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The Fruits of Shady Grove: Seeing the Forest for the Trees

Glenn S. Koppel

SYMPOSIUM: *ERIE* UNDER ADVISEMENT: THE DOCTRINE AFTER *SHADY GROVE*

THE FRUITS OF *SHADY GROVE*: SEEING THE FOREST FOR THE TREES

Glenn S. Koppel[*]

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* Professor of Law, Western State University College of Law; J.D., Harvard Law School; A.B., City College of New York. I am grateful to Jay Tidmarsh, Tom Rowe, Richard Freer, and Thom Main for their helpful comments and suggestions on earlier drafts. The errors are, of course, mine.

I. INTRODUCTION

As an alternative to the metaphor of a forest—to capture the lack of clarity of *Erie* jurisprudence—in which one can easily get lost among the trees in the search for meaning and guidance for future decisions, Justice Scalia, in the Supreme Court's latest "Erie" offering in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,[1] referred to "Erie's murky waters."[2] In *Shady Grove*, the Court fragmented into several opinions[3] that invite the reader into the forest—or, to mix metaphors, the grove—in search of fruitful answers to questions avoided, or unanswered, in *Gasperini v. Center for Humanities, Inc.*,[4] the Court's last extensive treatment of "Erie" doctrine before *Shady Grove*.

This article examines the fragments of *Shady Grove* and finds significant guidance in answering one of the questions side-stepped by the Court in *Gasperini*, namely the proper mode of analysis to employ when a Federal Rule potentially comes into conflict with a state law which, if not applied by the federal court in a diversity suit, could substantially affect the outcome of litigation. While these fragments may—or may not—yield a definitive "holding" in the strict stare decisis sense of the term, they do offer a principled Middle Way[5] to guide the

1. 130 S. Ct. 1431 (2010).
2. *Id.* at 1437.
3. *Id.* at 1436; *id.* at 1448 (Stevens, J., concurring); *id.* at 1460 (Ginsburg, J., dissenting).
4. 518 U.S. 415 (1996).
5. "The Buddha claimed that the practices he advocated in the quest for enlightenment avoided the extremes of sensual self-indulgence on the one hand and self-mortification on the other and thus he gave his Noble Eightfold Path the alternative name of the Middle Way." Glossary of Buddhist Terms, BUDDHIST STUDIES: BUDDHA DHARMA EDUCATION ASSOCIATION &

Court in succeeding cases in calibrating the balance of power in judicial federalism between the federal courts' interest in uniform procedure and the states' interest in uniform intra-state enforcement of their substantive policies.

The Court's 1996 opinion in *Gasperini* is like a jurisprudential version of a Rorschach test; commentators, looking for meaning, read into it what they hoped to see.[6] In *Gasperini*, the Court's majority counseled that federal courts should interpret the scope of Federal Rules "with sensitivity to important state interests and regulatory policies."[7] But what is the extent of this sensitivity? What principles guide a court in balancing the federal interest in procedural uniformity against state substantive policy interests? Until *Gasperini*, the Court did not go out of [its] way to avoid finding a conflict"[8] between a Federal Rule and state law, giving Federal Rules their "plain meaning."[9] Did *Gasperini* signal the Court's retreat from *Hanna's*[10] robust defense of the Rules Enabling Act's (REA) policy of federal procedural uniformity by narrowly construing Federal Rule 59 to create room for a pragmatic *Byrd*-like[11] accommodation of federal and state interests? In *Gasperini,* the Court, in Solomonic fashion, split the difference by deferring to New York's interests in capping damage awards[12] and the federal courts' interest in determining the appropriate division of labor between trial and appellate courts.[13]

Some commentators, like Professor Freer, read *Gasperini* to signal a resurrection of *Byrd*-balancing of state and federal interests: "[R]eading between the lines of *Gasperini,* we can find that *Byrd*—writ

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BUDDHANET, http://www.buddhanet.net/e-learning/dharmadata/fdd22.htm (last visited Oct. 11, 2010).

6. *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, 964-65 (1998) ("*Gasperini* is beginning to seem like a palimpsest, into which one can inscribe almost any meaning (good or bad) of one's choosing.").

7. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996).

8. Rowe, Jr., *supra* note 6, at 968.

9. Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.9 (1980).

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

11. "By recognizing three interests—(1) some federal systemic interest, (2) the state interest in governing the primary activity of citizens, and (3) the litigant interest in uniformity of outcome—and by embracing the concept of balancing, the Court reinvigorated principles of federalism in the vertical choice of law equation." Richard D. Freer, *Some Thoughts on the State of* Erie *After* Gasperini, 76 TEX. L. REV. 1637, 1651 (1998).

12. *Gasperini*, 518 U.S. at 430 n.12 .

13. *Id.* at 437.

large—may have a strong future."[14] Others foresaw a limited role for *Byrd*-balancing analysis.[15] If indeed *Gasperini* can be interpreted as a return to *Byrd*, what would this portend for federal rules uniformity? While, in my view, *Shady Grove* signals a return to the Court's pre-*Gasperini* propensity not to read Federal Rules to avoid a conflict with state law,[16] the decision sheds no light on the continuing viability of *Byrd*-balancing analysis,[17] which is applicable only to resolve the "relatively unguided *Erie* choice" under the Rules of Decision Act ("RDA");[18] the *Shady Grove* majority "[did] not wade into *Erie's* murky waters" finding that Federal Rule 23 was applicable and valid under the REA.[19]

Did *Gasperini* mark a return to pre-*Hanna* jurisprudence when, under the sway of *Guaranty Trust*, courts bent over backwards to apply state procedure over a Federal Rule to avoid a difference in litigation outcome? As discussed in Part IV, the dissent in *Shady Grove* falls back on an outcome determinative analysis under the RDA to conclude that the federal court should apply the state rule in that case over Federal Rule 23.[20] Seeking to build upon *Gasperini's* reliance on the outcome determination approach, one commentator, reacting to the conservative

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14. Freer, *supra* note 11, at 1660 . *See also* 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4511 (2d ed. 1996 & Supp. 2010) ("In the wake of *Gasperini*, the most pressing question is whether the Court's decision repudiates the promise in *Byrd* that the federal judiciary would be an independent system for the administration of justice. But despite Justice Scalia's objections, the Court's decision in *Gasperini* is a reasonable attempt to perform the balancing of interests required by *Byrd*."); C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 B.Y.U. L. REV. 267, 270 (1997) ("The *Gasperini* majority relied centrally on *Byrd*. . . .").

15. *See, e.g.*, Rowe, Jr., *supra* note 6, at 1007 ("[M]uch as I may disagree with Professor Floyd when he asserts that '[t]he *Gasperini* majority relied centrally on *Byrd*—for the Court does not engage in *Byrd*-style balancing to decide on the allocation of trial- and appellate-level responsibilities, and *Byrd* plays no role in the choice of standard for verdict-excessiveness review—the opinion largely earns his criticism that '*Byrd* still lives, but we know not why, or to what extent.'"); *id.* at 1009 ("So far . . . only a handful of post-*Gasperini* cases include substantial dealing with *Byrd*, and they sometimes appropriately find no 'essential characteristic' involved or cast doubt on whether the inquiry is suitable in the situation before the court.").

16. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1463-64 (Ginsburg, J., dissenting) ("The Court veers away from [interpreting the Federal Rules with sensitivity to important state interests]—and conspicuously, it's most recent reiteration in *Gasperini* . . .—in favor of a mechanical reading of Federal Rules, insensitive to state interests and productive of discord.").

17. *Byrd* is mentioned only once in passing in Justice Stevens' concurring opinion. *Id.* at 1448 (Stevens, J., concurring) (noting that "the federal courts sitting in diversity operate as 'an independent system for administering justice . . . .'").

18. *Id.* at 1448.

19. *Id.* at 1437.

20. *See infra* Part IV.

tilt of the federal judiciary and, in particular, the recent pro-defendant interpretation of pleading standards in *Twombly*[21] and *Iqbal,*[22] contends that *Gasperini* charts a new direction in Erie, arguing that federal courts in diversity suits are required to apply state judicial interpretations of Federal Rules, notwithstanding the REA.[23] In my view, such a prediction is premature after *Shady Grove* which, when the pieces of the puzzle are put together, moderates *Gasperini's* potential to undermine the congressionally-mandated policy of Federal Rules uniformity.

Another issue unresolved in *Gasperini* is the role of the so-called "substantive rights" proviso as an additional limit on the validity of Federal Rules under § 2072(b) of the REA. In 1941, the Court in *Sibbach v. Wilson & Co.*[24] announced a single test for determining the validity and applicability of the Federal Rules that focused solely on whether the Rule "really regulates procedure," declining to attribute independent force to the "substantive rights" proviso.[25] For seventy years, since *Sibbach*, the Supreme Court essentially ignored this proviso. During this period, *Hanna* expressly reaffirmed *Sibbach* as the test for rule validity in 1965.[26] Professors Wright, Miller, and Cooper, critical of *Sibbach*'s cavalier approach to state substantive polices, expressed the hope that, after *Hanna*, the Court would breathe life into the "substantive rights" proviso in *Gasperini*.[27] This hope was unfulfilled. But, in *Shady*

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21. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

22. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

23. *See generally* 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, 287 (2008).

24. 312 U.S. 1 (1941).

25. *Id.* 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.").

26. WRIGHT ET AL., *supra* note 14, § 4509 ("Although the Supreme Court never has addressed the question specifically, it so far has not seemed inclined to attribute much significance to the 'substantive rights' proviso. In *Hanna*, for example, the standard endorsed by the Court for determining the validity and applicability of the Civil Rules was the test announced in *Sibbach v. Wilson & Co.*, according to which the critical question is simply whether a Rule 'really regulates procedure.'").

27. *Id.* ("[T]here is reason to believe that the Supreme Court, should it have occasion to address specifically the relationship between the constitutional and the statutory restrictions on the permissible scope of the Civil Rules, will disapprove the suggestion in *Hanna* that the *Sibbach* test is the appropriate standard for determining both the constitutionality of a Civil Rule and its validity under the Enabling Act. . . . By virtue of the 'substantive rights' proviso in the statute, it is not sufficient that a Civil Rule relate to practice and procedure; in addition, it cannot 'abridge, enlarge or modify any substantive right.'"); *id.* § 4511 (referring to "one question presented by the Gasperini case," which was pending before the Court at the date of publication, whether Rule 59 controlled "the standard of review of a jury's damage award": "If Rule 59 does encompass that

Grove, the combined effect of Justice Stevens's pivotal concurrence and the dissent may augur a modification of *Sibbach*'s approach.[28]

Part II will sketch the facts of the case to prepare for an exploration of the roots of *Shady Grove* in Part III, which traces the evolution of the Court's *Erie* jurisprudence. At various points along the way, I will stop to anticipate where one or more of the several opinions in *Shady Grove* will shed light, in Part IV, on the meaning of *Shady Grove.*

II. A SYNOPSIS OF *SHADY GROVE*

Shady Grove filed a diversity suit against Allstate in the Eastern District of New York claiming individually unpaid statutory interest of $500 owed by Allstate on overdue insurance benefits and on behalf of a class of all others to whom Allstate owed statutory interest, in Justice Ginsburg's words, "transform[ing] a $500 case into a $5,000,000 award."[29] A subsection of New York's class-action rule—CPLR § 901(b)—located in the state's procedural code provided that "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."[30] The district court dismissed the suit for failing to satisfy the $75,000 amount in controversy requirement for diversity jurisdiction, concluding that statutory interest is a "penalty" within the meaning of CPLR § 901(b) which, therefore, barred the proposed class action.[31] The Second Circuit affirmed, holding (1) that no conflict exists between Rule 23 and CPLR § 901(b) because they addresses different issues: Rule 23 addresses whether a class action is *certifiable* while CPLR § 901(b) "addresses an antecedent question: whether the particular type of claim is *eligible* for class treatment in the first place," and (2) that CPLR § 901(b) is a "substantive" rule within the meaning of *Erie.*[32]

A fragmented Court, by a majority of five, reversed and remanded the case, holding that Federal Rule 23 and the state rule do conflict because both addresses the same issue—whether Shady Grove is

standard, then the federal courts must apply a federal standard *unless that standard would abridge, enlarge, or modify a substantive right in violation of the Rules Enabling Act.*" (emphasis added)).

28. *See infra* Part IV.

29. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1460 (2010) (Stevens, J., concurring). *But see id*. at 1459 n.18 ("Justice Ginsburg asserts that class certification in this matter would 'transform a $500 case into a $5,000,000 award.' But in fact, class certification would transform 10,000 $500 cases into one $5,000,000 case." (internal citations omitted)).

30. N.Y. C.P.L.R. § 901(b).

31. *Shady Grove*, 130 S. Ct. at 1437.

32. *Id.* at 1437-38 (emphasis added).

authorized to "maintain" a class action[33]—and, further, that Rule 23 was "valid" under the REA and, therefore, preempts the state rule.[34] The Court's majority—which included Justice Stevens, who concurred in Justice Ginsburg's Opinion of the Court in *Gasperini*—declined her invitation to narrowly construe Rule 23 to accommodate the substantive policy goals behind CPLR § 901(b).[35]

Although the Court fragmented into five opinions, these opinions do not align with the usual ideological, liberal-conservative fault lines.[36] The Court's opinion in Parts I and II-A, authored by Justice Scalia, was joined by two other conservative Justices—Roberts and Thomas—as well as two liberal Justices—Justice Sotomayor, a Democratic appointee, and Justice Stevens.[37] A plurality opinion in Parts II-B and II-D, also authored by Justice Scalia, which Justice Stevens did not join, affirmed *Sibbach*'s "really regulates procedure" test pursuant to which "compliance of a Federal Rule with the Enabling Act is to be assessed by consulting *the rule itself*, and not its effects in individual applications."[38] In Part II-C, Justice Scalia wrote a plurality opinion that responded specifically to Justice Stevens's concurrence, which Justice Sotomayor did not join.[39] Justice Ginsburg's dissenting opinion, joined by Justice Alito, a conservative, Justice Kennedy, a moderate-conservative, and Justice Breyer, a liberal, narrowly construed Rule 23 to avoid a collision with CPLR § 901(b) and applied the outcome determinative test to conclude that New York's class action rule was "substantive" under *Erie*[40] and, as the dissent was interpreted by the plurality[41] and Justice Stevens,[42] the REA. Justice Stevens wrote a

33. *Id.* at 1438-39.

34. *Id.* at 1437.

35. *Id.* at 1456 (Stevens, J., concurring).

36. The apolitical approach to federalism in *Shady Grove* runs counter to the view of some scholars that politics drive contemporary views of judicial federalism in light of the procedural disparities between federal and state courts. *See, e.g.*, Steinman, *supra* note 23, at 248.

37. For identification of Supreme Court Justices by ideological perspective, *see generally* William E. Nelson, Harvey Rishikof, I. Scott Messinger & Michael Jo, *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 62 VAND. L. REV. 1749 (2009).

38. *Shady Grove*, 130 S. Ct. at 1444 (emphasis added).

39. *Id.* at 1435.

40. *Id.* at 1469 (Ginsburg, J., dissenting).

41. *Id.* at 1442 ("What the dissent's approach achieves is not the avoiding of a 'conflict between Rule 23 and § 901(b),' . . . but rather the invalidation of Rule 23 (pursuant to § 2072(b) of the Rules Enabling Act) to the extent that it conflicts with the substantive policies of § 901.").

42. *Id.* at 1456 (Stevens, J., concurring) ("At bottom, the dissent's interpretation of Rule 23 seems to be that Rule 23 covers only those cases in which its application would create no *Erie* problem. 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."); *id.* at

concurring opinion that positioned him at the Court's center. He agreed with the dissent that the REA's "substantive rights" proviso required the Court to characterize the state rule as "substantive" or "procedural" in determining the validity of Rule 23 as applied to preempt the state rule,[43] but concurred with the plurality that the state rule was "procedural" and, therefore, not "substantive" under the REA's "substantive rights" proviso.[44] He disagreed with Justice Ginsburg who, in his words, "would apply the Rules of Decision Act[']s outcome determination] 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."[45]

Although some may opine that the Court once again missed its chance to provide relatively clear guidance on "Erie-Hanna"—as it did, some posit, in *Gasperini*[46]—this article will demonstrate—reading between the lines—that *Shady Grove* does provide some useful doctrinal guidance. In calibrating the judicial balance of power between federal and state interests, the Court's majority reaffirmed—in light of *Gasperini*, one might say re-established—the vitality of the REA's policy of federal procedural uniformity in diversity actions, by holding that Rule 23—a federal rule with powerful outcome impact on the enforcement of state-created rights—controlled the issue in dispute, was valid, and, therefore, preempted New York's conflicting, and outcome determinative, class action rule.[47] Another majority, comprising Justice Stevens and the four dissenting Justices, may signify a modification of the Court's unnecessarily rigid approach under *Sibbach* to Federal Rule validity by breathing some life into the "substantive rights" proviso, qualified, however, by Justice Stevens's pivotal concurrence that narrowly interpreted the reach of the proviso to exclude merely outcome determinative state law.[48] And, as explained in Part IV, Justice Ginsburg's dissent in *Shady Grove* may, in turn, serve to provide some

1459 ("It is an incorrect assumption that the rule of *Erie R. Co. v. Tompkins* constitutes the appropriate test of . . . the applicability of a Federal Rule of Civil Procedure.").

43. *Id.* at 1451 (Stevens, J., concurring) ("[The Enabling] Act requires, *inter alia,* that federal rules 'not abridge, enlarge or modify *any* substantive right'. . . . Unlike Justice Scalia, I believe that an application of a federal rule that effectively abridges, enlarges, or modifies a state-created right or remedy violates this command." (emphasis in original)).

44. *Id.* at 1459-60 (Stevens, J., concurring).

45. *Id.* at 1456.

46. *See, e.g.*, Freer, *supra* note 11, at 1663 ("[T]he Supreme Court has a duty to set meaningful precedent. In *Gasperini*, the Court had another opportunity—perhaps the best in a generation—to make a meaningful contribution to RDA analysis, including the role of *Byrd.* Instead, the Court has left the field about as murky as it was before.").

47. *Shady Grove*, 130 S. Ct. at 1448.

48. *Id.* at 1457 (Stevens, J., concurring).

clarity to our understanding of her opinion in *Gasperini*, which one commentator criticized as leaving "the field about as murky as it was before."[49]

III. THE ROOTS OF *SHADY GROVE*: "ERIE" JURISPRUDENCE AND THE OSCILLATING PENDULUM[50] OF JUDICIAL FEDERALISM BETWEEN FEDERAL AND STATE INTERESTS

The Supreme Court's 1938 landmark decision in *Erie Railroad Co. v. Tompkins*,[51] overturning a century of precedent in *Swift v. Tyson*,[52] revolutionized our concept of judicial federalism.[53] The limited purpose of this section is to sketch enough of the tortuous path of "Erie" jurisprudence, from *Erie* itself through *Guaranty Trust* to *Gasperini*, to aid in understanding the doctrinal implications of *Shady Grove* by situating the various positions taken by the Justices in that case at various points along the path's twists and turns. Themes that thread through *Erie* jurisprudence over its seventy-two-year metamorphosis also weave through *Shady Grove.* "Erie's" oscillating pendulum is the product of the Court's ongoing attempt to find the "right" judicial balance of power between federal and state interests that, in turn, has been influenced by differing concepts of federalism among the Justices.[54] It has been observed that federalism is a fluid notion that is

49. Freer, *supra* note 11, at 1663.

50. For an example of the swinging pendulum metaphor to describe the Supreme Court's oscillation between sensitivity to state substantive interests and the federal interest in procedural uniformity, see WRIGHT ET AL., *supra* note 14, § 4508 (referring to Justice Harlan's concern in his concurring opinion in *Hanna v. Plumer* that the majority went too far "by sanctifying unduly and rendering inviolate the federal rules": "But has the pendulum [in *Hanna*] swung too far? In a separate concurring opinion, Justice Harlan suggested that it has."). *See also* John Hart Ely, *The Irrepressible Myth of Erie,* 87 HARV. L. REV. 693, 696 (1974) ("[T]he pendulum that had begun in *Byrd* to swing back toward the teaching of *Erie* swung too far . . . in Chief Justice Warren's opinion for the Court in *Hanna v. Plumer*.").

51. 304 U.S. 64 (1938).

52. 41 U.S. 1 (1842).

53. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) ("*Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts."); WRIGHT ET AL., *supra* note 14, § 4503 ("It is impossible to overstate the importance of the Supreme Court's decision in *Erie Railroad Company v. Tompkins*. . . . [I]t goes to the heart of the relationship between the federal government and the states, and returns to the states a power that for nearly a century had been exercised by the federal government."); *see* LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 440 (4th ed. 2009) ("The Court [in *Erie*] seemed to treat the problem created by the *Swift* doctrine as exclusively one of federalism.").

54. Steinman, *supra* note 23, at 308 ("[[T]he cases that have come to constitute Erie's doctrinal 'progeny'] are principally about procedural federalism.").

shaped by historical forces[55] including the changing social, economic, and political environment.[56] The shifting balance of power also reflects the tension between formalism and legal realism and the corresponding tension inherent in the dichotomy[57] between "substance" and "procedure" in classifying law for choice of law purposes, including "Erie."[58]

These tensions are starkly manifest in *Shady Grove*. Formalists[59] value rules and tend to view procedure as normatively distinct from substance.[60] Realists[61] tend to be rule-skeptics[62] who view procedure as

55. EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA 185 (2000) ("*Erie*'s positivism was based on a practical recognition of the changing demands of constitutional federalism. It was part of a broader working approach that sought to adapt the architecture of American government to the challenges of a new, expanding, and dynamic interstate society."); Susan Bandes, Book Note, 110 YALE L.J. 829, 877 (2001) (reviewing EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000)) ("The abstract notion of federalism merely drives the influence of history underground and deprives all those affected of the opportunity to decide whether any particular version of federalism ought to retain its hold. It would be more sensible to look to history for help identifying the forces that have shaped and reshaped the notion of federalism over time.").

56. Steinman, *supra* note 23, at 248 ("Our septuagenarian *Erie* finds itself in a political and judicial environment that is eerily similar to the one prevailing at its birth. Then, as now, corporate and business interests tend to favor federal court, while their political and litigation adversaries tend to favor state court. . . . These procedural disparities are at the core of the contemporary politics of judicial federalism.").

57. "Substance" and "procedure" are not mutually exclusive concepts since statutes often contain substantive and procedural aspects. *See* Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 812-18 (2010) ("Dichotomy in Disarray"); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure,* 59 DEPAUL L. REV. 371, 415 (2010) ("[T]o jurisprudes like Thurman Arnold, the [substance-procedure] dichotomy eroded long ago. Perhaps more significantly, the politics of rulemaking since the 1970s has, in practical terms, dissolved a definable boundary in practice between substance and procedure.").

58. *See, e.g.*, Main, *supra* note 57, at 812 ("Today . . . a Federal Rule of Civil Procedure is not a valid procedural rule under the Rules Enabling Act if it abridges, enlarges or modifies a substantive right. In diversity cases, the *Erie* doctrine requires federal courts to apply state substantive law and federal procedural law. Closely related to the vertical choice of law context in *Erie* is the horizontal choice of law; a court usually applies the procedural law of the forum even when it applies the substantive law of another jurisdiction.").

59. Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, The Legal Workshop, CORNELL L. REV., Jan. 15, 2010, *available at* http://legalworkshop.org/2010/01/15/varieties-of-new-legal-realism-can-a-new-world-order-prompt-a-new-legal-theory ("[B]y formalism we mean a theory of law based on rationally organized first principles deductively applied.").

60. On the existence of procedural norms distinct from substance, see Steven S. Gensler, *The Role and Future of the Federal Rules: Justness! Speed! Inexpense! An Introduction to The Revolution of 1938 Revisited: The Role and Future of the Federal Rules,* 61 OKLA. L. REV. 257, 271 (2008) (noting the procedural norms expressed in Federal Rule 1: "Rulemaking that flows from our

thinly disguised substance. Realism eschews a priori classifications of laws as procedural or substantive.[63] Formalism in the procedural context

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Rule 1 ideals—the just, speedy, and inexpensive administration of the law—is not without its benefits. . . . [I]t also bears mentioning that modern rule-drafting and rulemaking bodies continue to invoke the norms of justness, speed, and efficiency."). *See also* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 894 (1999) ("[P]roponents of court rulemaking believed that procedure was normatively distinct from and subordinate to substantive law. . . . [T]he values relevant to procedural rulemaking were not substantive in nature. They were practical values of administrative design, such as efficiency (understood narrowly as minimizing administrative cost), simplicity, and flexibility."); Ely, *supra* note 50, at 724 n.168 (1974) (suggesting a distinctly procedural norm to define "procedure" as used in the REA, "a statute directed not so much to identity of outcome as to the creation of a uniform and enlightened practice for federal courts"). *Id.* at 724-25 ("We were all brought up on sophisticated talk about the fluidity of the line between substance and procedure. But the realization that the terms carry no monolithic meaning at once appropriate to all the contexts in which courts have seen fit to employ them need not imply that they can have no meaning at all. And they are the terms the Enabling Act uses. We have, I think, some moderately clear notion of what a procedural rule is—one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes. Thus, one way of doing things may be chosen over another because it is thought to be more likely to get at the truth, or better calculated to give the parties a fair opportunity to present their sides of the story, or because, and this may point quite the other way, it is a means of promoting the efficiency of the process. Or the protection of the process may proceed at wholesale, as by keeping the size of the docket at a level consistent with giving those cases that are heard the attention they deserve.").

61. Legal Realism is a rather amorphous concept. *See* Roy L. Brooks, *Structures of Judicial Decision Making from Legal Formalism to Critical Theory* 90 (2d ed. 2005) (citing Karl Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1254 (1931)) ("For all of its influence, legal realism is something of a mystery. Karl Llewellyn, one of legal realism's central figures, insisted in 1931 that there is no realist 'school,' only a congeries of perspectives that have left and right wings.").

62. Brooks, *supra* note 61, at 90-91 ("All legal realists are rule-skeptic and fact-skeptic. [R]ule-skepticism is the belief that law is not a body of rules but a set of facts that give rise to competing policy choices."). Legal realism's aversion to rules has powerfully influenced conflicts jurisprudence since the mid-twentieth century. For a discussion of the impact of legal realism's rule-skepticism on conflicts jurisprudence, see Symeon C. Symeonides, *American Choice of Law at the Dawn of the Twenty-First Century*, 37 WILLAMETTE L. REV. 1, 70 (2001) ("As happens in many revolutions, the established system was demolished rather than repaired. The spectacular deficiencies of the Restatement [of Conflicts] rules, coupled with the influence of American Legal Realism, which was the philosophical school of choice of most conflicts revolutionaries, provoked an overreaction against *any* rules." (emphasis added)).

63. Edgar H. Ailes, *Substance and Procedure in the Conflict of Laws,* 39 MICH. L. REV. 392, 393 (1940-41) ("To the realist, an *a priori* distinction between substance and procedure is meaningless jargon; subject to possible limitations imposed by public policy, [Karl Llewellyn] asserts that every rule of foreign law which bears materially upon the interests of the parties should be freely imported."); Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945) ("Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same keywords to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.").

values predictability of result, cabining judicial discretion.[64] Realism values substantive justice—achieving the "right" result in the individual case but often at the expense of predictability and uniformity.[65] These different formalist and realist perspectives on substance and procedure persist in current scholarly and judicial discourse[66] and are reflected in the opposing viewpoints between the Court's majority and the dissent in *Shady Grove*.[67] Realists, therefore, tend to view procedural uniformity as illusory;[68] the Federal Rules vest so much discretion in judges that the text of the rules does not provide uniformity of result in procedural decisions.[69] Therefore, in engaging in the "Erie" sport of characterizing rules as "procedural" or "substantive," formalists tend to broadly

64. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) ("And the trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well. When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*."); *id.* at 1179 (explaining the formalist's predilection for general rules that constrain political or policy preferences of judges: "For when, in writing for the majority of the Court, I adopt a general rule, and say, 'This is the basis of our decision,' I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle.").

65. Main, *supra* note 57, at 815 ("A functional approach purported to offer sufficient flexibility to consider all of the variables implicated in any particular application of the substance-procedure distinction. But, of course, flexibility cannot be achieved without severely compromising the values of predictability and uniformity.").

66. *See* Bone, *supra* note 60, at 888, 900-07 (chronicling the attack, since the 1970's, on the concept of procedural uniformity and the rejection of "the idea that civil process is normatively independent of substance.").

67. *See, e.g.*, Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1440-41 (2010).

68. Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1998) ("Federal Rules that avoid policy choices and that in essence chart ad hoc decision-making by trial judges are uniform and hence trans-substantive in only the most trivial sense.").

69. *See* David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 461 (2010) ("Realists wanted rules that would guide judges to decisions with good concrete results but, nonetheless, vest them with the discretion that made them assume responsibility for results."); Stephen N. Subrin, *Professors' View*: *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 391 (2010) ("Professor Burbank has pointed out: 'Many of the Federal Rules authorize essentially ad hoc decisions and therefore are trans-substantive in only the most trivial sense.' To put it another way, in order to meet the goal of having the same rules for all cases, the drafters were forced to draft general rules, with a good deal of discretion inherent in them, giving little direction to judges and in turn, to lawyers. Consequently, similar cases and situations are apt to be treated quite differently, depending on the judge. Since we now know that procedural decisions can, and often do, materially influence substantive application, the rules cannot provide uniformity of result.").

construe the former term and realists broadly construe the latter. This phenomenon, too, surfaces in *Shady Grove*.[70]

A. Erie *Realigns the Judicial Balance of Power in Favor of State Substantive Interests*

Under the RDA, "[t]he laws of the several States, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[71] At issue in *Swift* and, 100 years later, in *Erie,* was the meaning of the phrase "laws of the several states."[72] The Court in *Swift* held that "laws" was "strictly limited to local statutes and local usages . . . of a fixed and permanent operation"[73] and does not extend to decisions of state courts on general commercial law which are "at most, only evidence of what the laws are."[74] In reversing *Swift*'s formalist concept of a "transcendental body of law"[75] that judges discovered rather than created,[76] *Erie* reflected a legal realist perspective that law is what the judges say it is[77] and, in the absence of a controlling federal statute, state

70. *Compare Shady Grove*, 130 S. Ct. at 1442 ("What matters is what the rule itself *regulates*: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not."), *with id.* at 1458 (Stevens, J., concurring) ("[I]t is necessary to distinguish between procedural rules adopted for *some* policy reason and seemingly procedural rules that are intimately bound up in the scope of a substantive right or remedy." (emphasis original)).

71. 28 U.S.C. § 1652.

72. Swift v. Tyson, 41 U.S. 1, 18 (1842).

73. *Id.* at 18-19.

74. *Id.* at 19.

75. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

76. Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1475 & n.84 (1997) ("This conception of general common law drew heavily upon Blackstone's Commentaries, which maintained that common law existed independent of judicial decisions and was based on 'natural justice' and 'the established custom of the realm.'"). *See* 1 WILLIAM BLACKSTONE, COMMENTARIES; William R. Casto, *The* Erie *Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 913 (1988). *But see* Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 683 (1998) ("It is doubtful that *Swift* represented a commitment to our belief in the 'brooding omnipresence' theory later attributed to it by Holmes and *Erie*.").

77. *See* Laura Kalman, LEGAL REALISM AT YALE, 1927-1960, at 21 (1986) ("[W]hen Llewellyn defined law as 'what officials do about disputes,' and when Frank said that 'if the judges come to a 'wrong' result, their decision is none the less law,' realists appeared to espouse a sweeping ethical relativism that denied the existence of a higher law that provided judges with moral guidance."); K. N. LLEWELLYN, THE BRAMBLE BUSH 89-91 (1931) ("[W]hat appellate judges *do* is vastly more important than what appellate judges say."); *see, e.g.*, *id.* at 82-83 (1933).

substantive common law is as authoritatively binding on federal courts as state statutory law.[78]

Erie did not restrict federal courts' authority over their own procedure and, "[f]or seven years it was supposed that Erie drew a line between 'substance' and 'procedure,' with the former governed by state law in diversity cases and the latter subject to federal law."[79] Four years before *Erie*, Congress enshrined the "substance-procedure" dichotomy in the Rules Enabling Act of 1934 ("REA") by delegating authority to the Supreme Court to promulgate rules of "practice and procedure" for the federal courts which cannot, however, "abridge, enlarge or modify any substantive right."[80] Three years after the Federal Rules became effective, the Supreme Court confirmed the robust power of the federal courts over their own procedure in *Sibbach v. Wilson & Company*.[81] Consistent with *Erie*'s implicit dichotomy between substance and procedure,[82] *Sibbach* affirmed the broad sweep of the term "procedure" in determining the validity of a Federal Rule under the REA.[83] Seventy

78. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 17-18 (2006) ("In *Erie* the Court overruled *Swift v. Tyson*, explaining that 'what has been termed the general law of the country'—and what *Swift* had described as a search for 'the true' or 'just rule'—is 'often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject.' Once it became clear that judges were making law, rather than finding it, it became impossible for the Court to continue substituting its views on state law matters for those of state courts.").

79. WRIGHT ET AL., *supra* note 14, § 4508 ("Although Justice Brandeis did not mention 'procedure' in his opinion for the Court [in *Erie*], Justice Reed, in his concurring opinion, completed the dichotomy by observing that 'no one doubts federal power over procedure.'"). *But see* Ely, *supra* note 50, at 708 ("A considerable body of nostalgic literature to the contrary, *Erie* did not indicate that 'substance' and 'procedure' were the keys to interpreting the [Rules of Decision] Act.").

80. Rules Enabling Act of 1934, 28 U.S.C. § 2072 (a) & (b). *See* Hon. Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 288 (1946) ("The dichotomy of substance and procedure has had more discussion than any other single feature of the *Tompkins* doctrine. This was natural in view of the general importance of the subject; but it was made more dramatic by reason of the fact that four months earlier the Supreme Court had adopted rules of civil procedure, effective only several months later; designed to make uniform the procedure in all the federal courts throughout the country.").

81. Sibbach v. Wilson, 312 U.S. 1 (1940).

82. WRIGHT ET AL., *supra* note 14, § 4508 ("Implicit in the Court's opinion in *Sibbach* is the assumption that matters of procedure and matters of substance are, in the words of [Justice Frankfurter's] dissent, 'mutually exclusive categories with easily ascertainable contents,' . . . ."); *id.* ("At the time, the *Sibbach* standard for determining the validity of a Civil Rule corresponded closely with the prevailing interpretation of the decision in *Erie v. Tompkins* and the rule it announced for applying state law under the Rules of Decision Act.").

83. *Sibbach*, 312 U.S. at 14. *Sibbach*'s test of Federal Rule validity was "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." *Id.*

years later, in *Shady Grove*, the reach of *Sibbach*'s broad interpretation of the REA would divide the Court. Drawing "the line" between "substance and procedure" in the context of the REA and the *Erie* context of the RDA, as part of the larger tension between the federal interest in uniform procedure and state interest in uniform intra-state enforcement of substantive rights and remedies, has bedeviled the Court since *Erie* and, as discussed in the Part IV, still does in *Shady Grove*.[84]

Erie realigned the federal-state judicial balance of power[85] and, together with the tortuous path of its progeny, has been portrayed "as a prism through which to view the evolving concept of federalism."[86] Professor John Hart Ely, in his influential article,[87] wrote that *Erie* "implicates, indeed perhaps it is, the very essence of our federalism."[88] One writer commented that *Swift* and *Erie* essentially reflect different stages in the evolution of American federalism:

> *Swift* enabled litigants and judges to determine the proper division of power between states and federal government at a time when states were insular, parochial, and inclined to view themselves as small nations, and when the United States was struggling to assert its national authority both internally and against the world. *Erie*, on the other hand, dealt with an established nation where federal authority had been asserted and challenged, and where it had prevailed. In the process, the states had dissolved into comparative insignificance. The end of the *Lochner* era in 1937, and the development of the *Erie* doctrine in 1938, helped to restore eroded state power and prepare for a realignment of state and federal areas of concern.[89]

Professors Wright, Miller and Cooper observed that "[p]robably no Supreme Court decision rendered during [the twentieth century] has had

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84. *See infra* Part IV.

85. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (interpreting the policy expressed by *Erie* as "touch[ing] vitally the proper distribution of judicial power between State and federal courts."); Clark, *supra* note 81, at 269 (commenting that *Erie* "touches . . . the nature of our federal system and the difficulties of adjusting the spheres of authority of two independent, co-ordinate, and largely competitive sovereignties operating in the same territory . . . .").

86. Bandes, *supra* note 55, at 830 (referring to the "changing social dynamics that engendered and then constantly reinvented the *Erie* doctrine.").

87. Rowe, Jr., *supra* note 6, at 969 (referring to Professor Ely's *The Irrepressible Myth of Erie* as an "illuminating and deservedly influential article").

88. Ely, *supra* note 50, at 695.

89. Herbert Hovenkamp, Book Note, 34 HASTINGS L.J. 201, 215 (1982) (reviewing Tony Freyer, HARMONY AND DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM (1981)). *See also* Clark, *supra* note 80, at 276 ("[T]he *Tyson* rule came in as a gradual and not unnatural development in balancing and adjusting the national against the local interests of that day and period.").

as significant an impact on the distribution of judicial power between the federal government and the states as has *Erie Railroad Company v. Tompkins*."[90] In *Shady Grove*, Justice Ginsburg's dissenting opinion will refer to the "Court's erosion of *Erie*'s federalism grounding."[91]

Justice Brandeis's opinion in *Erie* has also been viewed in political terms "as a Progressive and New Deal move against lawmaking by what had been a conservative federal judiciary, and against the corporations that had gained the benefit of that lawmaking through their access to diversity jurisdiction."[92] In chronicling the Progressive roots of *Erie*, Professor Purcell observed that Justice Brandeis's opinion was, in part, motivated by his belief in "the virtues of a decentralized federalism"[93] and his opposition to the Rules Enabling Act.[94] "By overruling *Swift*, the Court would establish a new area of decentralized authority and counterbalance the new centralizing Federal Rules."[95] Politics continues to inform the dialogue about the judicial balance of power.[96] One writer, referring to the "contemporary politics of judicial federalism,"[97] argues that the continued evolution of *Erie* jurisprudence "finds itself in a political and judicial environment that is eerily similar to the one prevailing at its birth" and proposes an interpretation of *Erie*

90. Wright *et al.*, *supra* note 14, § 4503; *See also* FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 168 (5th ed. 2001) ("[O]ne can see the [*Erie*] decision as grounded in federalism and protecting the right of states to shape their own law in their own courts, with federal law stepping in only when Congress so decides."). *Erie* has also been viewed from a separation of powers perspective as establishing "the constitutional primacy of the legislature" over the judicial branch. PURCELL, JR., *supra* note 55, at 165. "Brandeis . . . wanted to establish the principle that the mere possibility of valid congressional legislation was by itself insufficient to authorize the national courts to make law in an area. Congress, not the courts, should determine when and where national lawmaking authority was exercised." *Id.* at 173.

91. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1473 (2010) (Ginsburg, J., dissenting).

92. FLEMING ET AL., *supra* note 90, at 167; Hovenkamp, *supra* note 89, at 224 ("*Erie* had an imposing legal and constitutional content, but it had a powerful cultural content as well. The *Erie* doctrine was a product of the New Deal (or of the reaction to the New Deal). It was a product of legal realism and of the scientific instrumentalism of the age. *Erie* was much more than a decision about forum-shopping.").

93. PURCELL, JR., *supra* note 55, at 134.

94. *Id.* at 135.

95. *Id.* at 136.

96. *See* Bandes, *supra* note 55, at 836 (criticizing the formalism of the Rehnquist Court's New Federalism that, according to the writer, did not defend its value choices about the appropriate balance of federal and state power).

97. Steinman, *supra* note 23, at 248 ("While Erie put state and federal courts on equal footing when it came to the substantive elements of the litigants' claims and defenses, the conventional wisdom is that it did not eliminate disparities with respect to many aspects of civil procedure. These procedural disparities are at the core of the contemporary politics of judicial federalism.").

jurisprudence after *Gasperini* that aims to shift the judicial balance toward plaintiff-friendly state courts.[98]

As noted earlier, *Erie* has also been viewed as representing a jurisprudential shift from nineteenth century legal formalism,[99] whereby judges discover law through deductive reasoning from "first principles,"[100] to the rule-skepticism of legal realism. Viewed through the lens of realism, the Federal Rules' concept of transsubstantive "procedure" as normatively distinct from substantive law is theoretically bankrupt and simply masks political choices.[101] A new generation of legal scholars appears to have taken up the banner of legal realism in challenging the viability of uniform and transsubstantive procedure.[102] This formalist-realist tension reappears in *Shady Grove* to divide the Court between Justices who broadly construe the Federal Rules and the meaning of "procedure" under § 2072(a) of the REA—shifting the judicial balance in favor of federal rules uniformity—and those who

98. *Id.*

99. Molot, *supra* note 78, at 17-18 ("Where nineteenth-century formalism had supplied the rationale for the federal courts' aggressive approach to state law matters in *Swift* and post-*Swift* cases, twentieth-century legal realism led the Court in *Erie Railroad Co. v. Tompkins* to relinquish its influence over state law."); Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for* Erie *and* Klaxon, 72 TEX. L. REV. 79, 115-16 (1993) ("But the change that finally brought about *Erie* and *Klaxon* was a revolution in legal philosophy. By the time *Erie* and *Klaxon* were decided, the Supreme Court, and the American legal consciousness generally, were dominated by legal positivists and realists. To the positivists and the realists, the notion of a 'general' law was nonsense. The positivist conception of law, derived largely from John Austin's lectures on jurisprudence, defined law as a command of a sovereign. In this system, there is no room for a corpus of law without an identifiable sovereign. As Justice Holmes argued in a famous dissent, '[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified.'").

100. Nourse & Shaffer, *supra* note 59 ("[B]y formalism we mean a theory of law based on rationally organized first principles deductively applied.").

101. Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 431 (1995) ("In Justice Holmes' conception, in the emerging language of the time, the common law flowed not from a *fact* of science but (at least in part) from a *choice* of politics, where 'politics' is simply that which now appears fundamentally contestable, up for grabs. In Justice Holmes' view, the rhetoric of the common law was masking a fundamentally political reality about what law was.").

102. *See, e.g.*, Steinman, *supra* note 23; Marcus, *supra* note 57, at 415 ("Trans-substantivity in the early twenty-first century is a paradox of sorts. It lacks a solid theoretical foundation. The principle depends on the substance-procedure dichotomy as its jurisprudential prerequisite. But to jurisprudes like Thurman Arnold, the dichotomy eroded long ago. Perhaps more significantly, *the politics of rulemaking since the 1970s* has, in practical terms, dissolved a definable boundary in practice between substance and procedure. Also, the normative assumption long made as to the purpose of procedural rules, another theoretical underpinning, cannot survive unchallenged. Trans-substantive rules do not privilege any area of law, reflecting the notion, as lawyers like Charles Clark and Roscoe Pound advocated, that procedural rules should have no purpose but to implement policy choices made in the substantive law efficiently." (emphasis added)).

stress the substantive impact of procedure under § 2072(b) of the REA, tipping the balance toward accommodating state substantive interests at the expense of federal procedural uniformity.

B. From Formalism to Realism under Guaranty Trust*: A Functional Approach to the Substance-Procedure Dichotomy Shifts the Judicial Balance Further toward State Substantive Interests*[103]

In the same year that *Sibbach* confirmed that "procedure" was the domain of the Federal Rules under the REA, and five years before *Guaranty Trust* "substantially redefined the Erie doctrine"[104] under the RDA to require federal courts to apply outcome determinative state procedure, Charles E. Clark, chief drafter of the Federal Rules,[105] warned "that the federal rules may be decidedly endangered if certain views of the wide scope of substance and the narrow extent of procedure which have been expressed should prevail . . . ."[106] His prediction was not unfounded.

For the first seven years after *Erie,* the substance-procedure distinction was marked, in formalist fashion,[107] by an a priori, or pre-existing, line between two mutually exclusive concepts. Questions of procedure in federal court were governed by federal, not state law. *Guaranty Trust* replaced this rigid substance-procedure dichotomy with

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103. Clark, *supra* note 80, at 270 (commenting on the "present marked shift towards emphasis of state law in the federal courts. . . .").

104. WRIGHT ET AL., *supra* note 14, § 4508 .

105. Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 80-81 ("Charles Clark was perhaps the single most important figure in the drafting of the 1938 Federal Rules of Civil Procedure and one of the most active participants in the ultimately successful campaign for their adoption. While dean of Yale Law School, Clark served as Reporter to the Advisory Committee that drafted the 1938 Rules, and he wrote extensively and spoke frequently in support of them. Although Clark's views were not held by all members of the Advisory Committee, his influence was considerable.").

106. Hon. Charles E. Clark, *The* Tompkins *Case and the Federal Rules,* 1 F.R.D. 417, 419 (1940).

107. Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 467, 496-497 (1988) ("[T]he classical theorists believed that these general principles contained legal concepts that could be rigidly separated. Distinctions between concepts were analogized to boundary lines between two pieces of property; either you are on my property or you are on your property—there is no gray area. Either there is a contract with all its attendant legal obligations or there is no contract and there are no affirmative obligations; either a state has personal jurisdiction or it does not; either you have acted unreasonably or you have acted reasonably. Our current view of concepts as shading into each other was almost completely absent in this period.").

a functional approach espoused by legal realists[108] like Walter Wheeler Cook in the domain of conflict of laws.[109] This test looked to the effect applying federal over state procedure would have on litigation outcome.[110]

In place of the one-size-fits-all definitions of substance and procedure, the Court recognized that their meaning varied according to the legal context.[111] Under this functional approach, the line between substance and procedure is drawn "in different places, depending upon the purpose for drawing it in any given instance."[112] In *Guaranty Trust*, the plaintiff, whose state claim, brought as a federal diversity action, would have been barred in state court by New York's statute of limitations, argued that her claim should be allowed to proceed under the equitable doctrine of laches.[113] A statute of limitations may be characterized as "procedural" in the conflict-of-laws context—as noted

108. *Id*. at 474 ("The legal realists wanted to replace formalism with a pragmatic attitude toward law generally. This attitude treats law as made, not found. Law therefore is, and must be, based on human experience, policy, and ethics, rather than formal logic. Legal principles are not inherent in some universal, timeless logical system; they are social constructs, designed by people in specific historical and social contexts for specific purposes to achieve specific ends. Law and legal reasoning are a part of the way we create our form of social life."); Robert J. Condlin, *"A Formstone of Our Federalism": The* Erie/Hanna *Doctrine & Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 496 n.89 ("*York*, like *Erie* itself, is another offspring of legal realism and as such, part of the general movement away from the formalism that represented American jurisprudence in the first part of the twentieth century."). *But see* Goldsmith & Walt, *supra* note 76, at 675 (disputing the influence of legal realism on *Erie*).

109. Walter Wheeler Cook, "*Substance" and "Procedure" in the Conflict of Laws,* 42 YALE L.J. 333, 343-344 (1933) ("If we admit that the 'substantive' shades off by imperceptible degrees into the 'procedural,' and that the 'line' between them does not 'exist,' to be discovered merely by logic and analysis, but is rather to be drawn so as best to carry out our purpose, we see that our problem resolves itself substantially into this: How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?").

110. WRIGHT ET AL., *supra* note 14, § 4508 ("In place of the substance-procedure distinction, *York* appeared to announce an outcome-determinative test for *Erie* questions, under which the applicability of state law turned on whether 'it significantly affect[s] the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court.'" (citing Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945))).

111. *Guaranty Trust Co.*, 326 U.S. at 108 ("Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same keywords to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.").

112. Main, *supra* note 57, at 815 ("Beginning shortly after the turn of the twentieth century, the early legal realist movement suggested that there was no pre-existing line [between substance and procedure], but merely a decision that needed to be made about where the line would be drawn. This realization, in turn, prompted acceptance of the notion that the line could be drawn in different places, depending upon the purpose for drawing it in any given instance.").

113. Guaranty Trust Co. v. York, 143 F.2d 503, 528 (2d. Cir. 1944).

in Justice Ginsburg's dissent in *Shady Grove*—but, under *Guaranty Trust,* characterized as "substantive" in the *Erie* context because it "would completely bar recovery in a suit if brought in a State court" and, thus, "bears on a State-created right vitally and not merely formally or negligibly."[114] Citing *Guaranty Trust* to support the dissent's view in *Shady Grove* that New York's CPLR § 901(b) should be applied over Federal Rule 23, Justice Ginsburg similarly noted that "state courts often apply the forum's limitations period as a 'procedural' bar to claims arising under the law of another State."[115] Justice Frankfurter, writing for the Court in *Guaranty Trust*, reformulated *Erie* in terms of outcome difference: "The question is whether [New York's statute of limitations] . . . is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?"[116] Under *Guaranty Trust*, the federal court sitting in diversity acts as a surrogate for state court that "duplicate[s] state court results in diversity cases."[117]

The jurisprudential dichotomy between formalism and realism reflected in *Guaranty Trust*'s reinterpretation of *Erie* is not a mere relic of *Erie*'s past,[118] for it reemerged in *Shady Grove* where the time-worn "substance-procedure" battle was once again fought among Justices who disagreed over the proper place to draw "the line" in determining the validity under the REA of the federal class action rule as applied to preempt New York's limitation on maintaining class actions in an action to recover statutory penalties.[119] The bone of contention between Justice

114. *Guaranty Trust Co.*, 326 U.S. at 110.

115. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1471 (2010) (Ginsburg, J., dissenting).

116. *Guaranty Trust Co.*, 326 U.S. at 109.

117. WRIGHT ET AL., *supra* note 14, § 4504.

118. Realism is experiencing a resurgence. *See, e.g.*, Nourse & Shaffer, *supra* note 59 ("Like the old legal realists, new legal realists take aim at the "status quo bias" of formalist reasoning, a bias once entrenched in Herbert Spencer's 'laissez-faire' philosophy and its libertarian ideal and, subsequently, Chicago-school neoclassical law and economics' recast exposition of that same ideal.").

119. *See Shady Grove*, 130 S. Ct. at 1442 (referring to rule validity under § 2072 of the REA: "[T]he Rule must 'really regulat[e] 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, [citing *Sibbach*] . . . . The test is not whether the rule affects a litigant's substantive rights; most procedural rules do . . . . What matters is what the rule itself *regulates*: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not."); *id*. at 1449-50 ("[I]n my view, the application of [the balance between federal and state interests] does not

Scalia—a latter-day formalist[120]—and Justice Ginsburg—taking a realist perspective[121]—was essentially whether Federal Rule 23 was valid as a "procedural" rule, because it "really regulates procedure,"[122] or invalid because New York's rule, though procedural on its face, was outcome determinative in its real-world impact.[123] Further, as discussed below, Justice Ginsburg's approach in *Shady Grove* to Federal Rule validity essentially imports the RDA's outcome determinative test into the REA's "substantive rights" proviso, which renders invalid federal rules that "abridge, enlarge or modify any substantive right."[124]

By extending the reach of *Erie*'s command into the domain of federal procedure by requiring federal courts to apply outcome determinative state procedure, *Guaranty Trust* continued the shift in the balance of judicial power, initiated by *Erie*, toward state governmental interests, threatening to undermine the policy of federal procedural uniformity only seven years after the Federal Rules took effect.

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necessarily turn on whether the state law at issue takes the *form* of what is traditionally described as substantive or procedural. Rather, it turns on whether the state law actually is part of a State's framework of substantive rights or remedies. . . . 'The line between procedural and substantive law is hazy,' [citing Justice Reed's concurrence in *Erie*] . . . and in some situations 'procedure and substance are so interwoven that rational separation becomes well-nigh impossible . . . . A 'state procedural rule, though undeniably 'procedural' in the ordinary sense of the term,' may exist 'to influence substantive outcomes . . . and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy."); *id.* at 1468 n.11 (Ginsburg, J., dissenting) (criticizing the "Court's *'one-size-fits-all'* reading of Rule 23 . . . ." (emphasis added)).

120. *See* Scalia, *supra* note 64.

121. *Shady Grove*, 130 S. Ct. at 1463 n.2 (Ginsburg, J., dissenting) ("Justice Stevens sees no reason to read Rule 23 with restraint in this particular case; the Federal Rule preempts New York's damage limitation, in his view, because § 901(b) is 'a procedural rule that is not part of New York's substantive law.' . . . This characterization of § 901(b) *does not mirror reality*." (emphasis added)).

122. *Id.* at 1442.

123. *See id.* at 1448 (citing Hanna v. Plumer, 380 U.S. 460 (1965)) ("The short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping. To hold otherwise would be to 'disembowel either the Constitution's grant of power over federal procedure' or Congress's exercise of it."); *id.* at 1464 (Ginsburg, J., dissenting) (criticizing the Court's "mechanical reading of Federal Rules, insensitive to state interests and productive of discord."); *id*. at 1457 (Stevens, J., concurring) ("Justice Ginsburg's approach would, in my view, work an end run around Congress' system of uniform federal rules.").

124. 28 U.S.C. § 2072(b).

C. Byrd *Restores Equilibrium to Judicial Federalism: The "Erie" Pendulum Swings Back toward Federal Procedural Uniformity as a Counter-Weight to Outcome Determination*

Applied literally, the outcome determination test threatened the uniform application of the Federal Rules in federal diversity cases since any procedural difference can affect the outcome of litigation.[125] As Professor John Hart Ely observed nine years after *Hanna*:

> *York*'s outcome determination test seemed overbroad. As the *Hanna* Court later noted, pushed to an extreme [the outcome determination test] would imply that a litigant in a diversity action could insist on filing his responsive pleadings in accord with the state rather than the federal timetable, on the theory that enforcement of the federal timetable would cause him to lose, and thereby undeniably determine the outcome of the suit.[126]

From 1945 until 1958, the Court's application of the outcome determinative approach swung the *Erie* pendulum even further toward deference to state law.[127] The Court "seemed committed to applying this outcome determinative test to its farthest reach"[128] when it handed down three decisions in 1949 applying state law over the Federal Rules. Professors Wright, Miller, and Cooper observed:

> None of the opinions in *Woods*, *Cohen*, or *Ragan* mentioned the rules Enabling Act or *Sibbach*. Without explaining why, the Court appeared to have dismissed as irrelevant the objective, embodied in the Federal Rules and endorsed by statute, of a uniform procedural system applicable in all civil actions in the federal courts regardless of the basis of subject-matter jurisdiction. In the wake of these three 1949

125. *See* WRIGHT ET AL., *supra* note 14, § 4504; ERWIN CHEMERINSKY, FEDERAL JURISDICTION 334 (5th ed. 2007) (referring to *Cohen v. Beneficial Finance Loan Corp*., 337 U.S. 541 (1949), *Ragan v. Merchants Transfer & Warehouse Co*., 337 U.S. 530 (1949), and *Woods v. Interstate Realty Co*., 337 U.S. 535 (1949): "After these decisions, there was great concern that the outcome determinative test articulated in *Guaranty Trust* and applied in *Cohen, Ragan,* and *Woods* ultimately would preclude the use of the Federal Rules of Civil Procedure in diversity cases because the rules certainly can determine the outcome of litigation."); Ely, *supra* note 50, at 724 n.170 ("[I]t would seem that any rule can be said to have both 'procedural effects,' affecting the way in which litigation is conducted, and 'substantive effects,' affecting society's distribution of risks and rewards. . . . Thus, an 'effects test' [to determine whether a Federal Rule abridges a state substantive right] would seem destined either to unintelligibility or to the invalidation of every Federal Rule, thereby rendering the Enabling Act entirely self-defeating.").

126. *Id.* at 709.

127. Freer, *supra* note 11, at 1645 ("The outcome determination approach evolved in cases decided between 1945 and 1958, a period marked by the Court's bending over backward to find that state law governed.").

128. WRIGHT ET AL., *supra* note 14, § 4508.

> decisions many observers believed that there was no longer much, if any, room for independent federal regulation of procedure.[129]

During this period, federal courts in diversity suits were viewed as "clones" of the state courts,[130] which concept, if carried to its logical conclusion, would undermine the power of the federal judiciary, as an independent judicial system, to regulate its own procedure. Elaborating on this "clone theory," Professor Freer has observed two ways in which "RDA opinions during this time skewed *Erie* . . . .":

> First, the Court focused almost exclusively on the 'litigant equality' underpinning of *Erie,* downplaying the federalism basis of its holding. Second, it converted the concern for *litigant* equality to a concern for *outcome* equality. *Erie* had not expressed this concern. That case aimed at ensuring that the *substantive law* be the same in federal and state court; it did not mandate that federal courts act as replicas of the state judiciary.[131]

Guaranty Trust threatened the integrity of the Federal Rules in yet another way. As explained by Professor Ely, "[i]t was during the reign of this outcome determination test that the Court made explicit the magnitude of *Erie's* influence, indicating that *Erie* is every bit as relevant to the choice between state and federal law when there is a Federal Rule of Civil Procedure covering the point as when there is none . . . ."[132] The analysis for determining the validity of the Federal Rules under the REA was thereby merged with—or linked to—the RDA analysis under *Erie* for determining whether to apply state law or federal common law procedure, with the latter informing the former. In 1965, the Court in *Hanna* will break this link, declaring that, although both the RDA, as interpreted in *Guaranty Trust,* and the REA require federal courts to apply state substantive law and federal procedural law, the two

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129. *Id*.

130. *See* Freer, *supra* note 11, at 1646 ("But a 'clone theory' took hold, identified largely with *Guaranty Trust Co. v. York*['s outcome determination approach]. . . . Applying this approach woodenly to matters seemingly procedural threatened the viability of the fledgling Federal Rules of Civil Procedure."); Floyd, *supra* note 14, at 274 (stating that *Guaranty Trust* "threatened to replace the separate federal system for administering justice with a clone of the state courts"); Guaranty Trust Co. v. York, 326 U.S. 99, 108-09 (1945) ("But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.").

131. Freer, *supra* note 11, at 1646 .

132. Ely, *supra* note 50, at 696.

tests are different.[133] Forty-five years after *Hanna*, the four dissenting Justices in *Shady Grove* will attempt to re-establish this link between the RDA's outcome determinative test and the validity of the Federal Rules under the REA's "substantive rights" proviso, effectively swinging the *Erie* pendulum back in the direction of state prerogatives[134] at the expense of federal procedural uniformity.

In reaction to the threat to "the integrity and independence of the federal courts,"[135] the Court, in its 1958 decision in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[136] provided a mid-course correction[137] between *Guaranty Trust* and *Hanna*. *Byrd* moderated the "extreme interpretations of the *York* case that seemed to require federal courts in the exercise of their diversity jurisdiction to transform themselves into state courts"[138] by recognizing the federal judiciary's status as "an independent system for administering justice."[139] Since *Byrd*, federal courts sitting in diversity were no longer considered mere "clones" of state courts.[140] The second "correction" occurred seven years later when the Court, responding to the continuing "threat to the goal of uniformity of federal procedure,"[141] held, in *Hanna*, that *Erie* is inapplicable altogether to the validity of the Federal Rules.[142]

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133. Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions. When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* Choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their *prima facie judgment* that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." (emphasis added)).

134. Ely, *supra* note 50, at 716 n.126 ("One of *Hanna*'s main points was that the Rules of Decision Act is more protective of state prerogatives than the Enabling Act.").

135. *See* Freer, *supra* note 11, at 1647.

136. 356 U.S. 525 (1958).

137. *See* Floyd, *supra* note 14, at 275 (calling the Court's opinion in *Byrd* "[t]he first of two significant corrections" to *Guaranty Trust*).

138. WRIGHT ET AL., *supra* note 14, § 4504.

139. *Byrd*, 356 U.S. at 537.

140. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1448-49 (Stevens, J., concurring) ("Congress has provided for a system of uniform federal rules . . . under which federal courts sitting in diversity operate as 'an independent system for administering justice to litigants who properly invoke its jurisdiction,' [citing *Byrd*] and not as state-court clones that assume all aspects of state tribunals but are managed by Article III judges [citing *Hanna*].").

141. *Hanna*, 380 U.S. at 463.

142. *See* PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 208 (5th ed. 2010) ("*Byrd v. Blue Ridge Rural Electric Cooperative, Inc.* and *Hanna v. Plumer* marked the turning point in the expanding effect of the 'outcome determinative' test and placed some practical limits on the *Erie* doctrine.").

Byrd restored some equilibrium to the federal-state judicial balance by counterbalancing "outcome determination" with the interests of the federal courts as an independent judicial system.[143] The Court was unclear, however, about what federal interests qualified to outweigh application of the state rule.[144] Although the particular issue in *Byrd* concerned the judge-jury relationship, "the Supreme Court's decision . . . provided welcome support for applying the Civil Rules in the face of conflicting state rules."[145]

The Court's balancing approach moderated the single-minded focus on outcome determination by making it only one of three factors to weigh in deciding whether to apply state law or federal procedure, thereby "reinvigorat[ing] principles of federalism in the vertical choice of law equation."[146] In formulating the balancing approach, the Court also "divided the universe of state laws into the following three categories: (1) rules defining state rights and obligations; (2) rules 'bound up' with state-created rights and obligations; and (3) rules of 'form and mode.'"[147] According to *Byrd*, *Erie* requires federal courts to apply rules that define state rights and obligations—a classic definition of substantive law.[148] Read literally, the Court's opinion appears also to require the application of "bound up" rules.[149] Rules of "form and mode" are subject to *Guaranty Trust*'s outcome determination approach

143. *Byrd*, 356 U.S. at 538.

144. *See* WRIGHT ET AL., *supra* note 14, § 4504; Freer, *supra* note 11, at 1651 n.105 ("*Byrd* is less than clear about what the federal interest is. Perhaps it is the influence of the Seventh Amendment; perhaps it is the judge-jury relationship; perhaps it is in running an independent system of justice.").

145. WRIGHT ET AL., *supra* note 14, § 4508 ("Federal policies regarding how the federal courts should be run—in Byrd, the federal policy favoring jury decisions of disputed fact questions—must be balanced against the policy of providing the same outcome in federal court as in state court."); Ely, *supra* note 50, at 696 ("In 1958, in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, the Court qualified [the outcome determination test] somewhat, announcing that *Erie* really required that the state's interests be balanced against whatever interests the federal government might have in the application of its rule."); Floyd, *supra* note 14, at 276-77 ("As *Byrd* has come generally to be read, it mandates a federal court to balance the weight of the federal interest in the application of its procedural rule against the weight of the interest in 'furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.'" (citing *Byrd*, 356 U.S. at 538)).

146. Freer, *supra* note 50, at 1651.

147. TEPLY & WHITTEN, *supra* note 53, at 460.

148. *Byrd*, 356 U.S. at 535 ("It was decided in *Erie R. Co.* v. *Tompkins* that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts.").

149. *Id.* at 535 ("We must, therefore, first examine the rule in *Adams v. Davison-Paxon Co.* to determine whether it is bound up with these rights and obligations in such a way that its application in the federal court is required.").

but counterbalanced by federal countervailing considerations.[150] Under a literal reading of *Byrd*, there is no balancing of rules that define state rights and obligations or "bound up" state rules. However,

> [o]ther courts and commentators have read the three sections of the *Byrd* opinion to establish a three-factor balancing test, under which (1) the significance or substantive character of the state rule under state law and (2) the likelihood of different outcomes, are to be weighed against (3) the importance of the federal interests or policies underlying the competing federal rule.[151]

The distinction between procedural rules that are "bound up with state created rights" and those characterized as "form and mode," drawn by the Court in *Byrd* in resolving *Erie* issues under the RDA, reappears in *Shady Grove* but, this time, in the context of resolving the issue of Federal Rule validity under the REA's "substantive rights" proviso.[152] After *Gasperini*, Professor Rowe, in "speaking of the limited applicability of the *Byrd* balancing approach," nevertheless anticipated the continued relevance of the "bound up" character of a state rule—but in the RDA-*Erie* context—when he suggested that:

> Asking whether a state rule with a procedural cast is 'intended to be bound up with the definition of the rights and obligation of the parties' . . . can be one sensible way of trying to figure out whether a state rule also has enough of a substantive nature that it would threaten 'inequitable administration of the laws.[153]

Twelve years later, in *Shady Grove*, Justice Stevens adopted a somewhat similar approach in his pivotal concurring opinion—*not* to figure out whether the New York state rule was substantive enough to threaten one of the twin aims of *Erie* under the *RDA*—but, rather, to determine whether state procedure was substantive enough to violate the ban on abridging substantive rights under the REA's "substantive rights" proviso.[154] As discussed in Part IV, Justice Stevens confined his classification of state procedure as "substantive," under the proviso, to

150. *Id.* at 537.

151. WRIGHT ET AL., *supra* note 14, § 4504.

152. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010).

153. Rowe, Jr., *supra* note 6, at 999 n.147.

154. *Shady Grove*, 130 S. Ct. at 1456 (Stevens, J., concurring) ("I readily acknowledge that if a federal rule displaces a state rule that is 'procedural' in the ordinary sense of the term,' . . . but sufficiently interwoven with the scope of a substantive right or remedy, there would be an Enabling Act problem, and the federal rule would have to give way."); *id.* at 1458 ("[I]t is necessary to distinguish between procedural rules adopted for *some* policy reason and seemingly procedural rules that are *intimately bound up* in the scope of a substantive right or remedy.").

"bound up" rules, excluding merely outcome determinative state procedure.[155] Justice Ginsburg's dissenting opinion, in realist fashion, would expand the meaning of "substantive rights" under the REA to include outcome determinative state procedure, *whether or not "bound up"*[156] with state-created rights. Only the four dissenting Justices in *Shady Grove* adopted Justice Ginsburg's broad, outcome-determinative interpretation of "substantive" under the REA while Justice Scalia, writing for the Court's plurality, essentially dismissed the proviso as redundant.

D. Hanna—*The Judicial Balance Continues to Shift toward Federal Rules Uniformity: RDA*-Erie *No Longer Applies to Test the Validity and, Hence, Applicability of a Federal Rule*

In 1965, the pendulum continued its momentum toward the federal interest in procedural uniformity, a policy mandated by Congress under the REA.[157] In *Hanna v. Plumer*,[158] Chief Justice Warren, in a strong endorsement of the breadth of the federal rulemaking power,[159] wrote for the Court:

> One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules. This is especially true of matters which relate to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules.[160]

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155. *Id.* at 1458 (Stevens, J., concurring) ("Although almost every rule is adopted for some reason and has some effect on the outcome of litigation, not every state rule 'defines the dimensions of [a] claim itself . . . .'").

156. *Id.* at 1469 (Ginsburg, J., dissenting) (applying *Hanna*'s "twin aims" *Erie* test "inquiring 'whether application of the [state] rule would have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would be likely to cause a plaintiff to choose federal court").

157. Ely, *supra* note 50, at 696 ("The Court [after *Byrd*] could not leave such sensible moderation alone, however, and in 1965, the pendulum that had begun in *Byrd* to swing back toward the teaching of *Erie* swung too far, indeed perhaps beyond its 1938 starting place, in Chief Justice Warren's opinion for the Court in *Hanna v. Plumer*.").

158. 380 U. S. 460 (1965).

159. PURCELL, JR., *supra* note 55, at 288 ("The *Hanna* decision was typical of the Warren Court. Ensuring the uniformity of federal procedure and guaranteeing its independence from the states, the decision asserted federal authority broadly and exemplified the Court's nationalizing tendencies.").

160. *Hanna*, 380 U. S. at 472-73 (quoting Lumbermen's Mutual Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963).

Hanna addressed the issue whether substitute service of process upon an executor pursuant to Federal Rule 4(d)(1) was proper in light of a state rule that required in-hand delivery upon the executor.[161] The Court bifurcated the "Erie" analysis into two separate tracks, announcing two different tests for applying the "substance-procedure" distinction depending on whether a Federal Rule addressed the issue in dispute or not. Put simply, if there is a Federal Rule on point, and that Rule is constitutional and a valid exercise of authority delegated by Congress under the REA, the Rule prevails over conflicting state law, even outcome determinative state procedure.[162] The Court made clear that the application of the outcome determination analysis under the RDA is confined to "those genuine Erie cases in which the choice-of-law question does not involve a federal rule"[163]—the "unguided Erie choice."[164] In other words, the *Erie* analysis under the RDA does not apply where a Federal Rule governs the issue in dispute. The Court concluded: "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act."[165]

Forty-five years later, in *Shady Grove*, Justice Stevens's concurrence will cite this central feature of *Hanna* in response to Justice Ginsburg's dissent, which appeared to blur the line between RDA and REA analyses:

> 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 '[w]hen a situation is

161. *Hanna*, 380 U.S. at 461.

162. WRIGHT ET AL., *supra* note 14, § 4504; *id.* § 4509 ("The central point of the Supreme Court's opinion in *Hanna v. Plumer* is that the terms of the Rules Enabling Act and relevant constitutional restrictions, rather than the principle of *Erie Railroad Company v. Tompkins*, govern the validity and applicability of the Federal Rules of Civil Procedure in the federal courts, even in cases arising under their diversity of citizenship jurisdiction.").

163. *Id.* § 4504.

164. *Hanna*, 380 U.S. at 471 ("When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice.").

165. *Id.* at 473-74; *see* CHEMERINSKY, *supra* note 125, at 329 ("Accordingly, it is now clearly established that the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure are to be applied by the federal court, even if there is a conflicting state requirement and even if the application of the federal Rule might determine the outcome of the case. The key decision establishing this proposition is *Hanna v. Plumer*.").

> covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice.'[166]

He went on to echo *Hanna*'s conclusion regarding federal rules uniformity: "Although it reflects a laudable concern to protect 'state regulatory policies,' . . . Justice Ginsburg's approach would, in my view, work an end run around Congress' system of uniform federal rules . . . and our decision in *Hanna.*"[167]

Although the Court in *Hanna* ruled that the validity of a Federal Rule should be determined solely under the REA, not the RDA, the Court gave scant attention to the extent to which the REA limits the validity of the Federal Rules. Section 2072(a) authorizes the Court to prescribe rules "of practice and procedure."[168] However, § 2072(b) provides, in the so-called "substantive rights" proviso, that such rules may not "abridge, enlarge or modify any substantive right."[169] Under a literal reading of the REA, a Rule could be "procedural" within the meaning of § 2072(a), yet abridge a substantive state right and, thus, be invalid under the "substantive rights" proviso. However, in its 1941 opinion in *Sibbach v. Wilson*, the Court rejected this literal reading in favor of a test of rule validity that turns solely on "whether a rule really regulates procedure," defining "procedure" as "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."[170] As Professor Ely explained:

> [T]he possibility that a Rule could fairly be labeled procedural and at the same time abridge or modify substantive rights was one the Court was unwilling to accept; by its lights, either a Rule was procedural *or* it affected substantive rights. Thus, the Act's two questions were

166. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1456-57 (2010) (Stevens, J., concurring) (quoting *Hanna*, 380 U.S. at 471).

167. *Shady Grove*, 130 S. Ct. at 1457.

168. 28 U.S.C. § 2072(a).

169. 28 U.S.C. § 2072(b).

170. Sibbach v. Wilson, 312 U.S. 1, 14 (1941). *See* TEPLY & WHITTEN, *supra* note 53, at 480 ("[T]he real problem with the Court's interpretation of the Rules Enabling Act in *Sibbach* and later cases is that it recognizes virtually no restrictions on the rulemaking authority at all."). *But see Shady* Grove, 130 S. Ct. at 1454-55 (Stevens, J., concurring) ("The Court [in *Sibbach*] had no occasion to consider whether the particular application of the Federal Rules in question would offend the Enabling Act. . . .The matter at issue [requiring medical exams for litigants] did not pertain to 'substantive rights' under the Enabling Act."). The *Sibbach* Court rejected plaintiff's expansive definition of "substantive rights" to encompass "important and substantial rights theretofore recognized." *Sibbach*, 312 U.S. at 13. The *Sibbach* Court further noted that the applicable law of Indiana, the place of plaintiff's injury, did not bar orders compelling medical exams. *Id.*

> collapsed into one: *'The test* must be whether a rule really regulates procedure . . . .'[171]

The *Hanna* Court approved *Sibbach*'s "really regulates procedure" test of the validity and, therefore, applicability, of the Federal Rules, simply quoting the test verbatim without elaboration.[172] In *Gasperini* the Court made only passing reference to the "substantive rights" proviso in a footnote, intimating—in response to Justice Scalia's dissent—that Rule 59 might be invalid if it preempted New York's verdict-excessiveness standard.[173] But, as discussed in Part IV, the issue of the scope of § 2072(b) reappears in *Shady Grove* where, for the first time since *Hanna*, the Justices debate the relevance of the "substantive rights" proviso as an independent limitation on rule validity under *Sibbach*.[174] Justice Stevens and the dissent will square off with the plurality, led by Justice Scalia, on the meaning of *Sibbach*.

Justice Harlan, in his concurrence in *Hanna*, criticized the Court's presumption in favor of Rule validity at the expense of state substantive interests, believing that the pendulum had swung too far by removing the *Erie* inquiry from the Federal Rules:

> So long as a reasonable man could characterize any duly adopted federal rule as "procedural," the Court, unless I misapprehend what is said, would have it apply no matter how seriously it frustrated a State's substantive regulation of the primary conduct and affairs of its citizens. Since the members of the Advisory Committee, the Judicial Conference, and this Court who formulated the Federal Rules are presumably reasonable men, it follows that the integrity of the Federal Rules is absolute. Whereas the unadulterated outcome and forum-shopping tests may err too far toward honoring state rules, I submit that the Court's "arguably procedural, *ergo* constitutional" test moves too fast and far in the other direction.[175]

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171. Ely, *supra* note 50, at 719.

172. *Hanna*, 380 U.S. at 464. Between *Hanna* and *Gasperini*, the Court made passing reference to the "substantive rights" proviso as an additional requirement for Rule validity. *See* Business Guides, Inc. v. Chromatic Commc'ns Enters., 498 U.S. 533, 551 (1991) ("The [Rules Enabling] Act authorizes the Court 'to prescribe general rules of practice and procedure,' but provides that such rules 'shall not abridge, enlarge, or modify any substantive right.'"); Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987) ("The Rules Enabling Act, however, contains an additional requirement. The Federal Rules must not 'abridge, enlarge or modify any substantive right . . . .'").

173. Gasperini v. Center for Humanities, 518 U.S. 415, 438 n.22 (1996).

174. *See infra* Part IV.

175. *Hanna*, 380 U.S. at 476 (Harlan, J., concurring).

In *Shady Grove*, Justice Ginsburg's dissent will draw upon Justice Harlan's concurrence in *Hanna*, reprising his invocation of *Erie*—"one of the modern cornerstones of our federalism"[176]—to set the stage for her view that the Federal Rules should continue to be interpreted "with an awareness of, and sensitivity to, important state regulatory policies."[177]

When no Federal Rule is on point, so that the court is faced with an "unguided *Erie* choice" under the RDA, *Hanna*, in dicta, reverted to the outcome determination approach rather than *Byrd*.[178] But the Court moderated outcome determination's extreme application by linking it to *Erie*'s "twin policies" of forum shopping and inequitable administration of the laws:[179]

> *Erie* and its progeny make clear that when a federal court sitting in a diversity case is faced with a question of whether or not to apply state law, the importance of a state rule is indeed relevant, but only in the context of asking whether application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or *whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.*[180]

Fast-forward again to *Shady Grove*, where Justice Ginsburg's dissent cited the italicized words in the above-quoted portion of the Court's opinion in *Hanna* to focus on the practical reality that Shady Grove sued Allstate in federal court to "seek class relief that is *ten thousand times* greater than the individual remedy available to it in state court."[181]

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176. *Id.* at 474.

177. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1460 (2010) (Stevens, J., concurring).

178. *Hanna*, 380 U.S. at 466-67.

179. Gasperini v. Ctr. for Humanities, 518 U.S. 415, 428 (1996) ("A later pathmarking case, qualifying *Guaranty Trust*, explained that the 'outcome-determination' test must not be applied mechanically to sweep in all manner of variations; instead, its application must be guided by 'the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws.'" (citing *Hanna*, 380 U.S. 474)).

180. *Hanna*, 380 U.S. at 468 n.9 (emphasis added).

181. *Shady Grove*, 130 S. Ct. at 1469 (Ginsburg, J., dissenting) (emphasis original).

E. Between Hanna *and* Gasperini*: When Federal Rules and State Law Collide*

1. *Hanna*'s Bifurcated "Erie" Analysis

From *Hanna* (1965) to *Shady Grove* (2010), the Court has adhered to its distinction between an "unguided *Erie* Choice," resolved under the RDA, and the applicability and validity of a Federal Rule over state law, which is determined under the REA.[182] A possible exception is the Court's decision in *Semtek International, Inc. v. Lockheed Martin Corp.*[183] (2001), which narrowly construed Federal Rule 41(b), holding that it did not govern the issue whether a federal court's dismissal of a breach of contract and tort action as time-barred under California's two-year statute of limitations precluded a subsequent action in a Maryland state court on the same claims which were not time-barred under that state's three-year statute of limitations. Writing for the Court, Justice Scalia asserted that a broad interpretation of Rule 41(b) that would extinguish Semtek's right under California law to sue on its claims in Maryland even after the California statute of limitations expired "would seem to violate" the REA's "substantive rights" proviso and, thus, constitute an invalid application of Rule 41(b).[184] However, Justice Scalia then went on to apply an RDA "outcome determination" analysis, stating that a broad construction of the Rule to govern the claim preclusive effect in other courts of a dismissal of a state claim would "violate the federalism principle of *Erie R. Co. v. Tompkins* . . . by engendering '"substantial" variations [in outcomes] between state and federal litigation' which would '[l]ikely . . . influence the choice of a forum . . . .'"[185] (Ironically, these words will be quoted in *Shady Grove* by Justice Ginsburg in her dissent to Justice Scalia's Opinion of the Court.)[186]

But nine years later, Justice Scalia, writing for the Court in *Shady Grove*, in a seemingly inconsistent statement, reaffirmed that "a Federal

182. Rowe, Jr., *supra* note 6, at 975 ("Since *Hanna* it has been clear that the validity of a candidate Federal Rule that covers the point at issue is to be judged by reference to the charter for the Federal Rules, the Rules Enabling Act."); WRIGHT ET AL., *supra* note 14, § 4508; 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' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules.").

183. 531 U.S. 497 (2001).

184. *Id.* at 503-04.

185. *Id.* at 504.

186. *Shady Grove*, 130 S. Ct. at 1463 (Ginsburg, J., dissenting).

rule that fails *Erie*'s forum-shopping test is not *ipso facto* invalid," citing *Hanna*.[187] The apparent inconsistency between these two statements may be reconciled by his caveat, in a footnote in *Shady Grove*, that Federal Rules should be read to avoid substantial differences in outcome *only when the Rule is ambiguous*—as it was in *Semtek*, but not in *Shady Grove*—and then, *not* to avoid an invalid application of the Rule under the "substantive rights" proviso of the REA, but "because it is reasonable to assume that 'Congress is just as concerned as we have been to avoid significant differences between state and federal courts in adjudicating claims.'"[188]

2. The Conflict between Federal Rules and State Law

Further, in all its decisions since *Hanna*—with *Walker v. Armco Steel Corp.*[189] (1980), *Gasperini v. Center for Humanities*[190] (1996), and *Semtek v. International, Inc. v. Lockheed Martin Corp.*[191] (2001) as the exceptions—the Court has not been inclined to narrowly construe the scope of a federal statute or Federal Rule to avoid colliding with, and thus preempting, state law.[192]

Although *Walker* narrowly interpreted the candidate Federal Rule, the Court rejected the idea that the Federal Rules should be narrowly interpreted to avoid a direct collision with state law but, rather, said that they are to be given their "plain meaning."[193] (Thirty years later, in her dissent in *Shady Grove*, Justice Ginsburg would cite *Walker*[194] to support her argument that Federal Rule 23 should be narrowly interpreted to avoid a collision with New York's class action rule, asking: "Is this conflict really necessary?")[195] In *Walker*,[196] the Court held that Federal

187. *Id.* at 1441 n.7.

188. *Id.* (citing Stewart Org. v. Ricoh Corp., 487 U.S. 22, 37-38 (1988)).

189. 446 U.S. 740, 750 (1980).

190. 518 U.S. 415 (1996). *See* Rowe, Jr., *supra* note 6, at 995 (noting that "[t]he *Gasperini* Court's shift of emphasis . . . should not be overread because the majority did not disavow the earlier statements about 'plain meaning' and straightforward . . . statutory interpretation' . . . .").

191. 531 U.S. 497 (2001).

192. Rowe, Jr., *supra* note 6, at 968 ("[[T]he Court's] attitude at least until *Gasperini* appeared to involve not going out of the way to avoid a conflict. . . . Indeed, the Court in all its other major *Erie-Hanna* decisions since 1965 involving federal statutes and rules had found the 'direct collision' that triggers the *Hanna* analysis.").

193. 446 U.S. at 750 n.9 ("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 state law arises from that plain meaning, then the analysis developed in *Hanna* v. *Plumer* applies.").

194. *Shady Grove*, 130 S. Ct. at 1462-63 (Ginsburg, J., dissenting)

195. *Id.* at 1460.

Rule 3, which defines "commencement" of an action to mean filing the complaint, did not conflict with Oklahoma's statute of limitations, which provided an action commences with service of summons, finding that "Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations."[197]

In deciding that *Walker* was indistinguishable from its pre-*Hanna* holding in *Ragan v. Merchants Transfer & Warehouse Co*., where the Court narrowly construed Rule 3 to avoid colliding with a similar state "commencement" rule,[198] the Court emphasized the force of stare decisis in reaffirming *Ragan*:

> We note at the outset that the doctrine of *stare decisis* weighs heavily against petitioner in this case. Petitioner seeks to have us overrule our decision in *Ragan.* Stare *decisis* does not mandate that earlier decisions be enshrined forever, of course, but it does counsel that we use caution in rejecting established law. In this case, the reasons petitioner asserts for overruling *Ragan* are the same factors which we concluded in *Hanna* did not undermine the validity of *Ragan*. A litigant who in effect asks us to reconsider not one but two prior decisions bears a heavy burden of supporting such a change in our jurisprudence. Petitioner here has not met that burden.[199]

Both *Ragan* and *Walker* also presented compelling cases for avoiding a conflict because the state tolling statute was *integrally linked*[200] to the enforcement of the substantive[201] purposes of the state's statute of limitations: "In contrast to Rule 3, the Oklahoma statute is a statement of a substantive decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations."[202] As discussed

196. 446 U.S. 740.

197. *Id.* at 751.

198. 337 U.S. 530 (1949).

199. *Walker*, 446 U.S. at 749.

200. *Id.* at 743 n.4 (quoting OKLA. STAT., tit. 12, §97 (1971) (repealed by Laws 1984, c. 164, § 32, eff. Nov. 1, 1984) ("An action shall be deemed commenced, *within the meaning of this article* [*the statute of limitations*], as to each defendant, at the date of the summons which is served on him . . . ." (emphasis added)).

201. *Walker*, 446 U.S. at 751-52.

202. *Id.* at 751 n.13 ("The *substantive link* of § 97 to the statute of limitations is made clear as well by another provision of Oklahoma law. Under Okla. Stat., tit. 12, § 151 (1971), '[a] civil action is deemed commenced by filing in the office of the court clerk of the proper court a petition and by the clerk's issuance of summons thereon.' This is the state-law corollary to Rule 3. However, § 97, not § 151, controls the commencement of the lawsuit for statute of limitations purposes. *See Tyler v. Taylor*, 578 P. 2d 1214 (Okla. App. 1977). Just as § 97 and § 151 can both

more fully in Part IV and as previously noted in connection with *Byrd*, Justice Stevens—whose concurring opinion in *Shady Grove* was pivotal to the majority result in that case in which Federal Rule 23 trumped New York's more limited class action rule—emphasized the difference between a state rule that *merely affects the outcome of the litigation*—Justice Ginsburg's touchstone, which Justice Stevens rejected—and a state rule that is "*intimately bound up* in the scope of a substantive right or remedy."[203] In his view, narrowly interpreting a Federal Rule to avoid a collision with state law is only justified where the state law is integrally bound up with the definition of the substantive right.[204]

Like *Ragan* and *Walker*, *Semtek* presented the other compelling post-*Hanna* case for avoiding a conflict to steer clear of violating the REA's "substantive rights" proviso. All three cases involved state law that was integrally connected to the enforcement of the state's statute of limitations; in *Walker* and *Ragan*, the state law marked the date of commencement of an action for purposes of tolling the statute;[205] in *Semtek*, the state law governed the claim preclusion effect of the dismissal of an action, commenced after the statute's expiration, on the right to commence a subsequent action in a state with a longer statutory period.[206] In Justice Scalia's words: "[I]f California law left petitioner free to sue on this claim in Maryland even after the California statute of limitations had expired, the federal court's extinguishment of that right (through Rule 41(b)'s mandated claim-preclusive effect of its judgment) would seem to violate this limitation."[207] In *Shady Grove*, Justice Stevens will cite Justice Scalia's narrow interpretation of Rule 41(b) in *Semtek* to support his contention that the "substantive rights" proviso functions as an additional constraint on Federal Rule validity and that "[w]hen a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result."[208]

In the two other post-*Hanna* decisions, until *Gasperini*, the Court found that the Federal Rule or statute at issue directly collided with, and

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apply in state court for their separate purposes, so too § 97 and Rule 3 may both apply in federal court in a diversity action." (emphasis added)).

203. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1458 (2010) (Stevens, J., concurring).

204. *Id*.

205. Ragan v. Merch. Transfer & Warehouse Co., 377 U.S. 530, 533 (1949); Walker v. Armco Steel Corp., 446 U.S. 740, 748-49 (1980).

206. Semtek Int'l v. Lockheed Martin Corp., 531 U.S. 497, 504 (2001).

207. *Id.* at 503-04.

208. *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring).

trumped, the state rule.[209] In *Burlington Northern Railroad Co. v. Woods*,[210] the Court found that a state rule of appellate procedure that imposed a mandatory affirmance penalty on an unsuccessful appellant conflicted with Federal Appellate Rule 38's "case-by-case approach to identifying and deterring frivolous appeals."[211] The Court declined to narrowly interpret Rule 38 to accommodate the state's interest, finding that "the Alabama statute precludes any exercise of discretion within its scope of operation."[212] *Woods* reaffirmed *Hanna*'s support of federal procedural uniformity at the expense of outcome difference: "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' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules."[213]

One year later, in *Stewart Organization v. Ricoh Corp.*,[214] the Court, again citing *Hanna*, and over Scalia's lone dissent, broadly construed 28 U.S.C. § 1404(a) to preempt application by the federal court of Alabama's state contract law that barred enforcement of forum selection clauses. As in *Burlington Northern*, the Court concluded that the state rule conflicted with the broad discretion conferred by § 1404(a) on the federal court to weigh a variety of factors bearing upon inter-district transfer of cases.[215] Justice Scalia dissented in *Ricoh*, differing with the majority's broad reading of § 1404(a).[216] In an ironic reversal of positions in *Shady Grove*, in which Justice Scalia refused to narrowly construe Federal Rule 23 to avoid a collision with New York's class action rule, Justice Ginsburg's dissent in *Shady Grove* will quote Justice Scalia's dissent in *Stewart Organization*:[217] "[I]n deciding whether a federal . . . Rule of Procedure encompasses a particular issue, a broad

209. Rowe, Jr., *supra* note 6, at 968 ("[I]n all its other major *Erie-Hanna* decisions since 1965 involving federal statutes and rules [the Court] had found the 'direct collision' that triggers the *Hanna* analysis.").

210. 480 U.S. 1 (1987).

211. *Id.* at 8.

212. *Id.*

213. *Id.* at 5.

214. 487 U.S. 22 (1988)

215. *Id.* at 32.

216. *Id.* at 33 (Scalia, J., dissenting).

217. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1461 (2010) (quoting Justice Scalia in Stewart Org. v. Ricoh Corp., 487 U.S. 22, 37-38 (1988) (Scalia, J., dissenting)).

reading that would create significant disuniformity between state and federal courts should be avoided if the text permits."[218]

F. Gasperini*: The Pendulum Swings Back Again toward Interpreting Federal Rules Narrowly to Accommodate Substantive State Interests*

Hanna left unresolved some basic *Erie* issues. The Court's cursory affirmance of *Sibbach*'s single-test of rule validity under the REA was criticized for "fail[ing] to provide a workable judicial line of demarcation between the overlapping and often conflicting spheres of power of the federal and state governments."[219] Also, *Hanna*—which, in dicta, asserted that a modified version of the outcome determinative test should be applied, in light of the "twin aims of Erie," to resolve RDA-Erie issues—did not clarify the fate of *Byrd*.[220] As Professor Freer noted, because *Hanna* neither overruled nor discussed *Byrd*, "[o]bservers looked to *Gasperini* with hope, because the case involved the allocation of authority between judge and jury, just as *Byrd* had."[221]

In *Gasperini*, the plaintiff won a $450,000 jury verdict in a diversity suit.[222] The defendant moved for a new trial under Federal Rule 59 on the grounds that the damage award was excessive.[223] Rule 59(a)(1) provides that "[t]he Court may . . . grant a new trial . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court."[224] Traditionally, one of those reasons is verdict-excessiveness, but Rule 59 does not specify the applicable standard for determining whether the jury's damage award is excessive. In scrutinizing jury awards, federal trial judges have ordered new trials on

218. *Stewart Org.*, 487 U.S. at 37 (Scalia, J., dissenting).

219. Comment: Hanna v. Plumer: *An Expanded Concept of Federal Common Law—A Requiem for Erie?,* 1966 DUKE L.J. 142, 165 (1966) (predicting that "future friction and consequent reformulation appear inevitable, especially in view of the failure of the Court to delineate with precision the outlines of the reformulated *Erie* test and the requisite constitutional shackles which confine the tentacles of federal interest").

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

221. Freer, *supra* note 11, at 1654; *id.* at 1650-51 ("*Byrd* has the wonderful virtue of placing outcome determination in a larger context . . . . *Byrd* gives a sophisticated model. . . . It corrects the fixation on outcome determination by making it one factor (not the sole factor) in the RDA analysis. . . . [B]y embracing the concept of balancing, the Court reinvigorated principles of federalism in the vertical choice of law equation. Unfortunately, the Court let *Byrd* languish, leading to confusion in the lower courts over how to apply it. The Court compounded the confusion by failing to discuss *Byrd* as part of the RDA equation in its next great pronouncement, *Hanna.*").

222. Gasperini v. Ctr. for Humanities, 518 U.S. 415, 420 (1996).

223. *Id.*

224. FED. R. CIV. P. 59.

grounds of excessive damages only when the verdict is so unreasonable that it "shocks the conscience."[225] Federal appellate courts only review new trial orders for abuse of discretion.[226]

In 1986, the New York Legislature enacted CPLR § 5501(c), a tort-reform measure designed to rein in runaway jury awards by giving the state's appellate courts authority to review jury awards for excessiveness and to order a new trial if an award "*deviates materially* from what would be reasonable compensation."[227] The "'deviates materially' standard calls for closer surveillance than 'shock the conscience' oversight."[228] The federal district judge in *Gasperini* denied the defendant's new trial motion.[229] On appeal, the Court of Appeal, applying CPLR § 5501(c), held that the $450,000 verdict "materially deviate[d] from what is reasonable compensation" and ordered a new trial unless the plaintiff agreed to an award of $100,000. On appeal to the Supreme Court, Justice Ginsburg, writing for the Court, framed the *Erie-Hanna* issue: "This case presents an important question regarding the standard a federal court uses to measure the alleged excessiveness of a jury's verdict in an action for damages based on state law."[230]

1. Did Federal Rule 59 and New York's CPLR § 5501(c) Collide?

Under *Hanna*'s analytical approach, a court must first "decide initially whether the rule actually conflicts with state law or whether it is narrower in scope so that the applicability of the state rule is governed by Erie."[231] And, as already noted, all post-*Hanna* decisions, except *Walker* and *Semtek*, declined to narrowly interpret the scope of a Federal Rule to avoid colliding with state law.[232] The Court's majority in *Gasperini* veered from this line of decisions suggesting, in Professor Rowe's words, "somewhat more deferential interpretations of federal

225. *Gasperini*, 518 U.S. at 422 ("Before 1986, state and federal courts in New York generally invoked the same judge-made formulation in responding to excessiveness attacks on jury verdicts: courts would not disturb an award unless the amount was so exorbitant that it 'shocked the conscience of the court.'"); WRIGHT ET AL., *supra* note 14, § 4511.

226. *Gasperini*, 518 U.S. at 422-23.

227. N.Y. C.P.L.R. § 5501(c) (emphasis added).

228. *Gasperini*, 518 U.S. at 424.

229. *Id.* at 420.

230. *Id.* at 422.

231. WRIGHT ET AL., *supra* note 14, § 4508.

232. *See supra* Part III.E.2.

law to avoid federal-state conflicts."[233] Justice Ginsburg gave scant attention in *Gasperini* to whether Rule 59 controlled the standard for determining excessiveness, addressing the issue indirectly in a footnote directed at Justice Scalia's dissent.[234] Instead, the Court's opinion initially framed the choice of law issue in terms evocative of *Byrd*—"whether federal courts can give effect to the substantive thrust of § 5501(c) without untoward alteration of the federal scheme for the trial and decision of civil cases"[235]—and then proceeded to launch into an *Erie*-RDA analysis to determine whether CPLR § 5501(c) is outcome determinative under *Hanna*'s "twin aims" dicta. The Court held that "New York's check on excessive damages implicates what we have called *Erie*'s 'twin aims'"[236] and, therefore, provided the applicable standard of excessiveness. Quoting *Ragan*, Justice Ginsburg concluded that, "[j]ust as the *Erie* principle precludes a federal court from giving a state-created claim 'longer life . . . than [the claim] would have had in the state court,' . . . so *Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court."[237]

In her dissenting opinion in *Shady Grove*, Justice Ginsburg will unsuccessfully make a similar argument that *Erie* should preclude Shady Grove from maintaining a class action under Rule 23 "to transform a $500 case into a $5,000,000 award [when] the State creating the right to recover has proscribed this alchemy" by barring a class action on the same state-created right in state court.[238] And although, in *Gasperini*, Justice Stevens agreed with her *Erie* analysis,[239] in *Shady Grove* he will

233. Rowe, Jr., *supra* note 6, at 994; *Gasperini*, 518 U.S. at 428 n.7 (quoting *Walker*, the Court's opinion noted that "[f]ederal courts have interpreted the Federal Rules, however, with sensitivity to important state interests and regulatory policies").

234. *Gasperini*, 518 U.S. at 438 n.22 ("Justice Scalia finds in Federal Rule of Civil Procedure 59 a 'federal standard' for new trial motions in '"direct collision"' with, and '"leaving no room for the operation of,"' a state law like CPLR § 5501(c). The relevant prescription, Rule 59(a), has remained unchanged since the adoption of the Federal Rules by this Court in 1937. Rule 59(a) is as encompassing as it is uncontroversial. It is indeed 'Hornbook' law that a most usual ground for a Rule 59 motion is that 'the damages are excessive.' Whether damages are excessive for the claim-in-suit must be governed by *some law.* And there is no candidate for that governance other than the law that gives rise to the claim for relief—here, the law of New York." (internal citations omitted)).

235. *Gasperini*, 518 U.S. at 426.

236. *Id.* at 430.

237. *Id.*

238. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1460 (2010) (Ginsburg, J., dissenting).

239. *Gasperini*, 518 U.S. at 440 (Stevens, J., dissenting) ("The Court correctly explains why the 1986 enactment of § 5501(c) of the N. Y. Civ. Prac. Law and Rules (McKinney 1995) changed the substantive law of the State. A state-law ceiling on allowable damages, whether fixed by a

reject her dissenting opinion's use of the outcome determinative test to support a narrow interpretation of Rule 23 to avoid violating the REA's "substantive rights" proviso.[240]

Some have speculated about what *Gasperini* portends for the "plain meaning" approach to interpreting the Federal Rules advanced in *Walker*[241] and, more fundamentally, for the policy of robust enforcement of the REA's policy of federal procedural uniformity articulated in *Burlington Northern*.[242] After *Gasperini,* Professor Freer observed that "the Court appears to embrace a new general policy regarding interpretation of Federal Rules,"[243] suggesting that, "if the Court means what it says, it may have replaced the search for 'plain meaning' with a heightened sensitivity to potential impact on state policy."[244]

Gasperini's narrow interpretation of Rule 59 raised questions about the future of federal rules uniformity under the REA. A *Cornell Law Review* student note published after the Court's decision suggested that "[i]f the majority really construed Rule 59 as allowing for a state-law gap-filler because the Rule did not explicitly set the standard of review, then many other Federal Rules will be subject to similar preemption," which "would undermine much of the predictability the Hanna holding provides" and reduce the Federal Rules, when not explicit, to the status of "mere empty containers waiting to be filled by state procedural rules."[245] Along these lines, Professor Adam Steinman recently invoked *Gasperini* to support his contention that *Erie* now requires federal courts to apply state case law interpretations of Federal Rules to avoid outcome differences.[246]

Professor Rowe counseled caution in prophesying such extreme interpretations of *Gasperini*, suggesting that "the *Gasperini* Court's shift of emphasis . . . should not be overread because the majority did not disavow the earlier statements about 'plain meaning' and

dollar limit or by a standard that forbids any award that 'deviates materially from what would be reasonable compensation' is a substantive rule of decision that federal courts must apply in diversity cases governed by New York law." (internal citations omitted)).

240. *Shady Grove*, 130 S. Ct. at 1459 (Stevens, J., concurring).

241. Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.9 (1980) ("The Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies.").

242. Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 n.3 (1987).

243. Freer, *supra* note 11, at 1642.

244. *Id.* at 1643.

245. J. Benjamin King, Note, *Clarification and Disruption: The Effect of* Gasperini v. Center for Humanities, Inc., *on the* Erie *Doctrine*, 83 CORNELL L. REV. 161, 189 (1997).

246. Steinman, *supra* note 23, at 282-87.

'straightforward . . . statutory interpretation."[247] While cautioning that "confident prophecy would be rash," he expressed doubt that federal courts would broadly interpret *Gasperini* to reduce the Federal Rules to mere receptacles for state law, "[g]iven the generality of Rule 59's language, the specificity of the *Gasperini* majority's focus on what it regarded as the substantive nature of the New York 'deviates materiality' standard, and the lower federal courts' treatment of *Gasperini* thus far."[248] As explained in Part IV, Professor Rowe's prediction that *Gasperini* did not portend an abandonment of the plain meaning interpretation of Federal Rules seems justified by *Shady Grove*, where the Court's majority will return to post-*Hanna* precedent by declining to avoid a conflict between Federal Rule 23 and New York's class action rule.[249]

2. If Federal Rule 59 had Conflicted with CPLR § 5501(c), Would It Have Been "Invalid" (as Applied) Under the REA?

Under *Hanna*, if the court finds a conflict between the Federal Rule and state law because the Rule is broad enough to address the issue in dispute, the court must then determine whether the Rule is valid under the REA.[250] Interpreting the REA's limitations on Rule validity raises two basic issues: (1) Does § 2072(b)—the "substantive rights" proviso—function as an additional limit on the Court's rulemaking authority; and (2) if it does, what is a "substantive right"? If the state law does not conflict with a Federal Rule, the court engages in an *Erie* analysis, applying the modified outcome determinative test.

First, if the candidate Rule qualifies as a rule of "practice and procedure" under § 2072(a)—if it "really regulates procedure" under *Sibbach*—can it, nevertheless, be invalid on its face, or as applied, because it would "abridge, modify or enlarge substantive rights" under § 2072(b)? In other words, does the "substantive rights" proviso act as an independent constraint on rule validity?[251] Before *Gasperini*, Professors Wright, Miller, and Cooper predicted:

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247. Rowe, Jr., *supra* note 6, at 995.

248. *Id.* at 995 n.126.

249. *See infra* Part IV.

250. WRIGHT ET AL., *supra* note 14, § 4508.

251. Professor Burbank's research into the legislative history of the Enabling Act revealed that "the Supreme Court was correct in *Sibbach* and subsequent cases to the extent that it failed to attribute independent meaning to the Act's second sentence, and thus to impute to the second sentence limitations not imposed by the first." Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1107-08 (1982) ("In the opinion of the draftsman, as indicated in his

> [T]here is reason to believe that the Supreme Court, should it have occasion to address specifically the relationship between the constitutional and the statutory restrictions on the permissible scope of the Civil Rules, will disapprove the suggestion in *Hanna* that the *Sibbach* test is the appropriate standard for determining both the constitutionality of a Civil Rule and its validity under the Enabling Act.[252]

This prediction did not materialize in *Gasperini*, where the majority glossed over the REA issue of the validity of Rule 59 as applied to trump New York's "materially deviates" rule. As noted previously, the Court did not directly address whether Rule 59 controls the standard for determining excessive damage awards, responding only indirectly to Justice Scalia's dissent on this point.[253] Professor Rowe opined that Justice Ginsburg's response to Justice Scalia's "broad reading of Rule 59"—which included a brief reference to § 2072(b)'s "ban on affecting substantive rights"—provides a clue that the Court may be suggesting that a broad application of Rule 59 to trump the state standard for determining excessiveness might be invalid under the REA.[254] Professor Rowe acknowledged that this reference "reads much like the passing acknowledgments of the substantive-rights proviso seen in previous opinions, but the Court's use of § 2072(b) gives some tentative support to the view that it might be willing in an appropriate, albeit unusual, case to read real teeth into that part of the statute."[255] As discussed more fully in Part IV, this prophecy seems to have *partly* come true in *Shady Grove*.[256] Although the plurality, led by Justice Scalia, reaffirmed the *Sibbach* test, which collapsed the two REA provisions into a single "really regulates procedure" standard,[257] a five Justice majority—Stevens concurrence and the four dissenting Justices— did, in fact, "read teeth" into § 2072(b).[258]

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correspondence, the second sentence served only to emphasize a restriction inherent in the use of the word 'procedure' in the first sentence.").

252. WRIGHT ET AL., *supra* note 14, § 4508.

253. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 438 n.22 (1996).

254. Rowe, Jr., *supra* note 6, at 996 ("As part of its response to Justice Scalia's broad reading of Rule 59, the majority briefly mentioned § 2072(b)'s ban on affecting substantive rights. In context, the Court seemed to be hinting that construing Rule 59 in such a way as to trump the state verdict-excessiveness standard just might raise a problem under the REA.").

255. *Id.*

256. *See infra* Part IV.

257. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010).

258. *Id.* at 1452 (Stevens, J., concurring).

Second, if the "substantive rights" proviso has teeth, how sharp are they? As explained in Part IV, Justice Stevens and the four dissenting Justices will part company in *Shady Grove* on this issue.[259] There, Justice Stevens reads the term "substantive rights" in § 2072(b) more narrowly than the dissent, applying the "bound up" standard (reminiscent of *Byrd*) in which the state rule, in effect, "operate[s] to define the rights and remedies available in a case,"[260] rather than the dissent's "outcome determination" standard (reminiscent of *Guaranty Trust*).[261] As explained in Part IV, Justice Ginsburg's dissent suggests that the Court should avoid a collision between Rule 23 and the state class action rule because, otherwise, application of Rule 23 would create an outcome difference that would place in jeopardy the validity of Rule 23.[262] I will consider in Part IV the impact of Justice Stevens's concurrence on the continuing viability of *Sibbach*'s single standard of Rule validity.[263]

3. Does *Hanna*'s "Twin Aims" Version of the Outcome Determination Test Supersede Byrd's Balancing Approach?

As noted previously, the *Gasperini* Court rested its holding that CPLR § 5501(c) provided the applicable standard for measuring the excessiveness of the jury's verdict on an RDA analysis applying *Hanna's* "twin aims" version of the outcome determination test instead of *Byrd's* balancing approach. *Gasperini* has been criticized for missing an opportunity to clarify RDA analysis under *Erie*, particularly the extent to which *Byrd* survives—or, on its merits, *should* survive.[264] Justice Ginsburg's opinion has been subject to varying interpretations in this regard. Professor Rowe opined that, despite the Court's reference to *Byrd*, "*Hanna*'s 'twin aims' formulation remains the general and dominant starting point for *Erie* cases involving judge-made federal law."[265] Professor Freer minimized as lip service the Court's reference

259. *See infra* Part IV.

260. *Shady Grove*, 130 S. Ct. at 1455 n.13 (Stevens, J., concurring).

261. *Id.* at 1471 (Ginsburg, J., dissenting).

262. *See infra* Part IV.

263. *See infra* Part IV.

264. *See, e.g.*, Freer, *supra* note 11, at 1663 ("In *Gasperini*, the Court had another opportunity—perhaps its best in a generation—to make a meaningful contribution to RDA analysis, including the role of *Byrd*. Instead, the Court has left the field about as murky as it was before."). *But see* Rowe, *supra* note 6, at 966 ("The *Gasperini* majority opinion is not a shining model, but neither does it strike me as a severe muddle.").

265. Rowe, *supra* note 6, at 998; *id.* at 966 ("[The *Gasperini* majority opinion] does not appear to mark a major shift in the Supreme Court's *Erie* jurisprudence of the last third of a century."); *id.*

to *Hanna*'s "twin aims" test[266] and, reading between the lines, suggested that "*Byrd*—writ large—may have a strong future."[267] Professors Wright, Miller, and Cooper read *Gasperini*'s Solomon-like, case-by-case accommodation of federal and state interests to be consistent with *Byrd*: "Given the Court's repeated assertions [in *Gasperini*] that it is giving effect to the substantive thrust of Section 5501(c) without untoward alteration of the federal system, the Court seems to remain faithful to its decision in Byrd."[268]

Reflecting on *Gasperini*'s meaning, Justice Ginsburg's more revealing explication of her views on "Erie-Hanna" in her *Shady Grove* dissent may shed some light on her opinion in *Gasperini*. Her *Shady Grove* dissent blurs the line between the separate RDA and REA analyses, employing the RDA-outcome determination test to inform her understanding of the "substantive rights" proviso of the REA[269] so that, in her view, Federal Rules should be narrowly construed to avoid outcome differences and the risk of an invalid application. As

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at 968 ("The majority's approach . . . confirms everything the Court had said on the point since it modified the *York* 'outcome determination' test in *Hanna.*"); *id.* at 1007 (noting the author's "disagree[ment] with Professor Floyd when he asserts that 'the *Gasperini* majority relied centrally on *Byrd* . . . .'" (citing Floyd, *supra* note 14, at 270)).

266. Freer, *supra* note 11, at 1655 ("[The majority opinion's] RDA analysis seems to proceed in the wrong direction. Instead of using the twin aims test to determine whether the statute is substantive, the Court declares that because the rule is substantive 'it thus appears' to 'implicate' the twin aims test. The analysis does not lead to a conclusion; it is used to justify a conclusion already reached. The twin aims test seems an afterthought.").

267. *Id.* at 1660 ("*Gasperini* shows that *Byrd* survives *Hanna* and serves at least to identify federal systemic interests. It is frustratingly mum, though, about *Byrd's* future in any larger sense . . . . But, reading between the lines of *Gasperini*, we can find that *Byrd*—writ large—may have a strong future.").

268. WRIGHT ET AL., *supra* note 14, § 4511 ("In the wake of *Gasperini*, the most pressing question is whether the Court's decision repudiates the promise in *Byrd* that the federal judiciary would be an independent system for the administration of justice. But despite Justice Scalia's objections, the Court's decision in *Gasperini* is a reasonable attempt to perform the balancing of interests required by *Byrd*."); *id.* ("In light of the substantial differences between the problems present in the two cases, it is difficult to conclude that *Gasperini* departs from the precedent set in *Byrd*. That conclusion requires one to turn a blind eye to the Court's observation in *Byrd* that the state rule was related to no rights and obligations created by state law, and the Court's reservation in *Byrd* that 'the policy of uniform enforcement of state-created rights and obligations . . . cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury.' Given the Court's repeated assertions [in *Gasperini*] that it is giving effect to the substantive thrust of Section 5501(c) without untoward alteration of the federal system, the Court seems to remain faithful to its decision in *Byrd*.").

269. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1456 (2010) (Stevens, J., concurring) ("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.").

previously mentioned, the Court's opinion in *Gasperini* did not directly address the first question under *Hanna*'s two-part analysis—whether Rule 59 covered the point in dispute and, if so, whether it would be valid under the REA.[270] I suggest that, in arguing for a narrow interpretation of Federal Rule 23, Justice Ginsburg's subsequent dissent in *Shady Grove* does address that question. As I shall explain more fully in Part IV, her opinion in *Gasperini,* in light of her subsequent dissent in *Shady Grove,* may be best understood as an *REA* analysis, rather than an *RDA* analysis, in which the Court narrowly interpreted Rule 59 to avoid what it perceived *would have been* an invalid application of that rule under the "substantive rights" proviso of § 2072(b).[271] This reading supports Professor Rowe's suggestion that "the Court [in *Gasperini*] seemed to be hinting that construing Rule 59 in such a way as to trump the state verdict-excessiveness standard just might raise a problem under the REA."[272]

IV. THE FOREST: SEARCHING FOR A PRINCIPLED "ERIE" ANALYSIS IN *SHADY GROVE*

The issue of Federal Rule validity under the REA, which *Gasperini* did not address, is the focus of attention in *Shady Grove*, a diversity action in which the majority broadly interpreted Federal Rule 23—a procedural rule with powerful substantive impact[273]—to conflict with, and preempt, New York's CPLR § 901(b), which bars class actions to enforce claims for penalties or statutory minimum damages.[274] Despite the class action's powerful "substantive" impact on the damages remedy, the majority emphasized its "procedural" character.[275]

The Justices engaged in line-drawing between "substance" and "procedure" in the context of the REA,[276] calibrating the appropriate balance between the norm of national procedural uniformity within the

270. *See, e.g.*, Freer, *supra* note 11, at 1641 ("Under the bifurcated analysis prescribed by *Hanna*, the standard initial inquiry in *Gasperini* would have been whether Rule 59(a)(1) 'cover[ed] the point in dispute' [citing *Hanna*] or '[was] sufficiently broad to control the issue before the Court,' [citing *Walker*] or whether there is a 'direct collision' between it and the state provision [citing *Burlington*].").

271. *See infra* Part IV.

272. Rowe, Jr., *supra* note 6, at 996.

273. *Shady Grove*, 130 S. Ct. 1431, 1437 (2010).

274. *Id.* at 1439.

275. *Id.* at 1444.

276. *See, e.g.*, *id.* at 1454 (Stevens, J., concurring) ("While it may not be easy to decide what is actually a 'substantive right,' 'the designations substantive and procedural become important, for the Enabling Act has made them so.'").

federal judicial system and New York's substantive state interests. In calibrating this balance, their opinions represent different points along a spectrum that accord varying degrees of weight to these federal and state interests, from Justice Scalia's plurality opinion, according maximum deference to the REA's policy of federal procedural uniformity,[277] through Justice Stevens's concurring opinion, taking a centrist position that still tips the delicate balance of judicial federalism in favor of the federal interest in uniformity,[278] to Justice Ginsburg's dissent, giving maximum deference to state substantive interests with its attendant potential for disrupting federal procedural uniformity.[279]

In addition to the core *Erie* theme of striking the appropriate balance of judicial federalism between federal and state interests, *Shady Grove* bears upon another theme which has been the recent focus of scholarly attention among neo-Realists,[280] in which increasingly politicized "procedure" is viewed as substantive law in disguise:[281] the concept of procedure as normatively distinct from substantive rights and remedies, a concept that is widely challenged as obsolete.[282] In locating the line between substance and procedure in *Shady Grove*,[283] the Justices debated the degree to which New York's CPLR § 901(b) serves the procedural goals of the fair and efficient conduct of litigation[284] as distinct from defining the scope of a substantive state-created right.[285]

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277. *Id.* at 1448 ("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.").

278. *Id.* at 1448.

279. *Id.* at 1460 (Ginsburg, J., dissenting).

280. *See, e.g.*, Nourse & Shaffer, *supra* note 59.

281. *See generally* Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 668 (1993) ("Legal Realism revolutionized the [legal] profession's thinking about law, making it virtually impossible for thoughtful lawyers to regard litigation procedure and policy as completely divorced from the politics of substantive outcomes."); Main, *supra* note 57, at 803, 818-22 ("relat[ing] the familiar narrative about how procedure is inherently substantive").

282. *See generally* Glenn S. Koppel, *Reflections on the "Chimera" of a Uniform Code of State Civil Procedure: The Virtue of Vision in Procedural Reform*, 58 DEPAUL L. REV. 971, 986-90 (2009).

283. *See, e.g.*, *Shady Grove*, 130 S. Ct. at 1450 (Stevens J., concurring) (acknowledging that "[t]he line between procedural and substantive law is hazy [citing *Erie R. Co. v. Tompkins*]" and that, "in some situations, 'procedure and substance are so interwoven that rational separation becomes well-nigh impossible [citing Justice Rutledge's dissent in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555 (1949)]").

284. *Shady Grove*, 130 S. Ct. at 1465 (Ginsburg, J., dissenting) ("§ 901(b) rejects the use of the class mechanism to pursue the particular remedy of statutory damages. The limitation was not designed with the fair conduct or efficiency of litigation in mind."); *id.* at 1458 n.16 (Stevens, J.,

Finally, the opinions in *Shady Grove* reflect the spectrum of formalist-realist perspectives in characterizing a rule as "procedural" or "substantive," from the formalism of Justice Scalia, who essentially ignores the practical impact of procedural differences on substantive rights and litigation outcomes[286] and applies "the [state] statute's clear text,"[287] to the mix of formalism and realism of Justice Stevens, who would "allow for the [rare][288] possibility that a state rule that regulates something traditionally considered to be procedural might actually define a substantive right,"[289] but who "respect[s] the plain textual reading" of a rule located in the state's procedural code when "there are two plausible competing narratives" about the rule's purpose,[290] to the full-blown realism[291] of Justice Ginsburg, who characterizes a state procedural rule as "substantive" if it is "outcome affective in the sense our cases on *Erie* (pre- and post-*Hanna*) develop."[292]

A. Did Federal Rule 23 and New York's CPLR § 901(b) Collide?

The Justices addressed *Hanna*'s two-step inquiry under the REA: first, whether Rule 23 is "'sufficiently broad' to 'control the issue'"[293] and, second, whether Rule 23, as applied to preempt CPLR § 901(b), is "valid" within the meaning of the REA. These two steps are not hermetically sealed off from each other; citing *Semtek*, Justice Stevens

concurring) (characterizing New York's procedural rule (C.P.L.R. § 901(b)) "as a general rule about how its courts operate . . . .").

285. *See id.* at 1453 n.8.

286. *Id.* at 1446-47 n.13 (Part II-C plurality opinion) ("The concurrence is correct . . . that under our disposition any rule that 'really regulates procedure' . . . will pre-empt a conflicting state rule, however 'bound up' the latter is with substantive law. The concurrence is wrong, however, that that result proves our interpretation of § 2072(b) implausible. . . . The result is troubling only if one stretches the term 'substantive rights' in § 2072(b) to mean not only state-law rights themselves, but also any state-law procedures closely connected to them.").

287. *Id.* at 1440.

288. *Id.* at 1455 n.13 (Stevens, J., concurring) (noting that it will be the "rare state rule[] that, although 'procedural' in the ordinary sense of the term, operate[s] to define the rights and remedies available in a case").

289. *Id.* at 1453 n.8.

290. *Id.* at 1459-60.

291. *Id.* at 1463 n.2 (Ginsburg, J., dissenting) ("[Justice Stevens'] characterization of § 901(b) [as a procedural rule that is not part of New York's substantive law] *does not mirror reality*." (emphasis added)).

292. *Id.* at 1471.

293. *Id.* at 1451 (Stevens, J., concurring).

commented that "the second step of the inquiry may well bleed back into the first" to avoid an invalid application.[294]

On the first question—whether Rule 23 is broad enough to "answer[ ] the question in dispute"[295]—the five-Justice majority, which included Justice Stevens's concurring opinion, found an unavoidable conflict between Rule 23 and the state class action rule, because they both addressed whether a class action may or may not be "maintained."[296] The Court rejected "the dissent's approach of determining whether state and federal rules conflict based on the subjective intentions of the state legislature."[297] The Court's opinion also rejected the Second Circuit's distinction between "eligibility"—addressed by the state rule—and "certifiability"—addressed by Federal Rule 23.[298]

The dissent found no conflict between the two rules. Notwithstanding that the New York rule, located in the state's procedural code, was framed as a procedural rule that addressed when a class action may, or may not, be "maintained," the dissent focused on the *purpose* behind CPLR § 901(b) to make the case that the New York legislature intended CPLR § 901(b) to affect the enforcement of a state-created remedy for an infraction of state law, a "manifestly substantive end,"[299] albeit through the medium of the class action device. Thus, according to the dissent, the state rule was not "procedural" in the normative sense of a rule "designed with the fair conduct or efficiency of litigation in mind."[300] Finding no conflict between Rule 23 and CPLR § 901(b), Justice Ginsburg's dissent proceeded to an *Erie*-RDA analysis[301] and concluded that the New York rule was substantive.[302]

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294. *Id.* at 1452 ("When a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result.").

295. *Id.* at 1437.

296. *Id.*

297. *Id.* at 1440-41.

298. *Id.* at 1438 ("The Second Circuit believed that § 901(b) and Rule 23 do not conflict because they address different issues. Rule 23, it said, concerns only the criteria for determining whether a given class can and should be certified; section 901(b), on the other hand, addresses an antecedent question: whether the particular type of claim is eligible for class treatment in the first place—a question on which Rule 23 is silent. Allstate embraces this analysis.").

299. *Id.* at 1465 (Ginsburg, J., dissenting).

300. *Id. But see id.* at 1457 (Stevens, J., concurring) ("The mere fact that a state law is designed as a procedural rule suggests it reflects a judgment about how state courts ought to operate and not a judgment about the scope of state-created rights and remedies.").

301. *Id.* at 1469 (Ginsburg, J., dissenting).

302. *Id.* at 1472.

Although Justice Stevens agreed with Justice Ginsburg that "a federal rule, like any federal law, must be interpreted in light of many different considerations, including sensitivity to important state interests,"[303] he differed with her "about the degree to which the meaning of federal rules may be contorted, absent congressional authorization to do so, to accommodate state policy goals."[304] Although in *Gasperini*, he sided, albeit in a dissenting opinion, with Justice Ginsburg's characterization of New York's "materially deviates" standard for reviewing jury awards as the equivalent of a statutory cap on damages[305] and, therefore, a "substantive" restriction on remedy, in his concurrence in *Shady Grove* he disagreed with her "substantive" characterization of New York's limit on the use of class actions to enforce statutory penalties. In what seems, at first glance, to be a turnabout from his position in *Gasperini*, he concluded that CPLR § 901(b) "is a procedural rule that is not part of New York's substantive law,"[306] notwithstanding that the New York rules at issue in each case were both located in that state's procedural code and, in both cases, Justice Ginsburg characterized the two procedural rules as limitations on the damages remedy.

B. Is Federal Rule 23 "Valid" under the REA as Applied to Preempt CPLR §901(b)?

As noted earlier, the REA contains two provisions that constrain the federal judiciary's rulemaking power and, therefore, a Federal Rule's validity.[307] First, to qualify as a rule of "practice and procedure" as interpreted by the Court in *Hanna*, a Federal Rule must "really regulat[e] procedure"[308] and, second, the Rule must not "abridge, enlarge or modify any substantive right."[309] *Sibbach* gave short shrift to the second, "substantive rights," provision as an additional constraint on Rule validity, articulating a single test for determining Federal Rule

303. *Id.* at 1451 n.5 (Stevens, J., concurring).

304. *Id.*

305. *Id.* at 1453 n.8 ("A rule about how damages are reviewed on appeal may really be a damages cap. *See* Gasperini [v. Ctr. for Humanities, Inc.], 518 U.S. 415, 427 (1996).").

306. *Shady Grove*, 130 S. Ct. 1453 n.8.

307. 28 U.S.C. § 2072 ("(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").

308. Hanna v. Plumer, 380 U.S. 460, 464 (1965).

309. *Id.*

validity: whether the Rule "really regulates procedure."[310] *Hanna* merely reaffirmed *Sibbach*, but failed to elaborate on the substantive rights proviso's meaning. In Professor Ely's words, "the text of the opinion did little more, so far as the interpretation of the Enabling Act was concerned, than point to *Sibbach*."[311] And, as observed by Professors Teply and Whitten, none of the Court's "Erie" opinions since *Hanna*, including *Gasperini*, "provide[d] much guidance about how the Rules Enabling branch of the *Erie* doctrine should operate."[312] As explained in this section, *Shady Grove* does provide some guidance on this long-neglected question.

1. Is REA § 2072(b)—the "Substantive Rights" Proviso—an Independent Constraint on Federal Rule Validity?

The Court split three ways on the limits imposed by the REA on the federal court's rulemaking power. The plurality, and Justice Stevens, found it necessary to "confront head-on whether Rule 23 falls within the statutory authorization"[313] because, in the concluding paragraph of the majority portion of Justice Scalia's opinion, "[w]hat the dissent's approach achieves is not the avoiding of a 'conflict between Rule 23 and § 901(b)' . . . but, rather the invalidation of Rule 23 (pursuant to § 2072(b) of the Rules Enabling Act) to the extent that it conflicts with the substantive policies of § 901."[314] The plurality, led by Justice Scalia, not only reaffirmed *Sibbach*'s "really regulates procedure" test, but broadly interpreted that test to effectively render the "substantive rights" proviso mere surplusage.[315] Justice Stevens, in his concurring opinion, and, by

310. Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

311. Ely, *supra* note 50, at 720.

312. TEPLY & WHITTEN, *supra* note 53, at 491. *See also* WRIGHT ET AL., *supra* note 14, at § 4508 ("The possible independent significance of this statutory limitation . . . to date has received little attention from the Supreme Court . . . ."); *id.* at 260 ("Although the Supreme Court never has addressed the question specifically, it so far has not seemed inclined to attribute much significance to the 'substantive rights' proviso.").

313. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010).

314. *Id.* at 1442. Although Justice Sotomayor did not join the Part II-C plurality, neither did she join Justice Stevens' concurrence. She did, however, agree with the plurality's view that the Court has "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." *Id.* at 1444 (Part II-B plurality opinion).

315. *Id.* at 1442 ("We have long held that this limitation [that Federal Rules shall not 'abridge, enlarge or modify any substantive right'] means that the Rule must "really regulat[e] 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." The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule

implication, the four dissenting Justices—a majority of five—rejected the plurality's view that "the sole Enabling Act question is whether the federal rule 'really regulates procedure,'"[316] so that a Federal Rule that qualifies as "procedural" under the REA's first provision can be rendered invalid, as applied, under the "substantive rights" proviso, if the state "procedural" rule it would displace is "sufficiently interwoven with the scope of a substantive right or remedy . . . ."[317]

Justice Ginsburg's dissent strongly suggests its agreement with Justice Stevens's position, in his concurrence, that the "substantive rights" proviso functions as an independent limit on Rule validity by quoting, among the points on which the two opinions "stake common ground," the following statement made by Justice Stevens in the context of his discussion of the "substantive rights" proviso's congressionally-imposed limit on the Court's rulemaking power:

> "[F]ederal rules," he observes, "must be interpreted with some degree of 'sensitivity to important state interests and regulatory policies,' . . . and applied to diversity cases against the background of Congress' command that such rules not alter substantive rights and with consideration of 'the degree to which the Rule makes the character and result of the federal litigation strayfrom the course it would follow in state courts.'"[318]

The congressional "command" to which Justice Stevens referred is the "substantive rights" proviso. Further, the text of the *Hanna* opinion, quoted by Justice Stevens in the above passage, also relates to the issue of Rule validity under the REA. Finally, although the dissent does not

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itself *regulates*: If it governs only "the manner and the means" by which the litigants' rights are "enforced," it is valid; if it alters "the rules of decision by which [the] court will adjudicate [those] rights," it is not." (emphasis original, internal citations omitted)). *Id.* at 1446 ("*Sibbach* has been settled law . . . for nearly seven decades. Setting aside any precedent requires a 'special justification' beyond a bare belief that it was wrong."). *See also id.* at 1446 n.12 ("The concurrence implies that *Sibbach* has slipped into desuetude, apparently for lack of sufficient citations. . . . We are unaware of any rule to the effect that a holding of ours expires if the case setting it forth is not periodically revalidated. In any event, the concurrence's account of our shunning of *Sibbach* is greatly exaggerated. *Hanna* did not merely cite the case, but recognized it as establishing the governing rule.").

316. *Id.* at 1452 (Stevens, J., concurring) (citing the plurality opinion).

317. *Id.* at 1456.

318. *Id.* at 1464 n.2 (Ginsburg, J., dissenting) (quoting *id.* at 1449 (Stevens, J., concurring)). Similarly, another statement in Justice Stevens' concurrence, quoted by the dissent as "staking common ground" with the dissent, was made in the context of the limits imposed by the REA on Rule validity: "When a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice." *Id.* at 1450 (Stevens J., concurring).

directly address the validity of Rule 23 under the REA, because it found no conflict with the state rule, Justice Ginsburg does acknowledge that a narrow interpretation of a Federal Rule, especially Rule 23, may indicate an awareness of the limits imposed by the REA on Rule validity: "In interpreting the scope of the Rules, including, in particular Rule 23, we have been mindful of the limits on our authority [under § 2072(b)]."[319]

Even though these five Justices appear to agree—either expressly or, in the case of the dissent, by implication—that the "substantive rights" proviso functions as an additional constraint on Federal Rules validity, *Shady Grove*'s bottom-line result nevertheless upheld the validity of Rule 23 as applied to preempt a state class action rule which New York's legislature had designed to avoid "overkill" in the enforcement of a state-law damage remedy.

An explanation of this seemingly incongruous result lies in the disagreement between Justice Stevens and the dissenting Justices over how interwoven the state's procedural rule must be with the state's substantive right or remedy to run afoul of § 2072(b)'s restriction. Rejecting the dissent's broad interpretation of § 2072(b) that defines "substantive" as "outcome determinative,"[320] Justice Stevens inquired whether the state rule is "so intertwined with a state right or remedy that it functions to define the scope of the state-created right."[321] Although Justice Stevens agreed with the Court's application of Rule 23 over CPLR § 901(b), he did so on the grounds that the *state rule* was "procedural" and therefore Rule 23, as applied in this case, did not abridge a substantive state right under § 2072(b).[322]

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319. *Id.* at 1461 (Ginsburg, J., dissenting); *id.* (quoting Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999) ("The Rules Enabling Act counsels against 'adventurous application' of Rule 23; any tension with the Act 'is best kept within tolerable limits.'"). *Shady Grove*, 130 S. Ct. at 1468 n.10 ("The plurality notes that 'we have rejected every statutory challenge to a Federal Rule that has come before us.' . . . But it omits that we have interpreted Rules with due restraint, including Rule 23, thus diminishing the prospects for the success of such challenges."). *See also id.* at 1452 (Stevens, J., concurring) (noting that "[t]he second step of the inquiry [i.e., if the Federal Rule is sufficiently broad to control the issue in dispute, whether application of the Federal Rule is a valid exercise of the Court's rulemaking authority] may well bleed back into the first [i.e., whether the Federal Rule is sufficiently broad to control the issue in dispute and, therefore, conflicts with the state rule].").

320. *Id.* at 1459 ("The difference of degree is relevant to the forum shopping considerations that are part of the Rules of Decision Act or *Erie* inquiry. If the applicable federal rule did not govern the particular question at issue (or could be fairly read not to do so), then those considerations would matter . . . . But that is not *this* case.").

321. *Id.* at 1452.

322. *Id.* at 1449.

The plurality argued that *Sibbach*'s validity inquiry, as reaffirmed in *Hanna*,[323] focused solely on the *Federal Rule* in question—*not* on the procedural or substantive character of the *state rule* under § 2072(b) of the REA. The plurality minimized the substantial impact of a class action on the enforcement of individual claims too small to pursue individually: "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 effect[s]*' we have long held does not violate § 2072(b)."[324] Justice Scalia—true to his plain text approach to statutory interpretation[325]—avoided delving into legislative intent altogether to determine whether the state rule conflicts[326] as well as in determining rule validity; in the plurality's view, the nature of the state rule is irrelevant as long as the federal rule "really regulates procedure."[327]

In Part II-C of the plurality's opinion,[328] Justice Scalia pressed his point even further about the irrelevance of outcome determinative state procedure in determining the Federal Rule's validity. Taking aim directly at Justice Stevens's concurrence, Part II-C asserts that "any rule that 'really regulates procedure,' . . . will pre-empt a conflicting state rule, *however 'bound up' the latter is with substantive law.*"[329] In a rejoinder, Justice Stevens suggested that Justice Scalia's approach involved circular reasoning since "[i]t is hard to [figure out whether a federal rule is really 'procedural'] without considering the nature and functions of the state law that the federal rule will displace."[330] In his

323. *Id.* at 1444 ("*Hanna* unmistakably expressed the same understanding [as *Sibbach*] that compliance of a Federal Rule with the Enabling Act is to be assessed by consulting the rule itself and not its effects in individual applications.").

324. *Id.* at 1443 (emphasis added).

325. *See* Scalia, *supra* note 64, at 1184 ("[I]t is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text.").

326. *See Shady Grove*, 130 S. Ct. at 1439 ("Unlike a law that sets a ceiling on damages (or puts other remedies out of reach) in properly filed class actions, § 901(b) says nothing about what remedies a court may award; it prevents the class actions it covers from coming into existence at all."); *id.* at 1439 n.4 ("§ 901(b) does not conflict because it addresses not the remedy, but the procedural right to maintain a class action."); *id.* at 1440 ("The dissent all but admits that the literal terms of § 901(b) address the same subject as Rule 23—i.e., whether a class action may be maintained—but insists the provision's purpose is to restrict only remedies."); *id.* ("But even accepting the dissent's account of the Legislature's objective at face value, it cannot override the statute's clear text. Even if its aim is to restrict the remedy a plaintiff can obtain, § 901(b) achieves that end by limiting a plaintiff's power to maintain a class action. The manner in which the law 'could have been written' has no bearing; what matters is the law the Legislature *did* enact.").

327. *Id.* at 1444.

328. Justice Sotomayor also did not join Justice Stevens' concurrence.

329. *Id.* at 1446 n.13(emphasis added).

330. *Id.* at 1454 n.10 (Stevens, J., concurring).

words, "[t]he plurality's 'test' is no test at all—in a sense, it is little more than the statement that a matter is procedural if, by revelation, it is procedural."[331]

From the point of view of calibrating the balance inherent in the REA between federal procedural uniformity and deference to substantive state policies,[332] the plurality's interpretation of the REA reflects the paramount importance it attributes to the congressional policy of procedural uniformity throughout the federal judicial system:[333] "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)."[334]

Justice Scalia's dismissal of the "substantive rights" proviso as surplusage is difficult to square, however, with his statement in *Semtek* that an interpretation of Rule 41(b) as a rule of claim preclusion "would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules 'shall not abridge, enlarge or modify any substantive right.'"[335]

Shady Grove nevertheless augurs the Court's shift away from *Sibbach*'s inflexible single test of Federal Rule validity because a different majority—consisting of Justice Stevens in his concurrence and, by implication though not expressly, Justices Ginsburg, Kennedy, Breyer, and Alito in their dissent—appears to have rejected the plurality's view that § 2072(b) lacks independent significance. Agreeing that "federal rules must be interpreted with some degree of 'sensitivity to important state interests and regulatory policies,'"[336] these five Justices implicitly interpreted the "substantive rights" proviso of the REA as an additional constraint on the Court's rulemaking power. To ignore this second limitation on rule validity, Justice Stevens cautioned, "ignores

331. *Id.* at 1454 n.10 (quoting WRIGHT ET AL., *supra* note 14, § 4509).

332. *Id.* at 1453.

333. *Id.* at 1446 ("*Sibbach*'s exclusive focus on the challenged Federal Rule—driven by the very real concern that Federal Rules which vary from State to State would be chaos . . .—is hard to square with § 2072(b)'s terms."). *See* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) ("Apart from the fact already stated, that the policy of the states in this respect has not been uniform, it is to be noted that the authorization of a comprehensive system of court rules was a departure in policy, and that the new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair, and exact determination of the truth. The challenged rules comport with this policy.").

334. *Shady Grove*, 130 S. Ct. at 1444.

335. Semtek Int'l v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001).

336. *Shady Grove*, 130 S. Ct. at 1449 (Stevens, J., concurring) (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996)); *id.* at 1463 (Ginsburg, J., dissenting).

the balance that Congress struck between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies."[337]

2. The Scope of the "Substantive Rights" Proviso: How Sharp Are Its Teeth to Protect State Substantive Policy Interests?

Although both Justice Stevens and, by implication, the dissenting Justices, agree that the "substantive rights" proviso operates to render invalid "procedural" rules that abridge, enlarge or modify "substantive" rights, and that Federal Rules should be narrowly interpreted to avoid invalidity under the Enabling Act,[338] they parted company on the meaning of the statutory phrase "substantive right." Several definitions have in the past been proposed. Professor Ely offered a normative definition of a "substantive rule" as "a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with *the fairness or efficiency of the litigation process*."[339] Justice Harlan, in his concurring opinion in *Hanna*, adopted Hart and Wechsler's standard that characterizes as substantive, for both RDA and REA purposes, rules that "affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation."[340]

In *Shady Grove*, Justice Ginsburg's dissenting opinion, as interpreted by Justice Stevens, expanded the definition of "substantive" beyond the foregoing to include *outcome determinative* procedural rules.[341] However, the dissent's analysis of "substantive rights" also employed a normative approach, reminiscent of Professor Ely's definition, which emphasized the legislative *purpose* behind the state rule.[342] Justice Stevens's concurring opinion proposed a more restrictive

337. *Id.* at 1453 (Stevens, J., concurring).

338. As noted by Justice Stevens, the first inquiry whether a Federal Rule and state rule conflict, and the second inquiry whether the Federal Rule is valid if applied over the state rule are but two sides of the same coin, since the latter inquiry "may well bleed back into the first." *Id.* at 1452.

339. Ely, *supra* note 50, at 725 (emphasis added).

340. Hanna v. Plumer, 380 U.S. 460, 475 (1965).

341. *Shady Grove*, 130 S. Ct. 1431, 1456-57 (Stevens, J., concurring) ("At bottom, the dissent's interpretation of Rule 23 seems to be that Rule 23 covers only those cases in which its application would create no *Erie* problem. 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 '[w]hen a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice.' Hanna, 380 U.S. at 471.").

342. *Id.* at 1464 (Ginsburg, J., dissenting).

definition suggestive of *Byrd*'s reference to "intimately bound up" state rules.[343] The difference between Justice Stevens and the dissent in determining what constitutes a "substantive" right centers on how tight the nexus must be between the state "procedural" rule and a state "substantive right" so that the state rule can be deemed "sufficiently interwoven with the scope of a substantive right or remedy [to create] an Enabling Act problem . . . ."[344] Justice Scalia, writing for the Court, adopted the most restrictive standard according to which legislative purpose "cannot override the [state] statute's clear text."[345]

a. The Dissent's Broad Construction of "Substantive Rights" under § 2072(b)

In the Court's view,[346] and mine, Justice Ginsburg's dissent broadly construed the term "substantive" in §2072(b) to embrace outcome determinative state procedure, in effect merging, once again, the RDA and REA analyses to determine the validity and applicability of a Federal Rule.[347] But, in addition to outcome determination, the dissent also considered—as did the Court's opinion in *Gasperini*—the legislative *purpose* behind the state rule, employing a normative

343. *Id.* at 1458 (Stevens, J., concurring).

344. *Id.* at 1456.

345. *Id.* at 1440 ("Even if [the Legislature's] aim is to restrict the remedy a plaintiff can obtain, § 901(b) achieves that end by limiting a plaintiff's power to maintain a class action. The manner in which the law 'could have been written,' . . . has no bearing; what matters is the law the Legislature *did* enact.").

346. *Id.* at 1442; *id.* at 1456-57 (Stevens, J., concurring) ("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. . . . Justice Ginsburg's approach would, in my view, work an end run around Congress' system of uniform federal rules.").

347. *Id.* at 1461 (Ginsburg, J., dissenting) ("In interpreting the scope of the Rules, including, in particular, Rule 23, we have been mindful of the limits on our authority. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999) ("The Rules Enabling Act counsels against 'adventurous application' of Rule 23; any tension with the Act 'is best kept within tolerable limits.'"). . . . Recognizing that the Rules of Decision Act and the Rules Enabling Act simultaneously frame and inform the *Erie* analysis, we have endeavored in diversity suits to remain safely within the bounds of both congressional directives."). Justice Ginsburg's dissent also suggests a merger of the RDA and REA analyses in its discussion of *Erie*'s significance early in the opinion by quoting from Justice Harlan's concurrence which criticized the *Hanna* Court's bifurcated RDA-REA analyses: "Justice Harlan aptly conveyed the importance of the doctrine; he described *Erie* as 'one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems." *Shady Grove*, 130 S. Ct. 1431, 1460 (Ginsburg J., dissenting) (citing Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring)).

approach similar to Professor Ely's normatively-based definition of "substantive."[348]

> [Section 901(b)'s class action] limitation was not designed with the *fair conduct or efficiency of litigation* in mind, . . . , New York's decision instead to block class-action proceedings for statutory damages, therefore, makes scant sense, except as a means to a *manifestly substantive end*: Limiting a defendant's liability in a single lawsuit in order to prevent the exorbitant inflation of penalties—remedies the New York Legislature created with individual suits in mind.[349]

The dissent's use of outcome determination to decide whether a Federal Rule abridges a state substantive remedy or right within the meaning of § 2072(b) effectively imports *Guaranty Trust*'s "unguided" "Erie" analysis under the RDA, as modified by *Hanna*'s "twin aims" approach, into the REA analysis, extending *Erie*'s reach into the domain of federal procedure. The dissent's position that a Federal Rule should be narrowly interpreted to avoid an invalid application of the Rule by preempting an outcome determinative state procedure appears to circle back to pre-*Hanna* jurisprudence that did not recognize the two distinct REA and RDA analytical tracks.[350] The dissent's conflation of the two tests is reminiscent of Justice Harlan's concurrence in *Hanna*—which Justice Ginsburg cited[351]—in which he opposed the Court's holding that the REA and the RDA run on two separate tracks and, therefore, that

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348. Professor Freer commented that Justice Ginsburg similarly conflated these two approaches to classifying a state rule as "substantive" or "procedural" in *Gasperini* but in the RDA, rather than REA, context:

> Instead of using the twin aims test [of outcome determination] to determine whether the statute is substantive, the Court declares that because the rule is substantive [because it is the functional equivalent of a statutory cap on damages and therefore "manifestly substantive"] "it thus appears" to "implicate" the twin aims test. . . . The twin aims test seems an afterthought.

Freer, *supra* note 11, at 1655.

349. *Shady Grove*, 130 S. Ct. at 1465 (Ginsburg, J., dissenting) (emphasis added).

350. On remand, the trial judge in *Gasperini* interpreted the Court's decision as a return to the application of *Guaranty Trust*'s outcome determinative test to the Federal Rules:

> The Supreme Court decision in this case represents an extension of *Erie* doctrine, or more likely a reversion by the Supreme Court to prior *Erie* doctrine since abandoned, of which *Guaranty Trust Co. v. York* . . . is the outstanding example. The Supreme Court in *Guaranty Trust* and again in *Gasperini* seems to have endorsed the outcome-determinative test to determine whether a disputed point of law is *procedural*, and therefore governed by the Federal Rules of Civil Procedure and case law developed thereunder, or *substantive* so as to be governed by state law.

Gasperini v. Ctr. for Humanities, Inc., 972 F. Supp. 765, 767 (S.D.N.Y. 1997).

351. *Shady Grove*, 130 S. Ct. at 1460 (Ginsburg, J., dissenting).

Erie is inapplicable to determine rule validity of an on-point Federal Rule.[352] In 1974, Professor Ely attributed "the monolithic 'Erie doctrine's' continued pervasion of the literature" post-*Hanna* to Justice Harlan's prestige:

> "The clear assumption of his otherwise sensitive discussion was that all choices between state and federal law in diversity actions are controlled by a single doctrine, the Erie doctrine, and that that doctrine is of constitutional magnitude and therefore indiscriminately applicable whether there is a Federal Rule covering the point in dispute or not."[353]

Justice Stevens rejected the dissent's application of the outcome determinative approach to test Federal Rule validity under § 2072(b) of the REA: "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."[354] Acknowledging the impact of CPLR § 901(b) to promote forum shopping in federal court, Justice Stevens went on to elaborate:

> If the applicable federal rule did not govern the particular question at issue (or could be fairly read not to do so), then [forum shopping] considerations would matter, for precisely the reasons given by the dissent. . . . But that is not *this* case. As the Court explained in *Hanna*, it is an 'incorrect assumption that the rule of *Erie R. Co. v. Thompkins*[sic] constitutes the appropriate test of . . . the applicability of a Federal Rule of Civil Procedure' . . . . 'It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law,' but the tests are different and reflect the fact that 'they were designed to control very different sorts of decisions.'"[355]

Justice Ginsburg's apparent conflation of REA and RDA standards, in her *Shady Grove* dissent, to accommodate "New York's legitimate interest in keeping certain monetary awards reasonably bounded"[356] by applying an outcome determination analysis sheds light on the underlying basis for the Court's opinion in *Gasperini*, which she also authored. In *Gasperini*, rather than initially tackling the first part of the *Hanna* analysis—whether Rule 59, that governs new trial motions, also controls the standard for reviewing the reasonableness of jury awards—

352. *Hanna*, 380 U.S. at 474 (Harlan, J., concurring).
353. Ely, *supra* note 50, at 699.
354. *Shady Grove*, 130 S. Ct. at 1456 (Stevens, J., concurring).
355. *Id.* at 1459 (quoting *Hanna*, 380 U.S. 460).
356. *Id.* at 1460 (Ginsburg, J., dissenting).

Justice Ginsburg addressed this issue cursorily in a footnote that responded to Justice Scalia's dissenting view that Rule 59 controlled this point.[357] Instead, in analyzing whether to apply the federal "shocks the conscience" standard or New York's "materially deviates" standard, Justice Ginsburg proceeded directly to an *Erie* analysis, applying the outcome determination test:

> [W]hether New York's "deviates materially" standard, codified in CPLR § 5501(c), is outcome affective in this sense: Would "application of the [standard] . . . have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose the federal court?"[358]

Extrapolating the more explicit RDA-REA analysis in her *Shady Grove* dissent to her opinion in *Gasperini*, and reading between the lines, one may interpret Justice Ginsburg's *Gasperini* opinion as having narrowly construed Rule 59 to avoid what she believed to be a violation of the "substantive rights" proviso of the Enabling Act.

Professor Steinman builds upon *Gasperini*'s "Erie" incursion into the Federal Rules, in an article written before *Shady Grove*, by taking the Court's approach one step further. Responding to the conservative complexion of the federal bench,[359] he contends that *Erie* jurisprudence has evolved to the point where federal courts, in diversity suits, are now required to ignore federal case law interpretations of the Federal Rules, like summary judgment, class certification, and pleading, applying state-law standards instead.[360] In language evocative of Justice Ginsburg's approach to REA analysis, Professor Steinman writes: "[F]ederal approaches to summary judgment, class certification, and pleading may so profoundly impact a litigant's ability to enforce substantive rights that they exceed the federal judiciary's statutory authority to promulgate positive law procedural rules such as the Federal Rules of Civil Procedure."[361] He extends the logic of *Gasperini*'s holding "that the

357. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 438 n.22 (1996).

358. *Id.* at 428 (citing *Hanna*, 380 U.S. at 468).

359. *See* Nelson et al., *supra* note 37, at 1776 n.95 ("[T]here are significantly fewer Democratic appointees serving on the lower courts. For example, there are currently sixty-three Democrats sitting on the federal circuit courts of appeals, compared with 101 Republicans. The numbers were very briefly even at the close of the Clinton administration—seventy-six and seventy-six, but given Republican domination of the White House since 1968, Republican-appointed judges typically have constituted a majority of federal circuit court judges in recent decades.").

360. Steinman, *supra* note 23.

361. *Id.* at 251.

Federal Rules themselves did not impose the shock-the-conscience standard that had long applied in federal court" to "suggest[] that the federal judiciary's gloss on the Federal Rules' generalized language for pleading, summary judgment, and class certification is, for Erie purposes, procedural common law that is not mandated by the Rules themselves."[362] It is in these procedural areas especially that Professor Steinman notes the imprimatur of a pro-defendant, conservative federal bench. In legal realist fashion, his approach—motivated by the "procedural disparities [that] are at the core of the contemporary politics of judicial federalism"[363]—seeks to "recalibrate the conventional understanding of judicial federalism in civil adjudication"[364] in the same manner that "Justice Brandeis' ruling in Erie restrained a pro-corporate federal judiciary."[365]

As mentioned earlier, Professor Rowe, in an article published before Professor Steinman's, and before *Shady Grove*, expressed doubt that *Gasperini* heralded "problematically broad readings" of that decision by the courts that would reduce the Federal Rules to "mere empty containers waiting to be filled in by state procedural rules."[366] In hindsight, that doubt appears justified by the majority's rejection of the dissent's approach to the Federal Rules in *Shady Grove*.[367]

b. Justice Stevens's Narrow Construction of "Substantive Rights" under § 2072(b): A Pivotal Opinion

Justice Stevens's concurrence narrowly interpreted "substantive rights" in § 2072(b) to apply to the rare state procedure that defines the scope of a substantive right or remedy.[368] Quoting Professor Ely's comment thirty-six years earlier that "almost 'any rule can be said to

362. *Id.* at 284.
363. *Id.* at 248.
364. *Id.*
365. *Id.*
366. Rowe, *supra* note 6, at 994 n.126 (quoting King, *supra* note 245, at 183).
367. *See also* Ely, *supra* note 50, at 721 ("The limiting language of the Enabling Act's second sentence ('abridge, enlarge or modify') is strong and on its face might be taken to command the application of state law in any situation covered by the refined outcome determination test that *Hanna* suggested for the Rules of Decision Act. . . . But as an interpretation of the Rules Enabling Act, it would seem that this approach must fail, since it would eviscerate the Rules and thereby render the Act almost entirely self-defeating.").
368. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1455 (2010) (Stevens, J., concurring) ("Although most state rules bearing on the litigation process are adopted for some policy reason, few seemingly 'procedural' rules define the scope of a substantive right or remedy."); *id.* at 1455 n.13 (referring to "those rare state rules that, although 'procedural' in the ordinary sense of the term, operate to define the rights and remedies available in a case.").

have . . . 'substantive effects,' affecting society's distribution of risks and rewards,'"[369] Justice Stevens rejected the outcome determination test in favor of a more restrictive "substantive rights" test that suggests *Byrd*'s "integrally bound" category of state procedural rule:[370] "it is necessary to distinguish between procedural rules adopted for *some* policy reason and seemingly procedural rules that are *intimately bound up* in the scope of a substantive right or remedy."[371] As noted earlier, *Byrd* distinguished between a state rule that is so "bound up" with the enforcement of a state-created right that it is functionally part of the definition of that right—and should, thus, be enforced by the federal court to the same extent as a substantive right[372]—and a state court rule "of form and mode" which, though procedural in the sense of regulating the conduct of litigation inside the courthouse, may have a substantial outcome effect on the enforcement of that right. *Byrd* restricted the application of outcome determination analysis to "form and mode" rules and further attenuated its influence by counterbalancing it with the countervailing interests of the "federal system [as] an independent system for administering justice."[373]

In drawing the line between substance and procedure, Justice Stevens focused on whether there is a sufficient nexus between the state rule and the scope of the substantive right or remedy to classify the state rule as "substantive": "I readily acknowledge that if a federal rule displaces a state rule that is '"procedural" in the ordinary sense of the term' . . . but sufficiently interwoven with the scope of a substantive right or remedy, there would be an Enabling Act problem, and the federal rule would have to give way."[374] But Justice Stevens set a "high

369. *Id.* at 1457; Ely, *supra* note 50, at 724 n.170 ("[I]t would seem that any rule can be said to have both 'procedural effects,' affecting the way in which litigation is conducted, and 'substantive effects,' affecting society's distribution of risks and rewards. . . . Thus, an 'effects test' would seem destined either to unintelligibility or to the invalidation of every Federal Rule, thereby rendering the Enabling Act entirely self-defeating.").

370. Although Professor Freer observed that "the Court has never undertaken to define 'bound up,'" he, like Justice Stevens, considers "bound up" rules the functional equivalent of rules that "serve to define or refine the state's assessment of when someone is entitled to recover." Freer, *supra* note 11, at 1648.

371. *Shady Grove*, 130 S. Ct. at 1458 (2010) (Stevens J., concurring) (emphasis added).

372. Byrd v. Blue Ridge Elec. Coop., Inc., 356 U.S. 525, 535 (1958) ("It was decided in *Erie R. Co.* v. *Tompkins* that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. We must, therefore, first examine the rule in *Adams v. Davison-Paxon Co.* to determine whether it is bound up with these rights and obligations in such a way that its application in the federal court is required.").

373. *Id.* at 538.

374. *Shady Grove*, 130 S. Ct. 1431, 1456 (Stevens, J., concurring).

bar" for "finding an Enabling Act problem:"[375] "The mere possibility that a federal rule would alter a state-created right is not sufficient. There must be little doubt."[376] His concern that Justice Ginsburg's approach would "work an end run around Congress' system of uniform federal rules"[377] harks back to Professor Ely's warning thirty-six years earlier about "import[ing] the Rules of Decision Act's standard into the Enabling Act":

> If [the] wholesale defeat of the Enabling Act is to be avoided, its interpretation must be geared not to the lawsuit's ultimate outcome, but rather to the character of the state provision that enforcement of the Federal rule in question will supplant, in particular to whether the state provision embodies a substantive policy or represents only a procedural disagreement with the federal rulemakers respecting the fairest and most efficient way of conducting litigation.[378]

Justice Stevens was the only member of the Court's majority who argued that a Federal Rule can be valid on its face, because it "really regulates procedure," *yet* invalid as applied because it violates the "substantive rights" provision of the REA.[379] Yet he voted with the majority because he cabined § 2072(b)'s independent force more narrowly than the dissent. Justice Stevens's pivotal doctrinal position in *Shady Grove*, therefore, lies in the middle of the spectrum that accords differing degrees of weight in balancing competing federal and state interests—between the plurality, which strikes the balance on one end of the spectrum in favor of federal rules uniformity,[380] and the dissent, which strikes the balance on the other end that favors deference to state interests at the expense of Federal Rules uniformity.[381]

Since Justice Stevens provided the pivotal vote for the majority of five that applied Rule 23 over the state rule, a closer analysis of his concurrence is critical to an understanding of the import—and possibly the future precedential impact—of *Shady Grove* in calibrating the

375. *Id.* at 1457 ("In my view, however, the bar for finding an Enabling Act problem is a high one. The mere fact that a state law is designed as a procedural rule suggests it reflects a judgment about how state courts ought to operate and not a judgment about the scope of state-created rights.").

376. *Id.* (noting that "for the purposes of operating a federal court system, there are costs involved in attempting to discover the true nature of a state procedural rule and allowing such a rule to operate alongside a federal rule that appears to govern the same question.").

377. *Id.* at 1457.

378. Ely, *supra* note 50, at 722.

379. *Shady Grove*, 130 S. Ct. at 1449 (Stevens, J., concurring).

380. *Id.* at 1448.

381. *Id.* at 1463 (Ginsburg, J., dissenting).

balance of judicial power between the federal judiciary's interest in procedural uniformity and the states' substantive interests. In *Marks v. United States*, the Supreme Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .'"[382] Unlike the plurality, which relied on the plain meaning of Rule 23 alone to determine its validity regardless of the New York Legislature's purpose behind the state rule,[383] Justice Stevens, like the dissent, was willing—to a point—to delve into the state rule's legislative history to determine whether the state rule is *intertwined enough* with the definition of state substantive rights and remedies to invalidate the candidate Federal Rule under the "substantive rights" proviso.[384] But this formulation begs the question how closely tied the state procedure must be to the state substantive right or remedy in order for the state's interest to outweigh the federal interest in procedural uniformity.

A key to an answer may lie in attempting to reconcile Justice Stevens's characterization of New York's "deviates materially" rule in *Gasperini* as "substantive" with his characterization of New York's CPLR § 901(b) in *Shady Grove* as "procedural." Both New York rules appear in the CPLR, the state's procedural statute, and Justice Ginsburg, in *Gasperini* and her dissent in *Shady Grove*, characterized both procedural rules as damages limitations and, therefore, "substantive."[385] For Justice Stevens, when the legislative history is ambiguous, the "plain textual reading" of the state law should prevail.[386] In concluding his concurrence, Justice Stevens stressed the great weight he attached to the "plain textual meaning" of statutory text: "In order to displace a federal

382. Marks v. United States, 430 U.S. 188, 193 (1977) (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

383. *Shady Grove*, 130 S. Ct. at 1440 ("But even accepting the dissent's account of the Legislature's objective at face value, it cannot override the statute's clear text.").

384. *Id.* at 1455 (Stevens, J., concurring).

385. *Id.* at 1464 n.2 (Ginsburg, J., dissenting)

386. *Id.* at 1459-60 (Stevens J., concurring) ("Although one can argue that class certification would enlarge New York's 'limited' damages remedy, . . . such arguments rest on extensive speculation about what the New York Legislature had in mind when it created § 901(b). But given that there are two plausible competing narratives, it seems obvious to me that we should respect the plain textual reading of § 901(b), a rule in New York's procedural code about when to certify class actions brought under any source of law, and respect Congress' decision that Rule 23 governs class certification in federal courts.").

rule, there must be more than just a possibility that the state rule is different than it appears."[387]

In *Gasperini*, Justice Stevens, in his dissenting opinion, agreed with Justice Ginsburg that the legislative history behind New York's CPLR § 5501(c) *clearly* showed the legislature's intent "to change the substantive law of the State."[388] By contrast, in *Shady Grove*, he found the legislative history behind § 901(b) "does not *clearly* describe a judgment that § 901(b) would operate as a limitation on New York's statutory damages."[389] Turning to the text of § 901(b), which "expressly and unambiguously applies not only to claims based on New York law but also to claims based on federal law or the law of any other State," Justice Stevens found it "hard to see how § 901(b) could be understood as a rule that, though procedural in form, serves the function of defining New York's rights and remedies."[390] The text of § 901(b), like the text of Rule 23, speaks in procedural terms of when class actions may or may not be "maintained."[391] Because the New York Legislature designed § 901(b) to address the normatively procedural matter of "how its courts operate," Justice Stevens was not willing to presume § 901(b) was intended to limit only remedies created by New York law.[392] This use of the statute's "plain text" as a default tool of interpretation is akin to Justice Scalia's formalist approach that errs in favor of maintaining the uniformity of the Federal Rules.[393] This formalist approach functions to

387. *Id.* at 1460.

388. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 440 (1996) (Stevens, J., dissenting) ("The Court correctly explains why the 1986 enactment of § 5501(c) of the [C.P.L.R.] changed the substantive law of the State. A state-law ceiling on allowable damages, whether fixed by a dollar limit or by a standard that forbids any award that 'deviates materially . . . from what would be reasonable compensation' is a substantive rule of decision that federal courts must apply in diversity cases governed by New York law. . . . I recognize that state rules of appellate procedure do not necessarily bind federal appellate courts. The majority persuasively shows, however, that New York has not merely adopted a new procedure for allocating the decision making function between trial and appellate courts. . . . Instead, New York courts have held that all jury awards, not only those reviewed on appeal, must conform to the requirement that they not 'deviat[e] materially' from amounts awarded in like cases. . . . That New York has chosen to tie its damages ceiling to awards traditionally recovered in similar cases, rather than to a legislatively determined but inflexible monetary sum, is none of our concern." (internal citations omitted)).

389. *Shady Grove*, 130 S. Ct. at 1458 (Stevens, J., concurring) ("The legislative history . . . does not clearly describe a judgment that § 901(b) would operate as a limitation on New York's statutory damages." (emphasis added)).

390. *Id.* at 1457.

391. N.Y. C.P.L.R. § 901(b).

392. *Shady Grove*, 130 S. Ct. at 1457-58 n.16 (Stevens, J., concurring).

393. *Id.* at 1439 ("*By its terms*, [§ 901(b)] precludes a plaintiff from 'maintain[ing]' a class action seeking statutory penalties."); *id.* at 1440 ("But even accepting the dissent's account of the Legislature's objective at face value, it cannot override the statute's clear text."); *id.* at 1440-41

shift the judicial balance of power in favor of protecting the uniform application of the Federal Rules, placed in jeopardy by the unpredictable accommodation of federal and state interests on a case-by-case basis.

Although New York's CPLR § 901(b) may be outcome determinative—because, as acknowledged by Justice Stevens, "[i]t may be that without class certification, not all of the potential plaintiffs would bring their cases"[394]—the rule is not integrally bound up in the scope of the remedy of statutory damages.[395] In focusing on whether § 901(b) is "sufficiently intertwined" with a New York state substantive remedy, Justice Stevens employed distinctively procedural norms in concluding that § 901(b)'s legislative history "reveals a classically procedural calibration of making it easier to litigate claims in New York courts (under any source of law) only when it is necessary to do so, and not making it too easy when the class tool is not required."[396] Again, emphasizing the distinctly procedural norms underlying § 901(b), he asserted: "The mere fact that a state law is designed as a procedural rule suggests it reflects a judgment about how state courts ought to operate and not a judgment about the scope of state-created rights and remedies."[397] His opinion cited Professor Ely's distinction between "'procedural effects,' affecting the way in which litigation is conducted, and 'substantive effects,' affecting society's distribution of risks and rewards."[398] Section 901(b) is not, in Justice Stevens's view, one of those "rare state rules that, although 'procedural' in the ordinary sense of

("The dissent's approach of determining whether state and federal rules conflict based on the subjective intentions of the state legislature is an enterprise destined to produce 'confusion worse confounded,' (citing Sibbach [v. Wilson & Co.], 312 U.S. 1, 14 (1941)). It would mean, to begin with, that one State's statute could survive pre-emption (and accordingly affect the procedures in federal court) while another State's identical law would not, merely because its authors had different aspirations.").

394. *Id.* at 1459 n.18 (Stevens, J., concurring).

395. *Id.* at 1458 ("As Justice Ginsburg carefully outlines, . . . § 901(b) was 'apparently' adopted in response to fears that the class-action procedure, applied to statutory penalties, would lead to 'annihilating punishment of the defendant' [quoting New York State legislative history]. But statements such as these are not particularly strong evidence that § 901(b) serves to define who can obtain a statutory penalty or that certifying such a class would enlarge New York's remedy. Any device that makes litigation easier makes it easier for plaintiffs to recover damages."). To further support his view that the legislative history does not clearly show that § 901(b) was intended to limit New York's damage remedy, Justice Stevens also noted that "Section 901(b) . . . is not directed to the conduct of persons but is instead directed to New York courts." *Id.* at 1458, n.16 (Stevens, J., concurring).

396. *Id.* at 1459.

397. *Id.* at 1457.

398. *Id.* at 1457; Ely, *supra* note 50, at 724.

the term, operate to define the rights and remedies available in a case."[399]

It is unclear how the recent succession of Justice Elena Kagan to the seat formerly occupied by Justice Stevens will affect the delicate balance in favor of procedural uniformity. Both jurists are liberals but, as previously noted, the positions taken by the Justices in *Gasperini* and *Shady Grove* do not appear to be driven by political ideology. And, given the lengthy intervals between major Court pronouncements on "Erie" doctrine, the Court may not revisit another "Erie" issue soon. Justice Stevens's moderating influence on *Gasperini*, in shifting the judicial balance of power back toward federal uniformity, may be felt for some time to come.

V. CONCLUSION: DOES *SHADY GROVE* YIELD A PRINCIPLED APPROACH TO THE REA BRANCH OF "ERIE-HANNA" REMOVED FROM POLITICS?

Principled guidance in applying "Erie-Hanna" doctrine that seems to emerge from *Shady Grove* is contained in Justice Stevens's concurrence, a pivotal opinion that lies at the Court's center between the plurality and the dissent, sharing certain principles with each. First, *Hanna*'s bifurcated approach that applies an REA analysis to the Federal Rules and a separate RDA analysis to the unguided *Erie* choice survives. Second, although Justice Stevens shares the plurality's "plain text" approach, he applies it to the *state*, rather than the *federal*, rule under the "substantive rights" proviso to determine whether the purpose of the rule is "substantive" or "procedural," and only as a default when legislative intent behind the state rule is ambiguous. Thus, in determining whether a conflict exists between the Federal Rule and state law, courts should look to the purpose behind each rule as indicated by the text of the rules and their legislative intent. When the legislative history is inconclusive, the court should "respect the plain textual reading" of the rules[400] as a default principle. Third, the REA's "substantive rights" proviso serves as an independent check on the federal rulemaking power so that, according to Justice Stevens, "[w]hen a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result."[401] But the proviso is not a very potent check, because "substantive rights" encompasses only state law that *defines*

399. *Shady Grove*, 130 S. Ct. at 1455 (Stevens J., concurring).
400. *Id.* at 1459-60.
401. *Id.* at 1452.

rights and remedies and state procedure that is *intimately bound up* with such substantive state law.[402] It will be a rare Federal Rule that qualifies under § 2072(a) as a rule of practice and procedure—because it "really regulates procedure"—but is invalid because it violates the strictures of § 2072(b).[403] In the words of Justice Stevens: "Simply because a rule should be read in light of federalism concerns, it does not follow that courts may rewrite the rule."[404] This narrow construction of "substantive rights" accords significant weight to the policy of Federal Rules uniformity—not as much as the plurality, but more than the dissent.

From the larger perspective of the swinging pendulum of judicial federalism that has characterized the evolution of *Erie* jurisprudence, *Shady Grove* has moved the pendulum back toward the federal interest in procedural uniformity. In Justice Ginsburg's words, the Court "veer[ed]" from *Gasperini*'s approach of narrowly interpreting Federal Rules to avoid conflict with important state regulatory interests.[405] *Shady Grove* marks a return to *Hanna*'s affirmation of the importance of federal procedural uniformity in calibrating the judicial balance of power between federal and state interests embedded in the REA.[406]

Essentially, *Shady Grove* represents a return to a modified formalist approach to interpreting procedural rules, according considerable—but not determinative—weight to the text of rules, state and federal, to achieve greater predictability in the application of the Federal Rules. This approach recognizes a normative difference between "substance" and "procedure," although individual rules may contain varying combinations of substantive and procedural norms and, therefore, the substance-procedure line will be drawn differently depending on the normative mix and the doctrinal purpose for making the particular characterization. Even Justice Ginsburg employed the norms of substance and procedure to calibrate the balance between federal and state interests when she commented that "[t]he fair and efficient *conduct* of class litigation is the legitimate concern of Rule 23; the *remedy* for an infraction of state law, however, is the legitimate concern of the State's lawmakers and not of the federal rulemakers."[407]

402. *Id.* at 1458.
403. *Id.* at 1454 n.10.
404. *Id.* at 1456.
405. *Id.* at 1463-64 (Ginsburg, J., dissenting).
406. *Id.* at 1453 (Stevens, J., concurring).
407. *Id.* at 1466 (Ginsburg, J., dissenting).

The plurality and the dissent reflected less an ideological divide between the Justices[408] than a principled disagreement about federalism and the appropriate balance between procedural uniformity and sensitivity to state substantive interests. The *Shady Grove* majority reaffirmed the value of procedural uniformity. Procedural uniformity matters because, normatively, "procedure" matters.

408. Justice Scalia's plurality opinion favored the plaintiff's litigation advantage in maintaining a class action under Rule 23. *Id.* at 1431-42. Justice Ginsburg's dissent, as in *Gasperini,* favored the defendant and New York's tort reform policy. *Id.* at 1464 (Ginsburg, J., dissenting).