id.* at 1440.

152 *See id.* at 1437–39. *But see* Jack Friedenthal, *Defining the Word "Maintain"; Context Counts*, 44 AKRON L. REV. (forthcoming 2011), *available at* http://ssrn.com/abstract=1709664.

153 *See Shady Grove*, 130 S. Ct. at 1456–57 (Stevens, J., concurring).

154 *See id.* at 1451–52.

155 *See id.* at 1461 (Ginsburg, J., dissenting) ("In interpreting the scope of the Rules, including, in particular, Rule 23, we have been mindful of the [REA] limits on our authority. . . . [W]e have avoided immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest.").

156 *Id.* at 1468.

157 *See id.* at 1464–69.

158 *Id.* at 1466.

b. Standard for Rules' Construction

Consider first the area of agreement. The Justices, and in fact the accumulated precedents, agree that in many ways the reading of the Rules is a straightforward exercise in interpretation, with the aim of a fair construction.[159] The Rules do not deserve an unduly narrow construction, as *Burlington Northern* and *Stewart Organization v. Ricoh* held.[160] But as *Gasperini* and *Semtek* held,[161] the Rules, given their special status as Court-promulgated provisions, merit a little special treatment in service of both separation-of-powers and federalism concerns.[162]

159 Some here draw the interpretation/construction distinction favored by the New Originalists but much criticized otherwise. *Compare* Steinman, *supra* note 27, at 284 n.233 (defining "interpretation" as the discernment of the semantic content of a text and "construction" as the further specification of law when the text is vague or otherwise runs out), *with* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 712, 731–34, 752–55, 765–66 (2011) (criticizing the distinction). The *Erie* cases, however, do not draw that distinction. Thus, I use interpretation and construction as synonyms. *Cf. infra* note 165 and accompanying text (discussing the distinction between mere text and judicial gloss).

160 *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 27 (1988); Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5–6 (1987).

161 *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–04 (2001); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996). Even if Congress had its sights fixed on separation-of-powers concerns when it inscribed the REA's outer limits, the precedents are clear that the courts, when they proceed beyond the validity determination to the task of interpreting the Rules, should account for federalism concerns as well.

162 There has been some writing on the related question of how to read the Rules to get at their meaning, as opposed merely to specifying their range of coverage. One scholar stresses that the specialness of the Rules counsels restraint in interpreting them. *See* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1102, 1147–52 (2002) (arguing, in light of the nature of the delegated rulemaking authority, for a nonactivist approach to reading the Rules; although the author approves an "avoidance canon" that would accommodate congressional and state interests when alternative interpretations of a Rule are permissible, she would prefer invalidating the Rule under the REA to an overly contorted narrowing of the Rule); *cf.* Krupski v. Costa Crociere S.p.A, 130 S. Ct. 2485, 2498–99 (2010) (Scalia, J., concurring in part and concurring in the judgment) (criticizing reliance on Advisory Committee's notes). *But see* Joseph P. Bauer, Schiavone*: An Un-*Fortune*-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 720, 729 (1988) (arguing for a "liberal" and "expansive" reading of the Rules in light of their "purpose," because neither separation-of-powers nor federalism concerns are at stake when dealing with Court-promulgated provisions); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039 (1993) (arguing for an activist approach that relies on purpose rather than plain text, given the lessened separation-of-powers concerns when dealing with Court-promulgated provisions). *See generally*

Such an approach, endorsed by all nine Justices in *Shady Grove*, reconciles the two canons of construction: viability of federal positive law and sensitivity to congressional and state interests.[163] To speak somewhat more precisely, federal courts should construe a procedural Rule in a fashion that includes considering the impact on the generalized congressional and state interests in regulating substance, but they should not adopt a narrowed construction simply to avoid conflict with the state's interests peculiarly in play in the particular situation presented by the case at bar. Why I can nevertheless characterize this task as a straightforward exercise in interpretation is that the framers of the Rules presumably wrote them with the same consideration of the generalized congressional and state interests in regulating substantive rights.[164] The federal courts therefore should read them, when alternative readings are defensible, to minimize their intrusion on substantive rights.

A competing way to determine the coverage of the Rules that displaces state law would be to say that *Sibbach-Hanna* insulates merely the text of the Rules, and not the judicial gloss that adheres to them.[165] This approach would explain the result in *Gasperini*: the text of Rule 59 merely authorized new trial motions, but federal common law had specified the standard of decision; accordingly, although the federal standard of decision would apply in federal question cases, the state standard of decision would apply in diversity cases.[166] That is comfortable enough as one explanation of *Gasperini*, but the approach would go much further. "This logic suggests that the federal judiciary's gloss on the Federal Rules' generalized language for pleading, summary judgment, and class certification is, for *Erie* pur-

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David Marcus, *When Rules Are Rules: The Federal Rules of Civil Procedure and Institutions in Legal Interpretations*, 2011 UTAH L. REV. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1852856 (arguing that a court should treat the Rules much like statutes, while acting as a restrained and faithful agent who looks to the rulemakers' intent and purpose).

163 *See supra* text accompanying notes 150–56; *cf.* Bernadette Bollas Genetin, *Reassessing the Avoidance Canon in* Erie *Cases*, 44 AKRON L. REV. (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1810949 (arguing for construction to avoid serious questions regarding a Rule's violation of the REA, if that construction is a plausible interpretation).

164 *See* 19 WRIGHT, MILLER & COOPER, *supra* note 85, § 4509, at 270–71; Burbank, *supra* note 92, at 1019–20.

165 *See, e.g.*, Steinman, *supra* note 27, at 282–87; Lucas Watkins, *How States Can Protect Their Policies in Federal Class Actions*, 32 CAMPBELL L. REV. 285, 295–301 (2010).

166 *See* Steinman, *supra* note 27, at 283.

poses, procedural common law that is not mandated by the Rules themselves."[167]

Thus, this competing approach had predicted that because class certification law was largely a judicial gloss on Rule 23, state law would govern uncodified procedures and even class certification.[168] *Shady Grove*, if realistically read, dashed that prediction. By refusing to apply a state law that fell rather far from being a provision dealing purely with class certification, the Supreme Court threw in deep doubt the whole of this competing approach. In fact, nothing appeared in any of the *Shady Grove* opinions that gave support to a mere-text/judicial-gloss distinction. The Court held that Rule 23 covers an area of procedural law, not just what its words say.[169] And in delineating that area, none of the Justices showed any interest in strictly distinguishing the wording from judicial construction of the Rule.[170]

In any event, drawing the line between mere text and judicial gloss would be a hopelessly difficult endeavor. Moreover, trying to draw any such line would hardly advance *Sibbach-Hanna*'s aim of protecting federal procedure. Instead, it would produce within the Rules' coverage an ineffective procedure with hillocks built on the Rules' text, surrounded by state procedural law that would mesh poorly and also vary from state to state. One need only imagine the mishmash of a discovery scheme that this competing approach would produce. Finally, the messiness would double because the state law would apply only to state claims in federal court, while the federal judicial gloss would still apply in other federal actions.

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167 *Id.* at 284.

168 *See id.* at 285–86.

169 *See infra* text accompanying notes 171–79.

170 Adam N. Steinman, *Our Class Action Federalism:* Erie *and the Rules Enabling Act After* Shady Grove, 86 NOTRE DAME L. REV. 1131, 1144–54 (2011), skillfully salvages the remnants of this approach after *Shady Grove*'s hurricane-force winds. He sets up a distinction between the width and the depth of a Federal Rule's coverage, so that Rule 3 is too narrow to cover commencement of an action for purposes of the statute of limitations while Rule 56 is too shallow to cover the standard of decision for summary judgment. He would look to state law if the Rule's coverage is not wide or deep enough to reach the matter in question. Using that terminology, I am saying that the Court looks at only the width of coverage: the Court would not apply state law to elaborate the Rules' words or even to fill any interstices lying squarely within the Rules' width. But I do not especially like the word "width" here, because coverage invokes an area rather than a dimension. The area could be a complex shape. So Rule 23 does not cover every matter relating to a class action. It, for example, might not cover the tolling of the statute of limitations by commencement of a federal class action, *see id.* at 1119–20 & n.146, and would not cover the preclusive effects of the judgment, *see id.* at 1157–59.

c. Federal Rule 23's Coverage

Consider now the area of apparent disagreement. The Court did appear to split on the coverage of Rule 23. The exercise of judgment under any accepted standard will vary, leading sometimes to split decisions, but here the split seemed more profound than that. Such a sharply voiced difference of opinion should make one doubt how settled the standard of construction is after all. One might conclude that the majority and dissent were in fact proceeding differently, and might therefore deem the question of Rule construction to be wide open.

The counterargument is that the majority and dissent were not disagreeing about the standard for proceeding, but rather about the propriety of a separable step in the analysis: which state interests the federal courts should consider. The majority looked to generalized interests. The dissent focused much more on New York's interest in its particular statute.

The majority's position was that federal courts, in construing a Rule, should consider the generalized congressional and state interests in regulating substance, because they are trying to figure out what the Rule will mean in all types of federal cases across the nation.[171] The courts should not adopt a narrowed construction just to avoid conflict with interests peculiarly in play in the particular case.[172]

The dissent's step of focusing on New York not only was rejected by a majority of the Court but also demonstrably constituted a logical or at least a tactical misstep. Justice Ginsburg herself had agreed that the Court's job in this case was to construe Rule 23 for all cases, rather than determining whether Rule 23 would apply in this particular case.[173] Thus, in the part of the opinion where she was construing Rule 23, she should not have been arguing so much about the particulars of section 901(b),[174] or about whether the statute's wording accurately described its true purpose to curb certain remedies (she wrote at length that although the statute prohibited maintaining a class

171 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1440–42 (2010) (Scalia, J., majority opinion); *id.* at 1451–52 (Stevens, J., concurring in part and concurring in the judgment) (discussing construction of Rule, as opposed to determination of its applicability).

172 *See id.* at 1441 (Scalia, J., majority opinion).

173 *See id.* at 1461–64 (Ginsburg, J., dissenting). In this part of her opinion, she runs through the big *Erie* cases to show how they arrived at a reading of some Federal Rule that would apply throughout the nation. She nowhere suggests that she is arguing for a reading of Rule 23 that would apply only in New York's federal courts.

174 *See id.* at 1464–69.

action to recover a penalty such as statutory interest,[175] it actually meant to limit "liability in a single lawsuit in order to prevent the exorbitant inflation of penalties"[176]). Instead, she should have been stressing the general interests of the states and Congress in regulating the liability of defendants. She could then have before concluded that Rule 23 does not cover remedy.

The weak comeback is that Justice Ginsburg might have been using section 901(b) only as an illustration of the substantive impact of a broad reading of Rule 23. There is certainly no error in examining the law of a single state as representative of state interests. But still the issue was whether the states as a group or Congress has sufficient substantive interests at stake. The task was the global construction of the Rule, not the case-by-case applicability inquiry characteristic of *Erie*. At the least, Justice Ginsburg did not make clear that she was keeping in mind the proposition that construing a Rule for all future use is different from determining its applicability in a particular case.

Anyway, the majority, after considering generalized congressional and state interests in regulating substance, held that Rule 23 covers at least maintainability.[177] The dissent said yes, but Rule 23 does not cover remedy.[178] To that assertion the majority demurred, saying that it did not have to decide if Rule 23 covered remedy because section 901(b) intruded on maintainability.[179] The result was that the two sides never reached the point of disagreeing on construction.

There is an important insight. Majority and dissent not only voiced the same general standard of construction, but also declined to disagree on the standard's effect on Rule 23. Both sides agreed that the Rule covered maintainability. They differed only on whether section 901(b) intruded into that realm. That is, the case pivoted on a mere dispute regarding the meaning of section 901(b), a fact that further undercuts the significance of *Shady Grove*.

d. New York Statute's Coverage

Consider finally the area of actual disagreement. Once one resolves the coverage of a Rule, one still must construe the state law to determine if the two cover the same matter. The majority read sec-

175 *See* N.Y. C.P.L.R. 901(b) (McKinney 2009) ("[A]n action to recover a penalty . . . may not be maintained as a class action.").

176 *Shady Grove*, 130 S. Ct. at 1465 (Ginsburg, J., dissenting).

177 *See id.* at 1438–39 (Scalia, J., majority opinion).

178 *See id.* at 1466–68 (Ginsburg, J., dissenting).

179 *See id.* at 1439–41 (Scalia, J., majority opinion).

tion 901(b) to treat maintainability, and so state law fell to Rule 23.[180] The dissent disagreed with that conclusion only because it read section 901(b) to treat remedies instead.[181]

Shady Grove added nothing to the eternal debate over statutory construction. The majority argued for looking more at the text of the state statute and less at its purposes.[182] The dissent was more purposivist in concluding the statute treated remedies rather than maintainability.[183] Here Justice Ginsburg's attention to New York's particular aims was relevant. The relevance was so great that it becomes clear why Justice Ginsburg got so tied up with the New York particulars. She should, however, have separated better the two constructions of Rule 23 and of the state statute.

If the majority had read section 901(b) as treating only remedies, would the state law still have fallen to Rule 23? We do not know for sure, because the majority explicitly ducked that question. Justice Scalia harped on the idea that Rule 23 covered at least maintainability[184] and—in response to the dissent's emphasis on section 901(b)'s remedial nature—asserted that the Court "need not decide whether a state law that limits the remedies available in an existing class action would conflict with Rule 23."[185] In other words, he did not reject the dissent's position on the applicability of state remedial law, but instead concluded that this state law involved maintainability and so had to fall.[186]

e. Summary

In the end, the opinions of *Shady Grove* were not as fractured as they seem at first glance. All the Justices agreed that Rule 23 was valid and applicable. Further, once a careful reading of the opinions has demonstrated the misstep of the dissent (considering specific rather than generalized state interests) and the real point of disagreement (how to read the state statute's coverage), it has also revealed that the Justices were all essentially in agreement on the logically antecedent

180 *See id.* at 1437–42.

181 *See id.* at 1466–68 (Ginsburg, J., dissenting).

182 *See id.* at 1439–41 (Scalia, J., majority opinion); *id.* at 1457–60 (Stevens, J., concurring).

183 *See id.* at 1464–69 (Ginsburg, J., dissenting).

184 *See id.* at 1437–42 (Scalia, J., majority opinion).

185 *Id.* at 1439; *see id.* at 1439 n.4 ("[W]e express no view as to whether state laws that set a ceiling on damages recoverable in a single suit are pre-empted." (citation omitted)).

186 For my resolution of this open question, see *infra* text accompanying notes 197–211.

point: the standard of construction for reading the Rules. Elucidating that standard may be *Shady Grove*'s principal doctrinal contribution.

The *Shady Grove* Justices concluded, consistently with all the Court's prior holdings and dicta, that construing a Rule is straightforwardly the traditional task, which here entails consideration of generalized congressional and state interests. The inquiry is not to be case-by-case with regard to the interests embodied in the law of a particular state, but once and for all with the Rule's construction governing in every federal case.

Of course, applying the standard of construction to a specific Rule in a specific case can be difficult. The Justices may have shared broad agreement as to Rule 23, but their opinions' different spirits will accentuate the difficulty of future cases. The majority approached the Rules generously. The dissent may have applied the same standard of construction, but did so with a different spirit that would in other cases result in narrower readings of the Rules.[187] That is a real difference.

Maybe *Shady Grove*'s outcome implies that the broad spirit of *Burlington Northern* and *Stewart Organization v. Ricoh* has, at least for the moment, ascended above the narrow spirit of *Gasperini* and *Semtek*. If so, it means that the Rules should not suffer contortion by aggressively narrow readings in the future.

The easy rejoinder is that in a perpetual oscillation, one side or the other will inevitably be in the ascendance. The surrejoinder, however, could be that future recognition of the Ginsburg misstep might help reduce the range of disagreement in reading the Rules. The impulse to read them too narrowly would diminish if judges agreed to weigh the same generalized interests. Further diminishment might come with the additional recognition that a ready cure for any rarely occurring problem with a particular result lies with the rulemaker (or Congress), which can rewrite any overbroad reading of a Rule.

3. Implications

Shady Grove is surely not an insignificant case. It held that Rule 23, being a valid Rule, applies to displace any contrary state law,

187 On the one hand, the spirit of the majority opinion suggests that it would go farther in construing Rule 23 to cover, say, certain remedial matters. It is noteworthy that Justice Stevens sided with Justice Scalia, and went out of his way to criticize Justice Ginsburg's willingness to rewrite and contort the Federal Rules. *See Shady Grove*, 130 S. Ct. at 1451 n.5, 1456–57 (Stevens, J., concurring). On the other hand, if Justice Scalia had to duck the question of applicability of state remedial law in order to attract Justice Sotomayor's vote, then the spirit of the majority is much more obscure.

including the state prohibition invoked in that case.[188] This holding means plenty. First, it puts to rest any lingering concern that Rule 23, in allowing courts to enforce substantive policies in situations where litigants would otherwise bring no suit or would incompletely present a suit, constitutes a violation of the REA.[189] Second, it will produce forum shopping, as the federal courts become more hospitable to class actions than some states.[190] Third, it will therefore create tension with the Class Action Fairness Act of 2005 (CAFA),[191] which aimed to discourage class actions.[192]

As to *Erie*, though, it says less. It reminds the courts of *Sibbach-Hanna*. Its major contribution to doctrine is to instruct courts how to construe the Rules. But actual application of that standard of construction remains unclear. How that application will work out is of greatest interest, but the answers reside largely in the realm of implication.[193]

It is well to observe why these implications are important. Federal judges have demonstrated an inclination, perhaps motivated by the irrepressible myth of *Erie*, to find some way to accommodate state

188 *See supra* text accompanying notes 124–87.

189 *See Shady Grove*, 130 S. Ct. at 1443, 1447–48 (Scalia, J., plurality opinion); *id.* at 1459 n.18 (Stevens, J., concurring); FIELD, KAPLAN & CLERMONT, *supra* note 80, at 917; Note, *The Rules Enabling Act and the Limits of Rule 23*, 111 HARV. L. REV. 2294, 2311 (1998).

190 *See Shady Grove*, 130 S. Ct. at 1447–48 (Scalia, J., plurality opinion) ("We must acknowledge the reality that keeping the federal-court door open to class actions that cannot proceed in state court will produce forum shopping. . . . But divergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure.").

191 Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

192 *See Shady Grove*, 130 S. Ct. at 1473 (Ginsburg, J., dissenting) ("Congress surely never anticipated that CAFA would make federal courts a mecca for suits of the kind Shady Grove has launched."); Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1554–55 (2008). However, Brief for Petitioner at 11–12, 49–53, *Shady Grove*, 130 S. Ct. 1431 (No. 08-1008), pointed out that CAFA had intended federal class action procedure to govern in federal court, an intention that would become blindingly obvious where state procedure is more indulgent of class actions.

193 The little case law thus far seems to be reading *Shady Grove* for the proposition of the Rules' broad coverage. *See* Retained Realty, Inc. v. McCabe, 376 F. App'x 52, 55–56 (2d Cir. 2010) (holding that FED. R. CIV. P. 54(b) is valid and that its reservation of authority to revise a decision before final judgment displaces contrary state law, which provided that foreclosure was not alterable once the title had become absolute); Durmishi v. Nat'l Cas. Co., No. 09-11061, 2010 WL 2629996 (E.D. Mich. June 30, 2010) (involving FED. R. CIV. P. 35).

interests.[194] A forthright way to do so would be to apply *Erie* to the Rules or the REA's second sentence as a check on the Rules. But *Shady Grove* tried to shut both of those doors (although surely its splintered opinions will lead lower court judges for a while to see the doors as slightly ajar[195]). So precedent-minded federal judges will henceforth have to indulge any state law impulse indirectly by manipulating their decisions on the scope of the Rule and on whether the state law covers the same matter, just as Justice Ginsburg unsuccessfully tried to do. This manipulation will hide the real stakes, and thus will warrant the most careful scrutiny.

a. Class Actions

Much of the debate over *Shady Grove* among proceduralists turns on how New York and other states[196] could rewrite their statutes to get out from under Rule 23's coverage. As already explained, Justice Scalia contributed to this confusion by harping on the idea that Rule 23 covered at least maintainability and by declining to reach "whether a state law that limits the remedies available in an existing class action would conflict with Rule 23."[197]

What would happen if a state wrote a provision similar to New York's but did so expressly in remedial language: "In any class action seeking statutory damages, relief is limited to the amount the named plaintiff would have recovered in an individual suit"?[198] This is a hard question that the Court did not reach. But it is worth reaching here.

The hypothesized statute would take us outside the maintainability part of Rule 23(a) and (b), but we might still be within Rule 23. On the coverage of the whole Rule, I find clarifying Justice Scalia's later reframing of Rule 23's coverage as involving the reach of joinder:

> Applying that criterion [of "procedure"], we think it obvious that rules allowing multiple claims (and claims by or against multiple parties) to be litigated together are also valid. Such rules neither change plaintiffs' separate entitlements to relief nor abridge

194 *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996) ("Federal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies.").

195 *See, e.g.*, *infra* notes 203, 205 (citing cases).

196 *See Shady Grove*, 130 S. Ct. at 1468 n.11 (Ginsburg, J., dissenting) (listing very similar state statutes); Brief for Respondent at apps. A–B, *Shady Grove*, 130 S. Ct. 1431 (No. 08-1008) (listing ninety-six similar state laws).

197 *Shady Grove*, 130 S. Ct. at 1439 (Scalia, J., majority opinion); *see supra* note 185 and accompanying text.

198 *Shady Grove*, 130 S. Ct. at 1472 (Ginsburg, J., dissenting) (hypothesizing such a statute).

> defendants' rights; they alter only how the claims are processed. For the same reason, Rule 23—at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action—falls within § 2072(b)'s authorization. A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.
>
> . . . It is undoubtedly true that some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action. That has no bearing, however, on [the defendant's] or the plaintiffs' legal rights. The likelihood that some (even many) plaintiffs will be induced to sue by the availability of a class action is just the sort of "incidental effec[t]" we have long held does not violate § 2072(b).[199]

The position that joinder is covered by federal law is not new—"in a diversity case the question of joinder is one of federal law"[200]—but it now has teeth.[201] What claims or parties may or must proceed together in a federal action, or must proceed separately, is for the Rules to decide.

Accordingly, I think that any state law that directly impedes or facilitates joinder must fall to Rule 23. Therefore, the hypothesized statute treating remedies *only* in class actions should not apply in federal court, because the state would thereby be regulating federal join-

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199 *Id.* at 1443 (Scalia, J., plurality opinion) (quoting, with alterations, Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946)) (omitting citations to FED. R. CIV. P. 18 (joinder of claims); *id.* R. 20 (joinder of parties); *id.* R. 42(a) (consolidation of actions)).

200 WRIGHT & KANE, *supra* note 23, § 70, at 503 (quoting Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 125 n.22 (1968)).

201 Thus, that leading treatise needs to correct its pronouncement:

> It seems not inconsistent with that rule to say that if, as a matter of substantive law, a state does not recognize that a plaintiff has a particular right of action unless plaintiff joins certain others, then the federal court in a diversity action is precluded from giving a plaintiff who fails to join those others an opportunity to proceed as though alone he had the substantive right.

Id. § 70, at 503–04 (citing Stevens v. Loomis, 223 F. Supp. 534, 536 (D. Mass. 1963) (dictum), *aff'd on other grounds*, 334 F.2d 775 (1st Cir. 1964)); *see* 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1603, at 33 & n.15 (3d ed. 2001) (seeming to reject the quoted view).

der.[202] Similarly, a state could not expect its prohibition on class actions for fraud claims to carry over to federal court.[203]

Of course, state law will cover the definition of the claim, including its rights and "available remedies."[204] A state could make federal class certification more likely by eliminating an element of its cause of action that requires individual proof.[205] But a state that changes the elements just for class actions could not have that law apply in federal court. Or the state could facilitate federal certification by changing its conflict-of-laws rules to make a single state's law govern in mass tort cases.[206] But if the state made the new law apply only in class actions, I think, with some trepidation, that *Shady Grove* would cause Rule 23 to trump the provision in federal court.[207] In other words, the state

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202 *See* Transcript of Oral Argument at 9–12, *Shady Grove*, 130 S. Ct. 1431 (No. 08-1008) (showing the prevailing petitioner's counsel taking this position in response to Justice Ginsburg's questioning).

203 *See Shady Grove*, 130 S. Ct. at 1439–40 (Scalia, J., majority opinion). *But see* McKinney v. Bayer Corp., No. 10-CV-224, 2010 WL 3834327, at *11 (N.D. Ohio Sept. 30, 2010) (applying Justice Stevens's approach to the REA). This distinction between barring all actions and barring class actions explains Justice Scalia's position in vacating the Second Circuit's application of New York's section 901(b) in a federal action under the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227 (2006), which calls for the application of state substantive law. *See* Holster v. Gatco, Inc., 130 S. Ct. 1575, 1576 (2010) (Scalia, J., concurring) ("[W]hen a State closes its doors to claims under the Act § 227(b)(3) requires federal courts in the State to do so as well; but when such claims are allowed, the federal forum may apply its own procedures in processing them."). On remand, the Second Circuit instead read the TCPA as a congressional directive to apply state law. *See* Holster v. Gatco, Inc., 618 F.3d 214, 217–18 (2d Cir. 2010); *cf.* Bearden v. Honeywell Int'l Inc., No. 3:09-1035, 2010 WL 3239285, at *9–10 (M.D. Tenn. Aug. 16, 2010) (failing to cite the Supreme Court's treatment of *Holster*, and unnecessarily embracing Justice Stevens's approach to the REA in order to apply state law).

204 *Shady Grove*, 130 S. Ct. at 1443 (Scalia, J., plurality opinion).

205 *See* Watkins, *supra* note 165, at 301–09 (discussing state legislation that would apply in federal class actions, including the creation of a presumption of reliance in fraud cases); *cf. In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., No. 1:08-WP-65000, 2010 WL 2756947, at *2 (N.D. Ohio July 12, 2010) (ruling that an element imposed by state law applies in federal court to defeat a cause of action—the defendant's conduct had to have been previously and officially declared deceptive—but doing so by confused reasoning that irrelevantly embraces Justice Stevens's approach to the REA).

206 *See* Watkins, *supra* note 165, at 305–06.

207 *See* Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1921 (2006) ("It would be odd, to say the least, to adhere to the principle that a change of forum from state to federal court cannot work a change in choice of law principles, even where the relevant state principles accord a power to aggregation literally to reform applicable substantive law in a manner out of line with Supreme Court class action decisions from

could not undermine CAFA by specifically encouraging class actions in federal court.

Here is what all this means on the more general question of whether a state can in any way legislate around *Shady Grove* to block federal class certification. Just as a state law damage cap on each plaintiff's recovery would govern in federal court,[208] a state law damage cap on the defendant's total liability would apply,[209] as would a state provision putting certain remedies out of reach for certain of its causes of action. The state has a free hand in regulating substance. But it cannot expect the federal courts to import its attempts to regulate joinder, no matter how the state phrases those attempts. That is, if it restricts its remedial reform to class actions or other mass joinder only, its law will not apply in federal court.[210] The Federal Rules cover the bounds of joinder.[211]

> A trickier problem lies in the suggestion that New York could provide that no individual right of action will accrue until 90 days after the individual has provided the defendant with a written intent to sue letter. The intent to sue letter would be one of the elements

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Shutts through *Ortiz*."); *cf.* Linda Silberman, *Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2022–24 (2008) (disapproving choice-of-law provisions specific to class actions, except perhaps those coming from Congress). *But see* Watkins, *supra* note 165, at 305–06; Patrick Woolley, Erie *and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1735 (2006) ("States have authority to adopt choice-of-law rules that facilitate the application of the law of a single state in multistate and nationwide class suits.").

208 *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 428–29 (1996) (asserting that no one disputes that a state law limit on available damages would be applicable "in a federal court sitting in diversity").

209 *See* Transcript of Oral Argument, *supra* note 202, at 13 (showing the prevailing petitioner's counsel taking this position in response to Justice Sotomayor's questioning).

210 Thus, "state laws that set a ceiling on damages recoverable in a single suit," Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1439 n.4 (2010) (Scalia, J., majority opinion), would fail in federal court. Accordingly, the paradox posed by Justice Ginsburg—that a cap phrased as "a suit to recover more than $1,000,000 may not be maintained as a class action" would fall to Rule 23 but a cap phrased as "no more than $1,000,000 may be recovered in a class action" would not fall—is no paradox. *See id.* at 1466–67, 1472 (Ginsburg, J., dissenting). Both her caps would fail in federal court.

211 *Cf.* Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1081–85 (2011) (making the intriguing argument that the state's desire to avoid remedial overkill could be relevant to FED. R. CIV. P. 23(b)(3)'s superiority determination).

> of the claim. Any class would be limited to individuals who had sent such a letter.[212]

Assume that this requirement applied to all state court actions, but its intent and realization were to derail class actions. I think the outcome would turn on how we read the state statute. Ironically, a Scalia-inspired textualist reading would have the state statute apply in federal court, while a better reading taking purpose and effect into account would result in the statute falling to Rule 23.[213]

It can seem shocking to restrict states in these ways. However, the fact is that a state, which has the power to create liabilities, does face limits on the means by which it can control enforcement of the liabilities it creates. If, for example, it thought it best to limit all enforcement actions to state court for a new cause of action, it obviously could not legislate to restrict federal jurisdiction. If it thought that class actions were out of control in federal court, it could not limit class actions to state court—that is, it could not pass a state version of CAFA to discourage class actions by congregating class actions in the unfriendly forum. And if it thought class actions were out of control everywhere and so prohibited them in state court, the federal court could still entertain a class action.[214]

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212 Posting of Allan Ides, Professor, Loyola Law School, Allan.Ides@lls.edu, to civpro@listserv.nd.edu (Apr. 2, 2010) (on file with author).

213 *Compare* Mace v. Van Ru Credit Corp., 109 F.3d 338, 346 (7th Cir. 1997) (refusing to apply a state notice-of-suit provision that applied only to class actions), *with* DWFII Corp. v. State Farm Mut. Auto. Ins. Co., No. 10-20116-CIV, 2010 WL 5094242, at *7 (S.D. Fla. Dec. 10, 2010) ("The demand letter requirement section 10(a) of the No-Fault statute can be distinguished from the New York state statute at issue in *Shady Grove*, because that statute specifically affected the procedural right to maintain a *class action*, whereas the demand letter requirement here affects only the right to maintain *an action under the No-Fault Statute itself*."). Another challenging problem lies in OHIO REV. CODE ANN. § 1345.09(B) (LexisNexis Supp. 2009), which provides that "the consumer may rescind the transaction or recover, but not in a class action, three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater, plus an amount not exceeding five thousand dollars in noneconomic damages or recover damages or other appropriate relief in a class action." It would seem that the extra recovery in an individual action aims at making the action feasible, like a targeted attorney's fee provision. Given its purpose and effect, it should apply in federal court.

214 For example, although Mississippi does not allow any class actions, *see* USF&G Ins. Co. v. Walls, 911 So. 2d 463 (Miss. 2005) (stating definitively that because the court has not made a rule providing for class actions, they are not allowed in state courts), the federal courts in Mississippi do entertain class actions on state causes of action, *see* Baker v. Wash. Mut. Fin. Grp., LLC, 193 F. App'x 294 (5th Cir. 2006); 7A WRIGHT, MILLER & KANE, *supra* note 201, § 1758, at 116 (3d ed. 2005). *But see* Transcript of Oral Argument, *supra* note 202, at 23–26, 33–34 (showing the losing respon-

The shock further diminishes upon remembering that a state remains free to pursue effectively its substantive goals if given the knowledge that uniform Rules will apply in federal court. The state need only address its concerns substantively rather than devise procedural workarounds:

> Consider also the state laws at issue in *Shady Grove*. The substantive law proclaimed that insurance companies would be liable for a two percent penalty if they failed to pay claims in a timely fashion. Perhaps, when this law was enacted, legislators and insurers alike knew that it would rarely be enforced: the cost of litigation would outweigh the potential recovery in individual actions, and the state prohibition on penalty class actions would prevent aggregation. The availability of class actions in federal court changes that, leading to far more efficient enforcement of the substantive right proclaimed on the face of the statute. Now, perhaps, as a matter of regulatory policy, this outcome over-deters: it makes insurance companies rush their payments too much, or it imposes liability out of proportion to their moral culpability, or it makes too many campaign contributors unhappy. If that is so, the legislature should change the substantive law. This outcome is preferable to keeping the same law—promising ordinary citizens that they are protected by this penalty—but disabling the courts from enforcing it.[215]

Thus, New York can attain its substantive goal by openly imposing a damage cap on the defendant's total liability, but it cannot forbid federal class actions.

b. Summary Judgment

For a second illustration, a recent article posed the problem of vertical choice of law on summary judgment, in view of the fact that states have varying summary judgment provisions as well as varying interpretations of identical provisions.[216] Its challenge was this:

> Consider a [diversity] lawsuit filed in federal district court in Indiana. The plaintiff has a weak claim, and the claim's weakness is made manifest during discovery. The defendant then moves for summary judgment. According to the federal standard set forth in *Celotex*, the defendant does not need to negate the plaintiff's claim; rather, the defendant only needs to "show"—by surveying the availa-

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dent's counsel taking the opposite position in response to Justices Sotomayor's and Stevens's questioning).

215 Hendricks, *supra* note 141, at 52–53 (footnotes omitted).

216 *See* Jeffrey O. Cooper, *Summary Judgment in the Shadow of* Erie, 43 AKRON L. REV. 1245, 1246 (2010); *see also* Bernadette Bollas Genetin, *Foreword: Summary Judgment and the Influence of Federal Rulemaking*, 43 AKRON L. REV. 1107, 1130–38 (2010).

> ble evidence—that no genuine issue of material fact exists; the burden then shifts to the plaintiff to identify specific evidence in the record that demonstrates the existence of a genuine issue of material fact. The difference may be somewhat difficult to articulate, but it is real: it is generally much harder to establish a negative, as the Indiana interpretation of its Rule 56 requires, than it is to suggest a negative and require the opposing party to prove a positive, as *Celotex* requires. A defendant in this situation, facing a weak claim, would prefer to be in federal court; by contrast, a plaintiff would prefer to operate under the more forgiving regime of the Indiana rule.[217]

What result in this hypothetical? Since *Hanna*, the cases have uniformly applied federal law on this matter.[218] But some theorists have read *Gasperini* and *Semtek*'s narrow approach to reading Rules as the path to interpret Rule 56 out of the standard-providing business, and hence as the path to applying state law.[219]

To my mind, the summary judgment hypothetical seems an easy case after *Shady Grove*, because the Court sapped *Gasperini* and *Semtek*'s vitality as to Rule construction. Even before *Shady Grove*, though, it was hard to read Rule 56 narrowly enough, in the fashion of *Gasperini* and *Semtek*, to avoid a conflict with state law. Rule 56(c)(2) set out the standard of decision of "genuine issue," and Rule 56(e)(2) provided the framework for *Celotex*'s burden shifting.[220] Because Rule 56 really treats procedure and it covers the standard of decision, it applies in any diversity case to displace state law that covers the same matter. A 2006 case summed the situation up:

> Although state law provides the substantive law in a diversity action, summary judgment procedure is governed by federal law. Federal law defines the standard for evaluating the sufficiency of the evidence. If reasonable persons could not find that the evidence justifies a decision for a party on each essential element, the court can grant summary judgment using federal standards. Federal courts may therefore grant summary judgment under Rule 56 upon concluding that no reasonable jury could return a verdict for the party

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217 Cooper, *supra* note 214, at 1257 (footnote omitted) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)).

218 *See* 17A MOORE, *supra* note 101, § 124.05, at 124–34; 10A WRIGHT, MILLER & KANE, *supra* note 201, § 2712, at 219–21 (3d ed. 1998) (collecting cases to the effect that federal law governs "the availability of summary judgment," as opposed to the elements of the claims and defenses and related matters that state law controls); Cooper, *supra* note 216, at 1258, 1263.

219 *See, e.g.*, Steinman, *supra* note 27, at 284 (viewing the standard of decision as a judicial gloss on the very generalized FED. R. CIV. P. 56).

220 FED. R. CIV. P. 56.

> opposing the motion, even if the state would require the judge to submit an identical case to the jury.[221]

Harder cases are possible to imagine, which would involve state law treating details that may lie outside Rule 56.[222] Although Rule 56 broadly covers the procedure of adjudication without trial,[223] there are related but separable procedures that might have a substantive impact. Examples that first come to mind might include the sort of detail currently left to federal courts' local rules.[224] One such example is that some local rules require submissions of factual support or opposition, or statements of uncontroverted fact.[225] Such a local rule may be valid as "consistent" with Rule 56,[226] and does not conflict with the words of Rule 56. Nevertheless, Rule 56, by not providing for such submissions,[227] would seem to "cover" the matter and so trump a state law requiring such submissions. The test for local rules allows for more play than *Shady Grove* allows with regard to state law.[228] This discrepancy may not be logical, but if the courts were to close it they probably should choose to tighten the limits on any local rulemaking that fills interstices in the Federal Rules.[229]

A better reason to apply state law would arise as the state provision moves outward from the umbrella of summary judgment. Thus, a state statute could establish special evidential requirements, like Indiana's requiring expert evidence in a medical malpractice case: on

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221 Maroules v. Jumbo, Inc., 452 F.3d 639, 645–46 (7th Cir. 2006) (citations omitted).

222 *See generally* EDWARD J. BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT (3d ed. 2006) (treating many details but mentioning none that could possibly call for application of state law).

223 Both the state and federal rules aim "to identify those cases that are so one-sided that no reasonable [factfinder] could possibly find for the non-moving party, thus negating the need for a trial." Cooper, *supra* note 216, at 1257.

224 *See* BRUNET & REDISH, *supra* note 222, ch. 4 & app. D.

225 *See id.* § 4.2.

226 *See* FED. R. CIV. P. 83(a)(1); BRUNET & REDISH, *supra* note 222, § 4.8.

227 Indeed, the Advisory Committee in 2009, having considered requiring point-counterpoint statements, declined to write them into the Rule. *See* COMM. ON RULES OF PRACTICE & PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 17–18 (2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/Combined_ST_Report_Sept_2009.pdf.

228 *See* Colgrove v. Battin, 413 U.S. 149, 163–64 (1973) (approving a local rule that provided for six-person juries).

229 *See* Miner v. Atlass, 363 U.S. 641, 646–51 (1960) (invalidating a local rule that allowed depositions not authorized in the national rules); Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 944–52 (1996).

that point, state law would likely apply.[230] Yet even such a provision would fall to Rule 56 if it worked merely to allocate decision between judge and jury, such as Michigan's Closed-Head Injury Act's provision that expert evidence creates a jury issue.[231] Just as in *Shady Grove*, despite any impact on substantive purposes or effects, the state statute falls within the coverage of the Federal Rule and therefore does not apply in federal court.[232]

c. Pleading Rules

A third illustration involves pleading. Always the federal cases have overwhelmingly called for the application of federal law.[233] But again some academics, on the view that "whether a plaintiff has made the necessary 'short and plain statement' is not dictated by the Rules themselves," have read Rule 8 narrowly enough to call for applying state law.[234]

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230 *See* Wallace v. McGlothan, 606 F.3d 410, 419–20 (7th Cir. 2010) (dictum) (noting conflict in case authority).

231 MICH. COMP. LAWS ANN. § 500.3135 (West 2005).

232 *See* Shropshire v. Laidlaw Transit, Inc., 550 F.3d 570, 575 n.4, 573–76 (6th Cir. 2008) (refusing to apply a state statute allocating the question of "serious" injury *vel non* to the judge except, "for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury"). The viability of *Shropshire* recently came before the Supreme Court. Medison Am., Inc. v. Preferred Med. Sys., LLC, 131 S. Ct. 101 (2010) (denying certiorari); *see* Petition for Writ of Certiorari, *Medison Am.*, 131 S. Ct. 101 (No. 09-1372) (seeking review of the Sixth Circuit's application of FED. R. CIV. P. 56 despite Tennessee's rejection of *Celotex*). On Tennessee's law, see Judy M. Cornett, *Trick or Treat? Summary Judgment in Tennessee After* Hannan v. Alltel Publishing Co., 77 TENN. L. REV. 305 (2010).

233 *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1204 (3d ed. 2004) (collecting cases to the effect that federal law governs pleading in federal court).

> The manner and details of pleading in the federal courts are governed by the Federal Rules of Civil Procedure regardless of the source of substantive law to be applied in the particular action. . . . [T]he rules regarding the standard of specificity to be applied to federal pleadings, the pleadings allowed in the federal courts, the form of the pleadings, the special requirements for pleading certain matters, the allocation of the burden of pleading among the parties, and the signing of pleadings by an attorney of record or an unrepresented party, all are governed by the federal rules and not by the practice of the courts in the state in which the federal court happens to be sitting.

Id. § 1204, at 104–05.

234 Steinman, *supra* note 27, at 285 (viewing the pleading standard as a judicial gloss on the generalized FED. R. CIV. P. 8(a)(2) and 12(b)(6)).

Still, the better view is that *Erie* does not carry state pleading law into federal court. The dispute has potentially become more intense as the Supreme Court has revolutionized pleading and so more widely separated federal pleading from state law.[235] Admittedly, the "resulting disparity between lenient state pleading and robust federal gatekeeping [under *Twombly* and *Iqbal*] will increase the considerable incentive to remove."[236] But such difference-induced forum shopping "is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure."[237] Federal law will govern because Rule 8 does indeed cover the general question of how the parties are to plead, telling them how much and what kind of stuff they must put into those pleadings.[238] Being a valid Rule of procedure, it displaces clashing state law.

Thus, a state statute regulating the pleading of punitive damages should not apply in federal court.[239] But a state statute requiring a separate step, such as certifying that the plaintiff has filed an administrative notice of claim, would apply.[240] Harder cases can arise. For example, a state provision on certification of a complaint's merit in a medical malpractice case conceivably could also slip out from under the pleading umbrella. It might then govern[241]—unless it

235 *See* Kevin M. Clermont, *Three Myths About* Twombly-Iqbal, 45 WAKE FOREST L. REV. 1337, 1340–59 (2010).

236 Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 832 n.41 (2010).

237 Shady Grove Orthopedics Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1448 (2010) (Scalia, J., plurality opinion).

238 *See* FED. R. CIV. P. 8.

239 *See* Richard Henry Seamon, *An* Erie *Obstacle to State Tort Reform*, 43 IDAHO L. REV. 37, 121–25 (2006); Benjamin Grossberg, Comment, *Uniformity, Federalism, and Tort Reform: The* Erie *Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. PA. L. REV. 217 (2010); Meryl J. Thomas, Note, *The Merits of Procedure vs. Substance:* Erie, Iqbal, *and Affidavits of Merit as Medmal Reform*, 52 ARIZ. L. REV. 1135 (2010). *But see* Rhett Traband, *An* Erie *Decision: Should State Statutes Prohibiting the Pleading of Punitive Damages Claims Be Applied in Federal Diversity Actions?*, 26 STETSON L. REV. 225, 252–54 (1996).

240 *See* Garman v. Campbell Cnty. Sch. Dist. No. 1, 630 F.3d 977, 983–85 (10th Cir. 2010).

241 *See* Chamberlain v. Giampapa, 210 F.3d 154, 164 (3d Cir. 2000); Lewis v. Ctr. for Counseling & Health Res., No. C08-1086 MJP, 2009 WL 2342459, at *6–7 (W.D. Wash. July 28, 2009). *But see* Baird v. Celis, 41 F. Supp. 2d 1358 (N.D. Ga. 1999). In the *Chamberlain* case, the court found that the New Jersey affidavit-of-merit statute did not conflict with Rule 8 or 9. The statute required medical malpractice plaintiffs to file, within sixty days of the defendant's answer, an affidavit signed by a physician stating that there is a "reasonable probability" that the care deviated from the professional standard. N.J. STAT. ANN. § 2A:53A-27 (West 2004). The court pointed out that the affidavit was not a pleading and did not affect the required degree of specific-

wanders into the coverage of another federal provision such as Rule 11.[242]

CONCLUSION

The law's answers to *Erie*'s eternal questions continue to evolve, albeit certainly not in the directions predicted by Professor Ely. *Shady Grove* has not fundamentally altered the law's current answers, but it mercifully makes them more comprehensible.

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ity in pleadings. Although the statute said that a plaintiff's failure to file the affidavit would "be deemed a failure to state a cause of action," *id.* § 2A:53A-29, the court did "not read this stipulation as implying that a failure to file the required affidavit somehow renders pleadings insufficient that would otherwise be sufficient." *Chamberlain*, 210 F.3d at 160.

However, the court also noted that the affidavit-of-merit statute is intended to eliminate frivolous claims, while the "overall purpose [of Rules 8 and 9] is to provide notice of the claims and defenses of the parties." *Id.* This argument is a tougher one to make now that *Twombly* and *Iqbal* are in place.

242 *See* Estate of C.A. v. Grier, No. CIV.A. H-10-0531, 2010 WL 4236865, at *6 (S.D. Tex. Oct. 15, 2010); Garza v. Scott & White Mem'l Hosp., 234 F.R.D. 617, 622–23 (W.D. Tex. 2005). In the *Garza* case, the court found that a Texas statute, which provided for dismissal of medical malpractice suits and imposition of costs and fees upon plaintiff's failure to file an expert report within 120 days of filing suit, conflicted with the Federal Rules in a number of ways. For one, the statute infringed on a court's discretion to impose sanctions for frivolous claims under Rule 11.