

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

2011

"The Tempest": Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.: The Rules Enabling Act Decision That Added to the Confusion--But Should Not Have

Donald L. Doernberg

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Civil Procedure Commons](#)

Recommended Citation

Donald L. Doernberg, "The Tempest": Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.: The Rules Enabling Act Decision That Added to the Confusion-but Should Not Have, 44 Akron L. Rev. 1147 (2011), <http://digitalcommons.pace.edu/lawfaculty/800/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

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

“THE TEMPEST”:¹ *SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A. v. ALLSTATE INSURANCE CO.*:² THE RULES ENABLING ACT DECISION THAT ADDED TO THE CONFUSION—BUT SHOULD NOT HAVE

Donald L. Doernberg^{*}

I. Introduction	1148
II. The Majority Opinion.....	1157
III. The Majority Justices’ REA Analyses.....	1159
A. Part II-B of Justice Scalia’s Opinion	1159
B. Part II-C of Justice Scalia’s Opinion and Justice Stevens’s Concurrence.....	1162
IV. The Dissent.....	1164
V. Evaluating the Opinions	1168
A. Justice Scalia.....	1168
B. Justice Stevens	1170
C. Justice Ginsburg.....	1174
VI. The Tempest That Is <i>Shady Grove</i>	1178
A. A (Very) Brief Review of Some Scholarly Commentary on REA.....	1178
B. A Better Way, with Thanks to Justice Harlan	1184

1. See WILLIAM SHAKESPEARE, *THE TEMPEST*.

2. 130 S. Ct. 1431 (2010).

^{*} © 2010 Donald L. Doernberg. Professor of Law, Pace University School of Law. B.A., Yale University, 1966; J.D., Columbia University, 1969. I gratefully acknowledge Professor Emily Waldman’s very helpful comments on an earlier draft of this article. I also thank my colleagues on the Pace faculty for their comments and questions in one of our round-table discussions. I am indebted to Katherine Leisch, Class of 2012, Fallyn Reichert, Class of 2011, and Amanda Marshall, J.D. 2009, for their research and editing assistance. I am greatly indebted to the editors and staff of *Akron Law Review* for their careful and thorough contributions to this article.

C. "The Road Not Taken," with Thanks to Robert Frost	1199
--	------

I. INTRODUCTION

Justice Kennedy remarked that "Federalism was our Nation's own discovery. The Framers split the atom of sovereignty."³ It is a wonderful metaphor. "Atom" comes from the Greek *átomos* (indivisible),⁴ and early political philosophers insisted sovereignty was similarly indivisible.⁵ When a neutron strikes an atom of the uranium isotope U₂₃₅, typically the collision produces one barium atom, one krypton atom and three neutrons.⁶ A variety of other fission products are possible, however.⁷ Justice Kennedy's metaphor is apt in that respect also, because the fission products of sovereignty in the United States are often typical,⁸ but sometimes notably atypical, and that is the heart of what is known as "the *Erie* problem."⁹

*Erie Railroad Co. v. Tompkins*¹⁰ definitively abandoned the natural law approach that had dominated legal discourse until the rise of legal positivism in the late nineteenth and early twentieth centuries.¹¹ *Swift v.*

3. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

4. OXFORD ENGLISH DICTIONARY 751 (2d ed. 1989).

5. See generally DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW: THE NEW FEDERALISM'S CHOICE 13-63 (2005).

6. RAYMOND A. SERWAY & JERRY S. FAUGHN, COLLEGE PHYSICS 972 (4th ed. 1995); JOSEPH A. MULLIGAN, INTRODUCTORY COLLEGE PHYSICS 845 (1985). The neutrons are available to shatter other U₂₃₅ atoms in what will become a chain reaction if there is a critical mass. See NIGEL SAUNDERS, URANIUM AND THE RARE EARTH METALS 44 (2004); GREGORY R. CIOTTONE, DISASTER MEDICINE 519 (3d ed. 2006).

7. SERWAY & FAUGHN, *supra* note 6; MULLIGAN, *supra* note 6.

8. See *infra* notes 27-28 and accompanying text.

9. Used this way, the phrase refers to all circumstances in which a court must choose between applying state or federal law to an issue. Common conflict-of-laws terminology denotes a vertical choice of law as one between state and federal law. See Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1236 (1999). A choice of law made from among state or foreign laws is a horizontal choice of law. *Id.* In a justly famous article, Professor Ely complained that use of that term "has served to make a major mystery out of what are really three distinct and rather ordinary problems of statutory and constitutional interpretation." John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 698 (1974). (It is not clear whether it is a capital offense to write an article about vertical choice-of-law doctrine without citing Ely, but it is at least a felony.) Nonetheless, the terms "*Erie* problem" and "*Erie* doctrine" customarily refer to the entire vertical choice-of-law enterprise, and it has gotten too late in the day to expect successful recharacterization as "the vertical choice-of-law problem."

10. 304 U.S. 64 (1938).

11. Donald L. Doernberg, *The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest a More Straightforward Form of Erie Analysis*, 109 W. VA. L. REV. 611, 617-21 (2007).

Tyson,¹² *Erie*'s predecessor, rested on the notion that the common law was objective and external to the human process of creating law. "In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws."¹³ Common law judges did not create common law; they discovered it.¹⁴ This view of common law led *Swift* to hold that federal courts sitting in diversity were free to discover general common law principles; the Rules of Decision Act¹⁵ did not require them to follow the states' views of what the common law was. Thus, common law was not the law of any state within the meaning of RDA. But it was not federal law either.¹⁶ It was what the

12. 41 U.S. 1 (1842).

13. *Id.* at 18.

14. As Professor Nockleby put it:

In Blackstone's era, judicial rule-making was legitimated by the mythology that law judges were "oracles", [1 WILLIAM BLACKSTONE, COMMENTARIES *69], whose pronouncements derived as though from a sacred text. To the 18th-century mind, judges "discovered" law, or at most drew upon existing principles. "In theory. . . judges drew their decisions from existing principles of law; ultimately these principles reflected the living values, attitudes, and ethical ideas of the English people." It took Holmes and the Realists a half-century to dislodge from lawyers' minds the notion that in common law adjudication judges merely "discovered" and "applied" law.

John T. Nockleby, *Access to Justice: Law and Popular Culture: Introduction*, 40 LOYOLA L.A. L. REV. 539, 543 n.12 (2007) (quoting Lawrence M. Friedman, *A History of American Law* 21 (2d ed. 1985)). See also Jack M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 928 (1988) ("Of course, the idea that common law judges do make law was not generally accepted before this century, and the fiction that judges discovered eternal legal principles served to obscure the obvious tension between the tasks of statutory interpretation and common law adjudication."); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 10 (Amy Gutmann ed., 1997) (referring to the 1780s, "when the prevailing image of the common law was that of a preexisting body of rules, uniform throughout the nation (rather than different from state to state), that judges merely 'discovered' rather than created.").

15. The Rules of Decision Act (hereinafter "RDA") was in the Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92: "The laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." It is little changed today. See 28 U.S.C. § 1652 (2006).

16. If it had been, the Supremacy Clause, U.S. CONST. art. VI, § 2, would have compelled the states to apply it in their own courts. "Just as federal courts are constitutionally obligated to apply state law to state claims . . . , so too the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.'" *Felder v. Casey*, 487 U.S. 131, 151 (1988) (citation and internal quotation marks omitted).

courts called “general law,”¹⁷ a third category of law neither state nor federal.¹⁸

Legal positivism had a different view. John Austin had said that law was nothing more than the command of the sovereign,¹⁹ and Justice Holmes famously admonished: “The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified. . . .”²⁰ *Erie* eliminated the category of general law, leaving only state and federal law to govern in the United States. Justice Brandeis’s declaration that “There is no federal *general* common law”²¹ was the death knell of natural law theory in the United States.²² Unfortunately, *Erie* left difficult problems in its wake.

17. See, e.g., *Swift*, 41 U.S. at 18 (referring to “the general commercial law”); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 70, 74 (1938).

18. In *Erie*, Justice Brandeis noted that under *Swift*, “the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.” 304 U.S. at 74. As a practical solution, *Erie* leaves much to be desired, because it created many difficulties of its own. See *infra* notes 29-50 and accompanying text.

19. JOHN AUSTIN, LECTURES ON JURISPRUDENCE 3-25 (R. Campbell ed., 1879). Blackstone anticipated (one might even say articulated) the positivist thesis: “Municipal law, thus understood [as distinct from the law of nature, the revealed law and the law of nations] is properly defined to be a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.” 1 WILLIAM BLACKSTONE, COMMENTARIES *44. See also *id.* at *46 (recognizing the legislature as the supreme power in a state: “Sovereignty and legislature are indeed convertible terms.”).

20. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting).

21. *Erie*, 304 U.S. at 78 (emphasis added).

22. As Justice Frankfurter observed in *Guaranty Trust Co. v. York*:

Erie R. Co. v. Tompkins did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare. . . . Law was conceived as a “brooding omnipresence” of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law, even in cases where a legal right as the basis for relief was created by State authority and could not be created by federal authority and the case got into a federal court merely because it was “between Citizens of different States. . . .”

326 U.S. 99, 101-02 (1945) (citations omitted). See also Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 348 (1990) (referring to *Erie*’s “death blow”).

Courts and commentators seem regularly to overstate Brandeis. See, e.g., *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1460-61 (2010) (Ginsburg, J., dissenting) (“The . . . Rules of Decision Act prohibits federal courts from generating substantive law in diversity actions.” (footnotes omitted)); *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) (“The broad command of *Erie* was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law.”); Marc A. Thurmon, *Confusion Codified: Why Trademark Remedies Make No Sense*, 17 J. INTELL. PROP. L. 245, 296 n. 243 (2010) (“Many years ago the Supreme Court held and has recently repeated that there is no Federal common law.”). See

Erie spawned an extended line of Supreme Court cases, too numerous for useful citation here,²³ grappling with the proper scope of state and federal law. In *Erie* itself, the solution was relatively easy. Implicitly noting that the case had aspects of both tort and property law,²⁴ Justice Brandeis declared,

Congress has no power to declare *substantive* rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.²⁵

There was no constitutional predicate for a federal law of torts or property, so state law applied by default.²⁶ "Substantive" took on enormous significance in the development of the doctrine, because it raised the problem of what was substantive and what was procedural. It is old learning that, *as a general rule*, state substantive law and federal procedural law apply in diversity cases,²⁷ but that simple statement begs the question of the distinction between substantive and procedural law and masks exceptions.²⁸

generally Craig Green, *Repressing Erie's Myth*, 96 CAL. L. REV. 595, 595 (2008) (referring to "the widespread illusion that, after *Erie*, 'there is no federal common law.'" (footnote and citations omitted)). Supreme Court Justices have even been known to yield to the temptation. See *Shady Grove*, 130 S. Ct. at 1461 (Ginsburg, J., dissenting) (stating that RDA "directs federal courts, in diversity cases, to apply state law when failure to do so would invite forum-shopping and yield markedly disparate results . . ."). Even Justice Brandeis overstated Brandeis, *Erie* itself ("[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State," *Erie*, 304 U.S. at 78), as subsequent developments demonstrated. See *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988) and *Banco Nacional de Cuba*, 376 U.S. 398 (1964). See *infra* note 28.

23. The most commonly cited and probably best known cases are *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996), *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), *Hanna v. Plumer*, 380 U.S. 460 (1965), *Byrd v. Blue Ridge Elec. Coop.*, 356 U.S. 525 (1958), and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), but there are many, many more, and some scholars will undoubtedly disagree with my estimate of their relative fame.

24. See *Erie*, 304 U.S. at 69-70 ((referring both to the law of negligence (the extent of any duty that the defendant owed to the plaintiff) and to property law (whether the plaintiff was a trespasser or a licensee)).

25. *Id.* at 78 (emphasis added).

26. I have suggested elsewhere that viewing the applicability of state law as the default rule makes a good beginning point for accurate *Erie* analysis. See Doernberg, *supra* note 11, at 645.

27. See, e.g., JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR C. MILLER, CIVIL PROCEDURE § 4.4, at 217 (4th ed. 2005) ("Taken together, the decision in *Erie* and the Court's promulgation of the Federal Rules . . . indicate that a federal court sitting in diversity jurisdiction should apply the substantive law of the state in which it was [sic] located, and the procedural law prescribed in the Federal Rules.").

28. See, e.g., *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988) (applying a federal common law rule of military contractors' immunity to a Virginia tort action); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (applying the federal common law act-of-state doctrine in a

Since the Court decided *Erie* in 1938, it has approached the vertical choice-of-law problem in different ways. *Guaranty Trust Co. v. York*²⁹ declared that a rule of law was substantive for *Erie* purposes if choosing federal *versus* state law would be outcome determinative. State statute-of-limitations periods became substantive.³⁰ The outcome-determinative approach caused difficulties because of its rigidity, but another statement also created problems. Justice Frankfurter declared, “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. . . .”³¹ In his view, a diversity case should always reach the same result that the state courts would reach. The trouble with that statement is that too many courts, including the Supreme Court, took it literally. With all respect to a great Justice, the impact of that statement is wildly overbroad, because it makes the Federal Rules of Civil Procedure wholly inapplicable in diversity cases except where they differ in no respect from state procedural law. If a federal court in diversity is really no more than another court of the state, then a fortiori it cannot deviate from state procedure. The authorization and continued existence of the Federal Rules of Civil Procedure demonstrate the limitations of such reasoning.

For 145 years, from the beginning of the Republic to 1934, Congress had directed the federal courts to use state procedure, first in the Process Act, a part of the Judiciary Law of 1789³² and then, when the static conformity that statute decreed³³ became unworkable, in the Conformity Act of 1872,³⁴ which replaced static conformity with dynamic conformity. In 1934, however, more than a decade before

diversity case sounding in contract). In both cases, using the federal rule rather than the state rule reversed what would otherwise have been the outcome.

29. 326 U.S. 99 (1945). Under the *Guaranty Trust* approach, both *Sabbatino* and *Boyle* would have come out the other way.

30. Sometimes, just to add to the confusion, statutes of limitation can be both substantive and procedural in the same case. In a post-*Guaranty-Trust* fact pattern similar to *Erie* (a tort action arising outside the forum but tried in a federal court in the forum), the federal court would apply the limitations law that the forum state would apply, see *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), because under *Guaranty Trust*, limitations are *substantive* for *Erie* purposes. The state, on the other hand, would likely use its own limitations period for the reason that, as a general rule in the law of horizontal (state-state) conflicts, statutes of limitation are *procedural*. See, e.g., *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953). See *infra* notes 103, 153 (discussing *Bournias v. Atl. Mar. Co.*, 220 F.2d 152, 154-56 (2d Cir. 1955)).

31. *Guaranty Trust*, 326 U.S. at 108.

32. Act of September 29, 1789, ch. 21, 1 Stat. 93.

33. See *id.* at 93-94 (directing the federal courts to use procedure approved by the state supreme courts as of the date of passage of the Process Act).

34. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196.

Guaranty Trust, Congress finally authorized the Federal Rules of Civil Procedure. The authorization came at the end of what scholars have characterized as a decades-long battle.³⁵ Congress's motives were apparently to substitute horizontal procedural uniformity among the federal district courts for the long-standing vertical uniformity with the procedural law of the state in which a particular federal court happened to sit. At the same time, Congress wanted to keep the federal courts away from the substantive law-making that the Constitution allocates to Congress.³⁶ The Rules Enabling Act³⁷ explicitly permitted the Supreme Court to unite law and equity procedure,³⁸ and procedural rules generally applicable in the federal courts would necessarily produce horizontal uniformity. The "only" two limitations REA imposed were that procedural rules under its *aegis* could "neither abridge, enlarge nor modify the substantive rights of any litigant,"³⁹ and that the unification of the rules of law and equity could not narrow the common law right to a jury trial in civil cases. The first of those limitations, however, gave rise to significant interpretive problems that threatened the Federal Rules of Civil Procedure's effectiveness in diversity cases. The challenge first appeared in the Supreme Court in *Sibbach & Co. v. Wilson*,⁴⁰ but it was

35. See, e.g., Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1023-24 (1982) (referring to a twenty-year battle); Steven N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 909 (1987) ("After almost twenty-five years of battle, Congress passed the Enabling Act of 1934. . . .").

Erie and the Rules Enabling Act have spawned considerable academic literature, far too extensive for complete citation. See, e.g., Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26 (2008); Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281; Burbank, *supra*; Subrin, *supra*; Ely, *supra* note 9.

36. See, e.g., Redish & Murashko, *supra* note 35, at 32 ("To a reasonable bystander observing the passage of the Enabling Act, two underlying purposes should have been readily apparent: (1) creating a uniform and effective system of procedural rules for the federal courts, while (2) preserving the substantive lawmaking power for Congress, free from challenge or threat from the Supreme Court's newly created rulemaking authority." (footnotes omitted)). See also Carrington, *supra* note 35, at 283 ("The concern expressed in Congress was that an expansive reading might be given to the statutory term 'procedure' to enable a court rule to override political decisions made by Congress.").

37. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended, 28 U.S.C. § 2072 (2006)) (hereinafter "REA").

38. *Id.* § 2.

39. *Id.* § 1. In 1948, Congress amended the statute to read "any substantive right." See Act of June 25, 1948, ch. 646, 62 Stat. 961. Professor Burbank noted that the change appears to have been one of "phraseology" only. Burbank, *supra* note 35, at 1103.

40. 312 U.S. 1 (1941). See *infra* notes 89-94, 223-30 and accompanying text.

Guaranty Trust's outcome-determinative test that ultimately created the greatest danger.

A trio of 1949 cases⁴¹ using *Guaranty Trust's* approach underscored the vulnerability of the Federal Rules of Civil Procedure. In each case, the Court disdained applying the Federal Rule because the choice of federal or state law was outcome-determinative. *Guaranty Trust's* test ultimately created what Professor Ely described as an inevitable backlash.⁴² In *Byrd v. Blue Ridge Electrical Cooperative, Inc.*,⁴³ the Court introduced a new approach—interest balancing⁴⁴—under which outcome-determinativeness became only one of three factors the federal courts would consider in making the vertical choice-of-law decision. The other two were the state's interest in the application of its rule and the federal government's interest (presuming the existence of constitutional authority) in federal law governing the issue.⁴⁵

*Hanna v. Plumer*⁴⁶ carved out a special niche for the Federal Rules of Civil Procedure, holding that a Rule on point and in direct collision with a competing state rule, if within the authorization of the Rules Enabling Act, would govern. *Hanna* was simply a special case of supremacy, under which "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ."⁴⁷ No one has ever seriously questioned Congress's power to have passed REA,⁴⁸ so the applicability of a Federal Rule today depends only on the scope of its words and whether

41. *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (holding that the state rule that the statute of limitations stops running at service applied over Federal Rule 3, which specified that filing the complaint commenced the action); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (holding that the state requirement of plaintiff posting bond in a shareholder's derivative action applied despite then-Rule 23 (now Rule 23.1) having no bond requirement); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949) (holding that the state law denying unregistered out-of-state corporation access to state courts as a plaintiff applied over Federal Rule 17's statement that the law of the state of incorporation determined capacity to sue). I shall refer to them collectively as "the 1949 trio." See *infra* notes 235-54 and accompanying text.

42. Ely, *supra* note 9, at 709.

43. 356 U.S. 525 (1958).

44. See Ely, *supra* note 9, at 709 (noting that the *Byrd* Court could have rested the decision on the Seventh Amendment directly but chose the balancing approach instead).

45. See FRIEDENTHAL, KANE & MILLER, *supra* note 27, § 4.3, at 213. See generally Doernberg, *supra* note 11, at 633-35.

46. 380 U.S. 460 (1965).

47. U.S. CONST. art. VI, § 2.

48. See, e.g., *Hanna v. Plumer*, 380 U.S. 460 (1965); *Sibbach & Co. v. Wilson*, 312 U.S. 1 (1941).

it "abridge[s], enlarge[s] or modif[ies] any substantive right."⁴⁹ That limitation on the Federal Rules has been in place since REA's original iteration in 1934.⁵⁰ Unfortunately, *Hanna* was not very clear about the test that should apply under REA to determine what was substantive. At one point, the Court echoed *Sibbach*'s really-regulates-procedure language,⁵¹ but later in the opinion it borrowed from *Mississippi Publishing Corp. v. Murphree*⁵² by referring to whether a Federal Rule's effect on substantive rights was "incidental."⁵³ Neither gives the judiciary or the bar much guidance.⁵⁴ Nonetheless, *Hanna*'s contribution—quite a substantial one—to the area of vertical choice-of-law lies in its recognition that REA prescribes the only appropriate test for evaluating the legitimacy of a Federal Rule.⁵⁵ The RDA cases from *Erie* forward play no direct role.⁵⁶

All of the Court's vertical choice-of-law jurisprudence⁵⁷ since *Byrd* has been nothing more than (sometimes regrettably well disguised) interest balancing, and that includes *Hanna*.⁵⁸ With respect to enacted federal law—the Constitution, statutes, administrative regulations and the Federal Rules—the Supremacy Clause operates as the dispositive weight in the balance, mandating the triumph of federal law (even a Federal Rule of Civil Procedure) over any contrary state rule. Nonetheless, that principle leaves the thorny question of when the Constitution and statutes (particularly REA) authorize the existence of

49. 28 U.S.C. § 2072 (2006).

50. See *supra* note 39.

51. *Hanna*, 380 U.S. at 464.

52. 326 U.S. 438 (1946).

53. *Hanna*, 380 U.S. at 465.

54. I say this notwithstanding Justice Scalia's observation that "we have managed to muddle through well enough in the 69 years since *Sibbach* was decided," apparently accepting that test as workable. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1447 (2010). Perhaps we have, but one always hopes for an approach that leaves less muddle rather than more.

55. *Hanna*, 380 U.S. at 469-71.

56. One should note, however, that after explaining that the *Erie* line of cases (referring particularly to *Erie* and *Guaranty Trust*) did not govern the validity of a Federal Rule of Civil Procedure, the Court went on to explain that its approach would be unlikely to engender the forum-shopping and inequitable administration of the law to which *Erie* had addressed itself. *Id.* at 468-69.

57. The modern understanding of the "*Erie* doctrine" today, despite Professor Ely's objection, see *supra* note 9, is that it embraces all vertical choice-of-law decisions, including those falling under REA. See Doernberg, *supra* note 11, at 612 n.2. This Article follows that convention.

58. See Doernberg, *supra* note 11, at 612. REA's limiting language describes what may go into the balance and on which side—for or against the primacy of a Federal Rule—it weighs. *Hanna* recognized that, hence its conclusion that REA, not RDA, specifies the correct balance to use when considering a Federal Rule.

federal law in the first place. That is the thicket into which the *Shady Grove* Court again ventured.

This Article discusses the effect *Shady Grove* is likely to have on vertical choice-of-law in cases involving a Federal Rule of Civil Procedure. The Court splintered in *Shady Grove*. A five-to-four vote decided the case, and Justice Scalia's opinion represented the Court only in Parts I and II-A. The majority's position was that Federal Rule 23 and the state rule did directly clash with each other, but at that point, the majority split. Four Justices took the position that Rule 23 did conflict directly with state law but did not address itself to substantive rights⁵⁹ and therefore was valid under REA. Justice Stevens agreed that Rule 23 was valid, but reached that position by determining that the competing state rule did not address substantive rights, writing separately to elaborate his inability to join the plurality's analysis.⁶⁰ Justice Ginsburg, joined by Justices Kennedy, Breyer and Alito, dissented. Her view was that the Court should have read Rule 23 not to conflict with the state rule, clearing the path for application of the state rule in the diversity action. She felt strongly that the state rule did address substantive rights.

Part II of the Article discusses the majority opinion. Part III deals with parts II-B and II-C of Justice Scalia's opinion and with the concurrence.⁶¹ Part IV addresses the dissent. Part V offers a critical evaluation of the opinions. Part VI discusses some of the scholarly interpretations of REA and suggests two possible perspectives on REA's substantive-rights limitation that make it more understandable in light of the *Erie* doctrine's history, easier to navigate, and less of a threat to predictability in future cases. The first perspective considers using the elements of a claim and of defenses on the merits as the touchstone.⁶² It has an intra-litigation focus. I reject that alternative because it omits a group of cases, albeit a small one, that suggest that a somewhat less mechanical approach would be more faithful to the balance of rule-

59. Chief Justice Roberts and Justices Thomas and Sotomayor joined Parts II-B and II-D of Justice Scalia's opinion. *Shady Grove*, 130 S. Ct. at 1436 (Scalia, J., for himself, the Chief Justice and Justices Thomas and Sotomayor).

60. Only the Chief Justice and Justice Thomas joined part II-C, which was a reply to the concurrence. *Id.* (Scalia, J., for himself, the Chief Justice and Justice Thomas).

61. Part II-D of Justice Scalia's opinion, joined by Justices Scalia, Roberts, Thomas and Sotomayor, merely acknowledged that *Shady Grove*'s decision in favor of Rule 23 would engender forum-shopping. *Id.* (Scalia, J., for himself, the Chief Justice and Justices Thomas and Sotomayor). Justice Scalia explained that while judicial decisions creating a rule that would produce forum-shopping were at least highly suspect, such a consequence was "the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure." *Id.* at 1449.

62. *See infra* note 221 and accompanying text.

making power between Congress and the Court at which REA aims.⁶³ The second perspective seizes upon an approach that Justice Harlan first articulated in *Hanna v. Plumer*,⁶⁴ expands upon it, and casts the Court's previous efforts to deal with REA in a more understandable light.⁶⁵ That perspective is an extra-litigation focus. Unfortunately, the *Shady Grove* Court missed an opportunity to clarify and rationalize its approach to REA.

II. THE MAJORITY OPINION

The facts of *Shady Grove* are quite simple. New York law⁶⁶ mandates that properly documented claims for insurance benefits relating to automobile accidents are payable within thirty days. It imposes a statutory penalty of two percent per month, plus reasonable attorney's fees, for late payments. Shady Grove, assignee of benefits owed by Allstate to one of its insureds, brought a diversity action and sought under Rule 23⁶⁷ to have the court certify a class of all insureds to whom Allstate owed interest. Shady Grove alleged that Allstate routinely refused to pay interest. The district court dismissed the action for lack of jurisdiction.⁶⁸ It relied on the diversity statute,⁶⁹ finding that Shady Grove's individual claim⁷⁰ did not meet the minimum jurisdictional amount of 28 U.S.C. § 1332.⁷¹ The court rejected Shady

63. Many scholars have argued that REA's limiting language addresses that separation-of-powers issue, not the federalism issue that has tended to dominate legal thinking since the Court announced *Erie*. See *infra* notes 190-192, 315-320 and accompanying text.

64. 380 U.S. 460 (1965).

65. See *infra* text following note 195.

66. N.Y. INSURANCE LAW § 5106 (McKinney 2009) ("(a) Payments of first party benefits and additional first party benefits shall be made as the loss is incurred. Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained. If proof is not supplied as to the entire claim, the amount which is supported by proof is overdue if not paid within thirty days after such proof is supplied. All overdue payments shall bear interest at the rate of two percent per month. If a valid claim or portion was overdue, the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to limitations promulgated by the superintendent in regulations.").

67. FED. R. CIV. P. 23.

68. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467 (E.D.N.Y. 2006), *aff'd*, 549 F.3d 137 (2d Cir. 2008), *rev'd*, 130 S. Ct. 1431 (2010).

69. 28 U.S.C. § 1332(a) (2006).

70. Justice Scalia's opinion notes that Shady Grove's claim amounted to approximately \$500. *Shady Grove*, 130 S. Ct. at 1437. Justice Ginsburg agreed. *Id.* at 1460 (Ginsburg, J., dissenting).

71. 28 U.S.C. § 1332 (2006).

Grove's argument that § 1332(d)(2)⁷² applied, on the ground that the statutory-mandated interest was a penalty within the meaning of New York's statute governing class actions,⁷³ which prohibits class actions in penalty cases unless specifically authorized by the statute creating the penalty.⁷⁴ The Second Circuit affirmed, seeing no direct conflict between Rule 23 and section 901(b) and finding the prohibition "substantive" for *Erie* purposes.⁷⁵

Justice Scalia's majority opinion took issue with the Second Circuit's finding that there was no direct conflict between Rule 23 and section 901(b).⁷⁶ Both address the single issue of when it is proper to certify a class.⁷⁷ In the Supreme Court's view, Rule 23 allows certification whenever the action meets the four requisites of Rule 23(a) and fits under one of the categories of Rule 23(b). New York's class action statute echoes the four requisites of Rule 23(a) and adds consideration (modeled on Rule 23(b)(3)) of whether a class action is a

72. 28 U.S.C. § 1332(d)(2) (2006). That section grants jurisdiction to the district courts for class actions in which there is minimal diversity and the matter in controversy exceeds \$5,000,000, irrespective of the size of the class representative's individual claim. *Id.*

73. See N.Y. C.P.L.R. § 901 (McKinney 2006).

74. *Id.* § 901(b) ("Unless a statute creating or imposing a penalty, [sic] or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, [sic] or minimum measure of recovery created or imposed by statute may not be maintained as a class action.").

75. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 145-146 (2d Cir. 2008), *rev'd*, 130 S. Ct. 1431 (2010). The Second Circuit stated:

Thus, the purpose behind CPLR 901(b) is to offset the deterrent effect of statutory penalties by eliminating the class action device as a means of enforcement of those penalties. CPLR 901(b) should be interpreted as part of the statutory interest penalty scheme, because it serves the state interest of offsetting that penalty. Allowing plaintiff to pursue its claims in federal court as a class action would circumvent this state policy.

Id. at 549 F.3d at 145-46. It is curious that the New York legislature would simultaneously create a statutory penalty and seek to offset its deterrent effect. On the other hand, one should never underestimate the New York legislature's capacity for folly, so the fact that the legislature did an incomplete (even self-contradictory) job should not surprise anyone. But, as the Court has admonished, courts sit to interpret and judge the constitutionality of legislation, not its wisdom. See, e.g., *Hodel v. Indiana*, 452 U.S. 314, 333 (1981) ("[T]he District Court essentially acted as a superlegislature, passing on the wisdom of congressional policy determinations. In so doing, the court exceeded its proper role." (citations omitted)); *Ferguson v. Skrupka*, 372 U.S. 726 (1963) ("We refuse to sit as a superlegislature to weigh the wisdom of legislation. . .").

76. Both Justice Ginsburg's dissent and the Second Circuit pointed out that every district court to have considered the question agreed that there was no unavoidable conflict between Rule 23 and section 901(b). See *Shady Grove*, 130 S. Ct. at 1465 (Ginsburg, J., dissenting); *Shady Grove*, 549 F.3d at 143. See *infra* text accompanying notes 128-34.

77. Justice Scalia noted and rejected the Second Circuit's attempt to distinguish between a dispute "eligibility" for class action treatment and a dispute about whether it is proper to certify a class. *Shady Grove*, 130 S. Ct. at 1438. "To begin with, the line between eligibility and certifiability is entirely artificial. Both are preconditions for maintaining a class action." *Id.*

superior method of resolution of the dispute. But New York's statute then imposes an additional limitation not found in Rule 23: disqualification of penalty class actions. The Court saw New York's rule as impermissibly attempting to modify Rule 23.⁷⁸

Having assembled a majority for that point of view, Justice Scalia next had to address the REA problem: whether Rule 23, unavoidably in conflict with the state rule, runs afoul of REA's substantive-right prohibition. He concluded that it does not because Rule 23 is not substantive, but that part of his opinion drew the support of only three other Justices. Justice Stevens concurred that there was no REA violation but reached that conclusion by finding that section 901(b) was not substantive, adding the fifth vote for the result in *Shady Grove*.

III. THE MAJORITY JUSTICES' REA ANALYSES

A. Part II-B of Justice Scalia's Opinion

Justice Scalia recited the history of the Court's approach to REA questions. He quoted *Sibbach v. Wilson & Co.*'s statement "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.'"⁷⁹ The *Sibbach* formulation, as others have pointed out,⁸⁰ begs the question of what is procedure and what is substance. The Court recognized that difficulty and elaborated *Sibbach*'s meaning in *Mississippi Publishing Corp. v. Murphree*,⁸¹ using language upon which Justice Scalia relied. He observed that,

78. In this respect, *Shady Grove* closely resembles *Byrd v. Blue Ridge*, 356 U.S. 525 (1958), in which a South Carolina statute forbade a jury trial in workers compensation cases whereas FED. R. CIV. P. 38 permitted them. The *Byrd* Court effectively told the states that they could control "the definition of state-created rights and obligations by the state courts." 356 U.S. at 535. Justice Brennan made clear, however, that he was speaking of non-litigation rights and obligations—in short, the kinds of things that we colloquially think of as substantive rather than procedural. *Id.* at 537-38. He denied South Carolina the power to control the federal courts' processing of litigation. *Id.* at 538-39.

79. *Shady Grove*, 130 S.Ct. at 1444 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941) (citations omitted)).

80. See, e.g., *In re Richards*, 213 F.3d 773, 791 (3d Cir. 2002) (characterizing the *Sibbach* test as "of little help"); William M. Wiecek, *The Debut of Modern Constitutional Procedure*, 26 REV. LITIG. 641, 677 (2007); David Crump, *The Twilight Zone of the Erie Doctrine: Is there Really a Different Choice of Equitable Remedies in the "Court a Block Away"?*, 1991 WIS. L. REV. 1233, 1237.

81. 326 U.S. 438 (1946).

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.⁸²

This is not surprising. The Court's recognition of the substantive effects of procedural rules and the impact of the outcome-determinative test on the Federal Rules in the 1949 trio⁸³ caused it to abandon exclusive reliance on that test in favor of *Byrd*'s interest-balancing approach. That approach has dominated *Erie* jurisprudence for the past half century.⁸⁴ Using *Murphree*'s approach, Justice Scalia concluded that Rule 23 was a method for adjudicating claims, much as Federal Rules 18,⁸⁵ 20,⁸⁶ and 42(a)⁸⁷ are, rather than alteration of substantive rights and liabilities.⁸⁸

The *Shady Grove* problem resembles problems the Court has faced before: what to do when federal procedural rules provide a procedure that state law either does not authorize or affirmatively prohibits. *Sibbach v. Wilson Co.*⁸⁹ is the best known example. Illinois law forbade compulsory physical examinations in damage actions.⁹⁰ Rule 35 allowed them. The Court affirmed the district court's order that the plaintiff undergo a physical examination. Justice Owen Roberts, writing for the *Sibbach* majority, found that Rule 35 "really regulates procedure"⁹¹ and identified the flaw in the plaintiff's argument:

[P]etitioner admits, and, we think, correctly, that Rules 35 and 37 are rules of procedure. She insists, nevertheless, that by the prohibition against abridging substantive rights, Congress has banned the rules here challenged. In order to reach this result she translates

82. *Shady Grove*, 130 S. Ct. at 1442 (quoting *Murphree*, 326 U.S. at 446).

83. See *supra* note 41 and accompanying text.

84. See *infra* notes 290-92 and accompanying text. See generally Doernberg, *supra* note 11.

85. FED. R. CIV. P. 18 (joinder of claims). See *Shady Grove*, 130 S. Ct. at 1443.

86. FED. R. CIV. P. 20 (joinder of parties). See *Shady Grove*, 130 S. Ct. at 1443.

87. FED. R. CIV. P. 42(a) (consolidation of actions). See *Shady Grove*, 130 S. Ct. at 1443. He might as well have included FED. R. CIV. P. 13 (counterclaims and crossclaims), FED. R. CIV. P. 14 (impleader), FED. R. CIV. P. 19 (parties needed for a just adjudication), FED. R. CIV. P. 22 (interpleader), FED. R. CIV. P. 24 (intervention) and FED. R. CIV. P. 25 (substitution of parties). FED. R. CIV. P. 14 is particularly relevant in this context. See *infra* notes 95-99 and accompanying text.

88. Discussion of Allstate's contrary argument appears in Justice Scalia's opinion. See *Shady Grove*, 130 S. Ct. at 1438-39.

89. 312 U.S. 1 (1941).

90. See *id.* at 7.

91. *Id.* at 14.

"substantive" into "important" or "substantial" rights. And she urges that if a rule affects such a right, albeit the rule is one of procedure merely, its prescription is not within the statutory grant of power embodied in the Act of June 19, 1934.⁹²

Thus *Sibbach* refused the plaintiff's re-characterization of REA's prohibition, though unfortunately it did little to provide a workable standard. It approved sanctions under Rule 37 for plaintiff's refusal to comply with the Rule 35 order.⁹³ Thus, where state law recognized a right incompatible with a Federal Rule (and, obviously would not have permitted sanctions for an order no state court had authority to issue), the Supreme Court held that the Federal Rule governed. Rule 35 overcame the contrary state law because the latter did not speak to the question of the defendant's liability for the plaintiff's personal injuries.⁹⁴ Only Justice Frankfurter dissented.

In *Jeub v. B/G Foods, Inc.*,⁹⁵ the third-party plaintiff had no ripe claim against the third-party defendant for indemnity under state law.⁹⁶ The court nonetheless permitted the impleader. The court noted that "invoking of the third-party procedural practice must not do violence to the substantive rights of the parties . . .,"⁹⁷ an obvious reference to REA. But the court held that Rule 14 had no substantive effect, instead concerning itself only with the timing of the assertion of the state-created substantive right. It relied on Rule 14's language allowing impleader of a party "who is or *may be* liable. . . ."⁹⁸ Courts since *Jeub* have cited it with some regularity and never with disapproval.⁹⁹

Justice Scalia's opinion cited *Sibbach* but did not discuss it at length. He relied on it for the idea that REA does not prohibit a Federal Rule from having any effect on any substantive right. Justice Scalia did

92. *Id.* at 11.

93. However, it disallowed the sanction of contempt that the lower court had imposed, noting that Rule 37 explicitly excluded that particular sanction for refusal to comply with an order to have a physical examination. *Id.* at 16.

94. See *Sibbach v. Wilson & Co.*, 108 F.2d 415, 415 (7th Cir. 1939), *rev'd*, 312 U.S. 1 (1941).

95. 2 F.R.D. 238 (D. Minn. 1942).

96. State law only gave rise to a claim for contribution or indemnity *after* "the party . . . suffered some loss or paid more than his share of the loss. . . ." *Id.* at 240. Under Minnesota law, therefore, a defendant against whom there was not yet any judgment had no substantive right to recover from a third-party defendant under state law.

97. *Id.*

98. *Id.* (quoting FED. R. CIV. P. 14) (emphasis by the court).

99. See, e.g., *Riblet Tramway Co., Inc. v. Marathon Elec. Avtek Drive Div.*, 621 A.2d 1274 (Vt. 1993); *Colton v. Swain*, 527 F.2d 296 (7th Cir. 1975); *Kittleson v. American Dist. Tel. Co.*, 81 F. Supp. 25 (D. Iowa 1948); *Anderson v. Kenosha Auto Transp.*, 6 F.R.D. 265 (D. Minn. 1946).

not discuss other cases¹⁰⁰ illustrating that principle, including *Jeub*. It is not clear why he did not, especially because these precedents appear to support his approach, and his opinion might have been stronger had he relied on them.

B. Part II-C of Justice Scalia's Opinion and Justice Stevens's Concurrence

Part II-C of Justice Scalia's opinion, supported only by the Chief Justice and Justice Thomas,¹⁰¹ responded to Justice Stevens's concurrence, which declined to join Parts II-B, II-C and II-D of Justice Scalia's opinion. Rather than beginning with Rule 23, Justice Stevens approached the REA problem differently. He focused on whether the *state* rule—section 901(b)—was substantive or procedural, arguing that it was procedural because it did not “function as a part of the State's definition of substantive rights and remedies.”¹⁰² To him, the fact that section 901(b) did not define Allstate's liability for untimely payments made the rule procedural only.¹⁰³

100. See, e.g., *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 125 n.22 (1968) (holding Rule 19 governed with respect to non-parties) (“[I]n a diversity case the question of joinder is one of federal law.”); *Olden v. Hagerstown Cash Register, Inc.*, 619 F.2d 271 (3d Cir. 1980) (holding Rule 24 controlled time and manner of intervention, though state law controlled whether intervenor had a judicially cognizable interest); *Har-Pen Truck Lines, Inc. v. Mills*, 378 F.2d 705 (5th Cir. 1967) (holding Rule 18 applied despite state statute that forbade joinder of contract and tort claims); *D'Onofrio Const. Co. v. Recon Co.*, 255 F.2d 904 (1st Cir. 1958) (holding Rule 14 applied despite that absence of state impleader); *Siebrand v. Gossnell*, 234 F.2d 81 (9th Cir. 1956) (holding Rule 20, not contrary Arizona law, governed permissibility of joinder of parties-defendant who were severally, not jointly, liable as tortfeasors); *Counsel Financial Services, LLC v. Melkersen Law, P.C.*, 602 F. Supp.2d 448 (W.D.N.Y. 2009) (holding Rule 13 permitted counterclaim despite explicit New York statute disallowing counterclaims in the circumstances).

101. Justice Sotomayor did not join and did not explain why she did not join. Perhaps she refrained because she viewed Part II-C as dictum.

102. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1448 (2010) (Stevens, J., concurring in part and concurring in the judgment). Thus, he recalled some of the language of *Byrd*. See *supra* note 78.

103. He did acknowledge that *some* state procedural rules may define substantive rights, *Shady Grove*, 130 S. Ct. at 1450 (Stevens, J., concurring in part and concurring in the judgment). Justice Stevens also asserted that if a state procedural rule “‘defines the dimensions’ of a state-created claim,” “there would be an Enabling Act problem, and the federal rule would have to give way.” *Id.* at 1456. He agreed in theory with Justice Ginsburg's dissent, 130 S. Ct. at 1461-64 (Ginsburg, J., dissenting), but disagreed with her assertion that *Shady Grove* was such a case. For Justice Ginsburg, this phenomenon was a rallying point for her argument that the Court should have read Rule 23 with greater sensitivity for New York's substantive interests, referring to the Court's “relentless[]” reading of Rule 23). *Id.* at 1460 (Ginsburg, J., dissenting).

Precedent supports the idea that some rules that look procedural are actually substantive, but it is important to note how limited it is. In *Bourmias v. Atlantic Maritime Co.*, 220 F.2d 152, 154-56 (2d Cir. 1955), then-Judge Harlan explained when federal courts would regard a non-federal

To Justice Scalia, Justice Stevens focused on the wrong question. Justice Scalia read REA and *Sibbach* to mandate inquiry not into whether the *state* law is substantive, but instead whether the federal law is. "The concurrence contends that *Sibbach* did not rule out its approach, but that is not so. Recognizing the impracticability of a test that turns on the idiosyncrasies of state law, *Sibbach* adopted and applied a rule with a single criterion: whether the Federal Rule 'really regulates procedure.'"¹⁰⁴ He accused Justice Stevens of wanting effectively to overrule *Sibbach* rather than to apply it,¹⁰⁵ but rejected the invitation: "*Sibbach* has been settled law . . . for nearly seven decades."¹⁰⁶

Justice Stevens argued that Justice Scalia's reading of REA was unfaithful to the statute's purpose, because some rules that look procedural may have substantive purposes.¹⁰⁷ Justice Scalia

limitation period as substantive, requiring its application in the federal courts. The case did not implicate *Guaranty Trust* because it was an admiralty case in which a seaman had two libel claims against respondent's vessel and thus did not arise under state law. *Id.* at 153. The matter in dispute was whether to apply an Article of the Panamanian labor code that barred claims filed more than one year after accrual. *Id.* at 154. That required the court to decide whether the limitation was substantive or procedural for choice-of-law purposes. *Id.* at 154-55. Judge Harlan focused on five factors that the courts should consider, which he discussed at some length. *See id.* For present purposes, the factors themselves are irrelevant. It is relevant, however, that the court recognized that there were circumstances in which rules of law that one normally thinks of as procedural are actually substantive. *See also* Carrington, *supra* note 35 at 290.

Justice Ginsburg's *Shady Grove* dissent offered other examples. Note, however, that the dissent's examples, *see Shady Grove*, 130 S. Ct. at 1471 (Ginsburg, J., dissenting) all antedate *Hanna v. Plumer*, 380 U.S. 460 (1965), which adopted the current approach to the vertical choice-of-law inquiry with respect to the Federal Rules. The Court decided two of the cases (part of the 1949 trio) under *Guaranty Trust's* outcome-determinative test, which *Byrd v. Blue Ridge Elec. Cooperative*, 356 U.S. 525 (1958), modified. The third, *Palmer v. Hoffman*, 318 U.S. 109 (1943), stated that "[t]he question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases must apply." *Id.* at 117 (citation omitted). *Palmer* is not apposite to *Shady Grove*, because there was no Federal Rule of Civil Procedure that governed who had the burden of proof. The *Palmer* Court declined to read Rule 8(c), which made contributory negligence an affirmative defense for pleading purposes, also to declare sub silentio which party had the burden of proof. *Palmer* would undoubtedly come out the same way under *Hanna*, because there is no direct collision. The *Shady Grove* Court, on the other hand, found Rule 23 and section 901(b) squarely in opposition. *See Shady Grove*, 130 S. Ct. at 1438. *See supra* notes 75-78 and accompanying text.

104. *Shady Grove*, 130 S. Ct. at 1445 (Scalia, J., for himself, the Chief Justice and Justice Thomas) (citing *Sibbach*, 312 U.S. at 14). Justice Scalia also rebutted another part of Justice Stevens's argument: "That the concurrence's approach would have yielded the same result in *Sibbach* proves nothing; what matters is the rule we *did* apply, and that rule leaves no room for special exemptions based on the function or purpose of a particular state rule." *Id.* (footnote omitted).

105. *Id.* (footnote omitted).

106. *Id.* at 1446 (footnote omitted).

107. *Id.* at 1449 (Stevens, J., concurring in part and concurring in the judgment) ("It is important to observe that the balance Congress has struck turns, in part, on the nature of the state

acknowledged Justice Stevens's point¹⁰⁸ but continued to insist that Justice Stevens had failed to interpret REA properly:

The concurrence's approach, however, is itself unfaithful to the statute's terms. Section 2072(b) bans abridgement [*sic*] or modification only of "substantive rights," but the concurrence would prohibit preemption of "procedural rules that are intimately bound up in the scope of a substantive right or remedy. . . ." This would allow States to force a wide array of parochial procedures on federal courts so long as they are "sufficiently intertwined with a state right or remedy."¹⁰⁹

Thus, the battle lines between the two Justices were drawn—and no one prevailed. Justices Scalia and Stevens were at odds about what REA and *Sibbach* mandate. It will be interesting to see what position Justice Kagan, Justice Stevens's successor, takes. Justice Stevens ended up concurring in the judgment but reached that conclusion by a different path from Justice Scalia. Justice Ginsburg and her three joining colleagues were unable to get there at all, and her opinion requires careful attention.

IV. THE DISSENT

Justice Ginsburg had a different starting point. It was self-evident to her that section 901(b)'s prohibition was a substantive right belonging to and enforceable by the defendant.

The Court today approves Shady Grove's attempt to transform a \$500 case into a \$5,000,000 award, although the State creating the right to recover has proscribed this alchemy. If Shady Grove had filed suit in New York state court, the 2% interest payment authorized . . . as a penalty for overdue benefits would, by Shady Grove's own measure,

law that is being displaced by a federal rule. And in my view, the application of that balance does not 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.").

108. *Id.* at 1445-46 (Scalia, J., for himself, the Chief Justice and Justice Thomas) ("There is something to that. It is possible to understand how it can be determined whether a Federal Rule 'enlarges' substantive rights without consulting State law: If the Rule creates a substantive right, even one that duplicates some state-created rights, it establishes a new federal right. But it is hard to understand how it can be determined whether a Federal Rule 'abridges' or 'modifies' substantive rights without knowing what state-created rights would obtain if the Federal Rule did not exist. *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.").

109. *Id.* at 1446 n.11 (quoting *id.* at 1458, 1455 (Stevens, J., concurring in part and concurring in the judgment)).

amount to no more than \$500. By instead filing in federal court based on the parties' diverse citizenship and requesting class certification, Shady Grove hopes to recover, for the class, statutory damages of more than \$5,000,000. The New York Legislature has barred this remedy¹¹⁰

Having thus conceptualized the New York legislative scheme, it was a straightforward matter for Justice Ginsburg and her colleagues to find that the Court's interpretations of Rule 23 and REA were improper.

Relying significantly on two cases from the 1949 trio¹¹¹—decided under *Guaranty Trust's* outcome-determinative approach rather than *Hanna's* REA approach—Justice Ginsburg argued that the *Shady Grove* Court should have interpreted Rule 23 to avoid the clash with section 901(b)'s prohibition.¹¹² She also relied on *Walker v. Armco Steel Co.*,¹¹³ a post-*Hanna* decision that reached *Ragan's* result but abandoned its theory.¹¹⁴ *Ragan* directed applying the state rule because not applying it would have produced a different outcome (maintenance of the action *versus* dismissal for untimeliness).¹¹⁵ That was faithful to *Guaranty Trust*. *Walker*, by contrast, read Rule 3's language¹¹⁶ not to address the event that stops a state statute of limitations from running. In both *Ragan* and *Walker*, the state had specified service on the defendant as the critical event.¹¹⁷

Justice Ginsburg reviewed her opinion for the Court in *Gasperini v. Center for Humanities, Inc.*¹¹⁸ She characterized *Gasperini* as having read Rule 59's language¹¹⁹ narrowly to avoid conflict with a New York rule allowing judges to review jury verdicts "to determine whether they 'deviate[d] materially from what would be reasonable compensation

110. *Id.* at 1460 (Ginsburg, J., dissenting) (citation omitted) (referring to "New York's restriction on the availability of statutory damages"). Read quickly enough, the argument is appealing. Closer analysis, however, suggests a different conclusion. See *infra* notes 159-64, 332 and accompanying text.

111. *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

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

113. 446 U.S. 740 (1980).

114. *Shady Grove*, 130 S. Ct. at 1461 (Ginsburg, J., dissenting).

115. *Ragan*, 337 U.S. at 533-34.

116. FED. R. CIV. P. 3 provides, "A civil action is commenced by filing a complaint with the court."

117. *Walker*, 446 U.S. at 742; *Ragan*, 337 U.S. at 531.

118. 518 U.S. 415 (1996).

119. FED. R. CIV. P. 59 provided in pertinent part that a district judge could grant a motion for a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." She noted that Rule 59's most common use was to assess the excessiveness of damages. *Gasperini*, 518 U.S. at 437 n.22.

...¹²⁰ That standard differed from the federal shocks-the-conscience test.¹²¹ Having already characterized section 901(b) as “New York’s limitation on statutory damages,”¹²² she accused the majority of giving it “no quarter.”¹²³ Thus, she sought to bring *Shady Grove* in line with her majority result in *Gasperini*, in which the Court viewed New York’s reasonable-compensation standard as a statutory cap—albeit a flexible one—on damages.¹²⁴

Justice Ginsburg relied on the legislative history of the amendment of New York’s class action statute that included section 901(b). That history suggested that organizations faced with possible class actions lobbied the legislature to avoid that result. “These constituents ‘feared that recoveries beyond actual damages could lead to excessively harsh results.’ ”¹²⁵ Justice Ginsburg also relied on the governor’s signing statement with respect to the revised class action statute,¹²⁶ concluding:

“[T]he final bill . . . was the result of a compromise among competing interests.” . . . Section 901(a) allows courts leeway in deciding whether to certify a class, but § 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. Indeed, suits seeking statutory damages are arguably *best* suited to the class device because individual proof of actual damages is unnecessary. New York’s decision instead to block class-action proceedings for statutory damages therefore makes scant sense, except

120. *Shady Grove*, 130 S. Ct. at 1463 (Ginsburg, J., dissenting) (quoting *Gasperini*, 518 U.S. at 423-25 (quoting N.Y. C.P.L.R. § 5501(c) (McKinney 1995 & Supp. 2010))).

121. *See id.* The Supreme Court has never articulated this test with respect to excessive or insufficient damages, but the lower federal courts have recognized it at least since the Federal Rules came into effect. *See, e.g.,* *Lopczyk v. Chester a Poling, Inc.*, 60 F. Supp. 839, 840 (S.D.N.Y.), *aff’d*, 152 F.2d 457 (2d Cir. 1945) (“It is familiar learning that the Court should not set aside a verdict on the ground that it is excessive unless it is so high as to shock the conscience.”); *Zarek v. Fredericks*, 138 F.2d 689, 691 (3d Cir. 1943) (jury award, although “overliberal,” not “so outrageous” that appellate court could set it aside when trial court had not). To be sure, *Gasperini* did that, but that is far from all it said that is relevant to *Shady Grove*, as I will discuss later. *See infra* notes 164-69 and accompanying text.

122. *Shady Grove*, 130 S. Ct. at 1464 (Ginsburg, J., dissenting).

123. *Id.*

124. *See infra* notes 164-69 and accompanying text.

125. *Shady Grove*, 130 S. Ct. at 1464 (Ginsburg, J., dissenting) (quoting *Sperry v. Crompton Corp.*, 863 N.E.2d 1012, 1015 (N.Y. 2007)). One should read this argument closely, however. It is not really an argument against the class action device; it is an argument against the very existence of statutory penalties, hence the reference to “actual damages.”

126. *Id.* (“Governor Hugh Carey stated that the new statute ‘empowers the court to prevent abuse of the class action device and provides a *controlled remedy*.’ ” (emphasis added by Justice Ginsburg)). Note, however, that neither the lobbyists, the legislature nor the signing statement questioned at all whether it was proper for the legislature to authorize statutory penalties.

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.¹²⁷

Having made that argument, Justice Ginsburg then had to propose a reading of Rule 23 that avoided the difficulties the majority opinion presented.

"The Court, I am convinced, finds conflict where none is necessary."¹²⁸ Noting that the Second Circuit, two of New York's district courts, a Pennsylvania district court and the Connecticut Supreme Court had all concluded that for *Erie* purposes, section 901(b) was substantive and not in conflict with Rule 23,¹²⁹ she explained her rationale:

Rule 23 describes a method of enforcing a claim for relief, while § 901(b) defines the dimensions of the claim itself. In this regard, it is immaterial that § 901(b) bars statutory penalties in wholesale, rather than retail, fashion. The New York Legislature could have embedded the limitation in every provision creating a cause of action for which a penalty is authorized; § 901(b) operates as shorthand to the same effect.¹³⁰

Thus, Justice Ginsburg sought to avoid a clash between state and federal law by reading section 901(b) as a substantive limitation on damages and Rule 23 only to facilitate efficient litigation. "Section 901(b) responds to an entirely different concern; it does not allow class members to recover statutory damages because the New York Legislature considered the result of adjudicating such claims *en masse* to be exorbitant."¹³¹ Given that view, it is easy to understand why the

127. *Id.* at 1464-65 (Ginsburg, J., dissenting) (footnote omitted) (quoting *Sperry*, 863 N.E.2d at 1015).

128. *Id.* at 1465.

129. *See supra* note 76.

130. *Id.* at 1466 (Ginsburg, J., dissenting). The Court's majority explicitly rejected the distinction. *See supra* note 77.

131. *Shady Grove*, 131 S. Ct. at 1466 (Ginsburg, J., dissenting) (footnote omitted). In the omitted footnote, Justice Ginsburg responded to the deprecation of her reliance on the legislative history, ironically finding it to be both persuasive and unnecessary:

The Court disputes the strength of the evidence of legislative intent . . . but offers no alternative account of § 901(b)'s purpose. Perhaps this silence indicates how very hard it would be to ascribe to § 901(b) *any* purpose bound up with the fairness and efficiency of processing cases. On its face, the proscription is concerned with remedies, *i.e.*, the availability of statutory damages in a lawsuit. Legislative history confirms this objective, but is not essential to revealing it.

Id. at 1466 n.6. She illustrated her point with a hypothetical example:

dissent did not see a direct collision with Rule 23.¹³² Justice Ginsburg rejected Shady Grove's attempt to characterize the state rule as procedural, arguing instead that because it was an "outcome affective"¹³³ statute, it had to apply "[w]hen no federal law or rule is dispositive of [the] issue."¹³⁴ She reiterated her argument that the New York rule functioned as a statutory cap on damages every bit as much as the cap that the Court honored in *Gasperini*. She focused on *Hanna*'s evident concern that the Federal Rules of Civil Procedure not become unnecessarily outcome-determinative: "'The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.'"¹³⁵ But Justice Ginsburg and her dissenting colleagues lost that battle.

V. EVALUATING THE OPINIONS

A. Justice Scalia

For Justice Scalia, REA analysis is straightforward. There are only two questions for a court to answer. The first is whether the Federal Rule directly addresses the issue. In *Shady Grove*, the issue was whether

Suppose, for example, that a State, wishing to cap damages in class actions at \$1,000,000, enacted a statute providing that "a suit to recover more than \$1,000,000 may not be maintained as a class action." Under the Court's reasoning—which attributes dispositive significance to the words "may not be maintained"—Rule 23 would preempt this provision, nevermind [sic] that Congress, by authorizing the promulgation of rules of procedure for federal courts, surely did not intend to displace state-created ceilings on damages.

Id. at 1466.

132. One may question, however, whether Justice Ginsburg's hypothetical example is truly apposite to the problem in *Shady Grove*. See *supra* note 110 and accompanying text.

133. *Shady Grove*, 130 S. Ct. at 1471 (Ginsburg, J., dissenting).

134. *Id.*

135. *Id.* This appears to be an oblique reference to "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). I suggest the Court should have said, "the twin aim of *Erie*," because the two parts of the formulation are only different sides of the same coin. The forum-shopping *Swift v. Tyson* engendered is what caused the inequitable administration of the laws to which the *Erie* Court referred.

There is more to Justice Ginsburg's use of this statement, however, than initially meets the eye. Almost in the next breath, the Court's opinion declared that the *Erie* approach is the wrong test for determining the legitimacy of a Federal Rule of Civil Procedure: "There is, however, a more fundamental flaw in respondent's syllogism: the incorrect assumption that the rule of *Erie R. Co. v. Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure." *Hanna*, 380 U.S. 460, 469-70. The Court prescribed REA as the proper test. See *id.* at 470-74.

the case could proceed as a class action.¹³⁶ The majority found that Rule 23 applied by its terms, because it gives the district court permission to certify any class that meets the requirements of Rule 23(a) and (b).¹³⁷ The majority rested largely on Rule 23's lack of limitations relevant to *Shady Grove* and resisted what it saw as New York's attempt to add an additional limitation to the Rule.¹³⁸

The Court refuted Allstate's contrary argument by turning it back on itself. Allstate urged that because Congress created some exceptions to Rule 23, the Rule was not categorical.¹³⁹ The Court responded. "The fact that Congress has created specific exceptions to Rule 23 hardly proves that the Rule does not apply generally. In fact, it proves the opposite. If Rule 23 did *not* authorize class actions across the board, the statutory exceptions would be unnecessary."¹⁴⁰

If the Federal Rule addresses the issue, the second question is whether it violates REA¹⁴¹ by abridging, enlarging or modifying a substantive right. Justice Scalia discussed that issue in Part II-B.¹⁴² There he and Justice Stevens diverged, leaving Justice Scalia one vote short of a majority for this part of his opinion. He could not amass a majority for his discussions of whether Rule 23 has an impermissibly substantive effect because he and Justice Stevens disagreed about the correct question to ask. Justice Scalia began by focusing on whether Rule 23 is substantive within the meaning of REA, concluding it is not because it " 'really regulates procedure.' "¹⁴³ Essentially, he looked at

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

137. *Id.* ("The question in dispute is whether *Shady Grove*'s suit may proceed as a class action. Rule 23 provides an answer. It states that '[a] class action may be maintained' if two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b). FED. RULE CIV. PROC. 23(b). By its terms this creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action Thus, Rule 23 provides a one-size-fits-all formula for deciding the class-action question.").

138. *See supra* notes 76-78 and accompanying text.

139. "Allstate points out that Congress has carved out some federal claims from Rule 23's reach, *see, e.g.*, 8 U.S.C. § 1252(e)(1)(B)—which shows, Allstate contends, that Rule 23 does not authorize class actions for all claims, but rather leaves room for laws like § 901(b)." *Shady Grove*, 130 S. Ct. at 1438.

140. *Id.* at 1438.

141. *Id.* at 1437.

142. *Id.* at 1442-44.

143. *See supra* note 104 and accompanying text. He thus effectively asked whether the Rule by its terms addressed any matter of substantive law, rejecting state law having any role in that inquiry. This exemplifies what I call the "explicitness approach." *See infra* notes 144-45 and accompanying text. Because of that position, he rejected the dissent's attempt to buttress its argument by reference to the New York statute's legislative history. *Shady Grove*, 130 S. Ct. at 1440. Whether one agrees with him or not, the opinion is reasonably straightforward.

Rule 23 and, seeing nothing that purported to address substantive issues of law, ended the REA inquiry.¹⁴⁴

This approach may imply that Justice Scalia prefers the explicitness approach: a Federal Rule is substantive for REA purposes only if it purports to address substantive rights. Under such an approach, it is not hard to understand why the Court has never invalidated one of the Federal Rules: none has ever explicitly addressed any substantive right. On the other hand, Justice Scalia acknowledges that the Court's history demonstrates a restrained reading of Federal Rules in order to avoid REA problems. If the Court had adopted the explicitness approach, restrained reading would never be necessary; the decision would turn solely on the text of the Federal Rule, not on its consequential effects.

B. *Justice Stevens*

By contrast, Justice Stevens asked whether the *state* rule is substantive.¹⁴⁵ He made his method unmistakable when he threw down the gauntlet to the dissent: "If my dissenting colleagues feel strongly that § 901(b) is substantive and that class certification should be denied, then they should argue within the Enabling Act's framework. Otherwise, 'the Federal Rule applies regardless of contrary state law.'"¹⁴⁶

144. In some cases, there could be a third question for Justice Scalia to ask. Were he to find that the Federal Rule violated REA, that would not end the vertical-choice-of-law inquiry. The matter then becomes whether the federal courts should create a federal common law rule—in other words, whether there is some dominant federal interest that mandates displacing state law. (This is also the question when there is no Federal Rule that purports to address the question.) Note, however, that this is an RDA inquiry—the “relatively unguided *Erie* choice,” *Hanna v. Plumer*, 380 U.S. 460, 471 (1965), not a part of the REA analysis.

145. He concluded that it is not. *Shady Grove*, 130 S. Ct. at 1448 (Stevens, J., concurring in part and concurring in the judgment) (“The New York law at issue . . . is a procedural rule that is not part of New York’s substantive law. Accordingly, I agree with Justice Scalia that Federal Rule of Civil Procedure 23 must apply in this case and join Parts I and II-A of the Court’s opinion. But I also agree with Justice Ginsburg that there are some state procedural rules that federal courts must apply in diversity cases because they function as a part of the State’s definition of substantive rights and remedies.” (citation omitted)). He relied in part on section 901’s placement in New York’s Civil Practice Law and Rules. *See supra* text accompanying note 107. “[In Justice Stevens’s] 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 and remedies.” *Shady Grove*, 130 S. Ct. at 1457 (Stevens, J., concurring in part and concurring in the judgment). That seems a thin reed upon which to rely, but the important thing about the statement is that it seems to support Justice Scalia’s assertion that Justice Stevens was asking a different (and in Justice Scalia’s view incorrect) question.

146. *Id.* (citation omitted). Arguably, Justice Ginsburg’s dissent does exactly what Justice Stevens requested. *See supra* notes 110-27 and accompanying text.

Justice Stevens also recognized that procedural rules can have substantive effects (or even, in the case of state procedural rules, substantive purposes).¹⁴⁷ That they may have incidental substantive effects is not surprising; the Court discussed that phenomenon in *Hanna v. Plumer*¹⁴⁸ when it noted (reflecting the influence of *Guaranty Trust's* outcome-determinative approach) that virtually any procedural rule can affect substantive rights.¹⁴⁹ Outcome-determinativeness was *Guaranty Trust's* litmus test for whether the vertical choice-of-law inquiry involved something substantive or procedural. By that measure, statutes of limitation became substantive for *Erie* purposes. Justice Harlan, concurring in *Hanna*, was more explicit:

The Court is quite right in stating that the "outcome-determinative" test of *Guaranty Trust* . . . , if taken literally, proves too much, for any rule, no matter how clearly "procedural," can affect the outcome of litigation if it is not obeyed. In turning from the "outcome" test of *York* back to the unadorned forum-shopping rationale of *Erie*, however, the Court falls prey to like oversimplification, for a simple forum-shopping rule also proves too much; litigants often choose a federal forum merely to obtain what they consider the advantages of the Federal Rules of Civil Procedure or to try their cases before a supposedly more favorable judge. To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether "substantive" or "procedural," is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.¹⁵⁰

Justice Harlan appeared to view rules as substantive if they affect the way people live their day-to-day lives and conduct their worldly affairs in light of the law, i.e., non-litigation conduct. As I will suggest

147. See *supra* note 103. Justice Stevens made those observations as part of his argument that in service of the *Erie* doctrine's policy, the Court should not limit itself to characterizing only the Federal Rule as substantive or procedural. See *supra* notes 107-09 and accompanying text.

148. 380 U.S. 460 (1965).

149. *Id.* at 464-65 ("Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. . . . The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the district court for northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights." (citation omitted)).

150. *Id.* at 475 (Harlan, J., concurring).

later,¹⁵¹ Justice Harlan's approach probably should become the majority rule, but it needs a bit of refinement.

Justice Stevens, however, thought the first question should be whether the state rule was substantive or procedural.¹⁵² He concluded that section 901(b) is procedural.¹⁵³ Although he agreed with Justice

151. See *infra* notes 306-307 and accompanying text.

152. *Shady Grove*, 130 S. Ct. at 1448 (Stevens, J., concurring in part and concurring in the judgment). Professor Ely agreed:

If this 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.

Ely, *supra* note 9, at 722.

153. *Id.* (Stevens, J., concurring in part and concurring in the judgment) ("The New York law at issue . . . is a procedural rule that is not part of New York's substantive law. Accordingly, I agree with Justice Scalia that Federal Rule of Civil Procedure 23 must apply in this case and join Parts I and II-A of the Court's opinion. But I also agree with Justice Ginsburg that there are some state procedural rules that federal courts must apply in diversity cases because they function as a part of the State's definition of substantive rights and remedies." (citation omitted)). He relied in part on section 901's placement in New York's Civil Practice Law and Rules. *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 and remedies."). That seems a thin reed upon which to rely, but the important thing about the statement is that it seems to support Justice Scalia's assertion that Justice Stevens was asking a different (and in Justice Scalia's view incorrect) question.

Statutes of limitation usually appear in state procedural codes, but the Court, despite having abandoned *Guaranty Trust's* outcome-determinative litmus test, nonetheless remains faithful to its holding that limitations periods are substantive for *Erie* purposes. See Doernberg, *supra* note 11, at 630. The most definitive federal judicial statement on the classification of limitations for choice-of-law purposes, *Boumias v. Atlantic Maritime Co.*, 220 F.2d 152 (2d Cir. 1955), noted that placement of a limitations period in the same statute that created the plaintiff's right should be a key factor in deciding whether the courts should regard the limitation as substantive or procedural. "The common case [where limitations are treated as "substantive"] is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not." *Id.* at 155 (quoting Justice Holmes's majority opinion in *Davis v. Mills*, 194 U.S. 451, 454 (1904)).

Applying state limitations periods to state-created claims is proper and entirely consonant with the balancing approach that the Court now uses (but without explicit acknowledgement) in all *Erie* cases. There is no federal limitations statute that applies to state-created claims, so the matter comes down to *Byrd* balancing. There is no dominant federal interest that requires ousting the state rule. See Doernberg, *supra* note 11, at 647. (Congress might bestir itself to enact federal limitations periods to apply in diversity cases. Such a statute would almost certainly pass constitutional muster. There is a discernible federal interest in how long federal courts remain open to increasingly stale claims, given all the problems of proof that they present. Therefore, Congress could effectively make statutes of limitations procedural for *Erie* purposes. See Ely, *supra* note 9, at 726-27 (positing that while Congress could enact such a statute, for a Federal Rule to attempt the same thing would violate REA)).

Scalia that Rule 23 and section 901(b) directly collided, his decision that section 901(b) is procedural meant that he saw no REA problem in Rule 23 displacing section 901(b).¹⁵⁴

As between Justice Scalia's and Justice Stevens's views, Justice Scalia has the simpler argument, though not necessarily the better one. He argued that REA directs attention to the Federal Rules of Civil Procedure, not to state rules. That is an over-simplification. REA's reference to "any substantive right" commands attention to the sovereign that created the supposed substantive right—in *Shady Grove*, the State of New York in section 901(b). By ignoring that, Justice Scalia recreates the anti-positivist fallacy by assuming that the terms "substantive" and "procedural" have fixed meanings independent of the sovereigns who create the rules. Criticizing Justice Stevens's approach, Part II-C of Justice Scalia's opinion said:

Instead of a single hard question of whether a Federal Rule regulates substance or procedure, that approach will present hundreds of hard questions, forcing federal courts to assess the substantive or procedural character of countless state rules that may conflict with a single Federal Rule. And it still does not sidestep the problem it seeks to avoid. At the end of the day, one must come face to face with the decision whether or not the state policy (with which a putatively procedural state rule may be "bound up") pertains to a "substantive right or remedy,"—that is, whether it is substance or procedure.¹⁵⁵

It is as if substance and procedure exist in a vacuum, as independent concepts capable of application to worldly things like statutes, rules and goals. Ironically, Justice Scalia took his position in purported service of the goals of vertical choice-of-law that *Erie* both articulated and spawned, but in doing so, he implicitly rejected the greatest jurisprudential change that *Erie* ushered in: the rejection of natural law in favor of legal positivism.

Justice Stevens's position was that one cannot conclusively tell whether a Federal Rule impermissibly affects a substantive right without looking to the source of the supposed right and considering whether the right-creating sovereign sought to address substantive goals—the kinds of things to which Justice Harlan referred as dealing "the primary conduct and affairs of its citizens."¹⁵⁶ His reasoning is persuasive. If

154. *Shady Grove*, 130 S. Ct. at 1448 (Stevens, J., concurring in part and concurring in the judgment).

155. *Id.* at 1447 (Scalia, J., for himself, the Chief Justice and Justice Thomas) (citations and footnotes omitted).

156. *Hanna v. Plumer*, 380 U.S. 460, 476 (1965) (Harlan, J., concurring).

sovereigns create rules of law, then we cannot know whether a particular rule is substantive or procedural without considering its purpose, and only the sovereign establishing the rule can define that.

C. *Justice Ginsburg*

Justice Ginsburg's dissent, while purporting to rely heavily on her majority opinion in *Gasperini*, overlooked important differences between *Gasperini* and *Shady Grove*.¹⁵⁷ She interpreted section 901(b) as a substantive limitation the New York legislature intended on Allstate's total exposure to damages.¹⁵⁸ I beg to differ. It is a mistake to read section 901(b) in isolation from the rest of New York law, which permits either joint trial or consolidation of "actions involving a common question of law or fact. . . ."¹⁵⁹ There is no limit on the amount recoverable; a defendant in multiple penalty cases might face just as large a loss as the one Justice Ginsburg inferred the New York legislature feared.¹⁶⁰ Even if neither the plaintiffs nor the court seek consolidation, the defendant may¹⁶¹ choose the perceived economic advantage of defending one action rather than many, recognizing that it faces the same amount of risk. The total exposure of a defendant in Allstate's position is nowhere limited, even by implication, in New York law. At worst, potential class members would have to bring individual

157. *Shady Grove*, 130 S. Ct. at 1463, 1469, 1471-72 (Ginsburg, J., dissenting). I recognize the danger in suggesting that a Justice misconstrued her former opinion, especially a sitting Justice with respect to a relatively recent opinion. In *American National Red Cross v. Solicitor General*, 505 U.S. 247 (1992), Justice Scalia made a similar assertion about two opinions that Chief Justice John Marshall wrote. See *id.* at 268-72 (Scalia, J., dissenting). Justice Souter's majority opinion responded: "The dissent accuses us of repeating what it announces as Chief Justice Marshall's misunderstanding, in *Osborn*, of his own previous opinion in *Deveaux*. We are honored." *Id.* at 256 n.7. But I persist.

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

159. N.Y. C.P.L.R. § 602(a) (McKinney 2006). That statute emphasizes the importance New York attaches to being able to join or consolidate similar cases. It permits higher courts hearing a case to transfer to themselves qualifying cases pending in lower courts. N.Y. C.P.L.R. § 602(b) (McKinney 2006).

160. See *supra* note 131 and accompanying text.

161. § 602(a) ("the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders. . . ."). A defendant in Allstate's position might see economic advantage in doing so, because defense of the consolidated action might cost significantly less than defense of numerous individual actions. This is less risky in New York than it might appear, since New York recognizes offensive non-mutual collateral estoppel, see *B.R. DeWitt, Inc. v. Hall*, 225 N.E.2d 195 (N.Y. 1967), which would allow individual plaintiffs in separate cases presenting the same issues to preclude Allstate from retrying those issues.

actions. If the legislature *was* attempting to limit the total liability of statutory-penalty sufferers, it left no other indications of that intention.

There is a more fundamental difference between *Gasperini* and *Shady Grove*.¹⁶² In *Gasperini*, New York law¹⁶³ established an absolute, though hard-to-calculate, range of liability: *immaterial* deviation from reasonable compensation.¹⁶⁴ The statute directs New York courts to adjust jury verdicts outside that range to come within it. "Reasonable compensation" is a dollar amount, as is "material deviation." Those two amounts may vary from case to case, but that is beside the point; the critical matter is that in each case, the court places a value on each term, and the sum of those values (deviation upward) and their difference (deviation downward) are numbers. Contrast that with section 901(b), which places no monetary limit on recovery for statutory penalties.¹⁶⁵ It merely means that plaintiffs must recover penalties in separate (or consolidated) actions rather than in a class action. Whatever section 901(b) is, it is not a legal limit on the maximum exposure to damages that a defendant faces. Part of the *Gasperini* rule clearly was. Thus, the dissent's comparison of *Gasperini* and *Shady Grove* is forced. Ultimately, it fails.

The dissent tends to conflate different parts of the statute involved in *Gasperini*. For example, Justice Ginsburg noted the *Gasperini* Court's sensitivity to New York's policy, stating, "[t]his Court held that Rule 59(a) did not inhibit federal-court accommodation of New York's invigorated test."¹⁶⁶ From that language, one might infer that the *Gasperini* Court simply applied section 5501(c), but it did not. The statute prescribed two things: (1) a different measure of jury-verdict excessiveness, migrating from the shock-the-conscience test to the deviates-materially test, and (2) a mandate to New York's intermediate appellate courts to review on that basis.¹⁶⁷ *Gasperini* carefully distinguished the two, noting that the New York law was both substantive and procedural.¹⁶⁸ The *Shady Grove* dissent's reference to

162. Both cases, coincidentally, involved New York law.

163. N.Y. C.P.L.R. § 5501(c) (McKinney 1995 & Supp. 2010).

164. See *supra* text accompanying note 120.

165. See N.Y. C.P.L.R. § 901(b) (McKinney 2006).

166. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1463 (Ginsberg, J., dissenting) (2010).

167. § 901(b).

168. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426 (1996) ("As the parties' arguments suggest, CPLR § 5501(c), appraised under *Erie R. Co. v. Tompkins* . . . and decisions in *Erie*'s path, is both 'substantive' and 'procedural': 'substantive' in that § 5501(c)'s 'deviates materially' standard controls how much a plaintiff can be awarded; 'procedural' in that § 5501(c)

“[t]he provision held ‘substantive’ for *Erie* purposes in *Gasperini*,” elided the fact that Justice Ginsburg pointedly refused to apply its procedural facet.¹⁶⁹

The dissent also relied on an unstated syllogism. The major premise is that all remedies are substantive for REA purposes. The minor premise is that section 901’s class action device is a remedy and section 901(b) makes that remedy unavailable to Shady Grove. The conclusion is that section 901(b) is substantive for REA purposes.¹⁷⁰ Such a view requires overruling *Sibbach*. There, Illinois law did not permit compelling the plaintiff in a personal injury action to submit to a

assigns decisionmaking authority to New York’s Appellate Division. Parallel application of § 5501(c) at the federal appellate level would be out of sync with the federal system’s division of trial and appellate court functions, an allocation weighted by the Seventh Amendment. The dispositive question, therefore, is 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.”).

The procedural problem that troubled the *Gasperini* Court may not be as severe as the Court feared. The implicit assumption the Court appears to make is that “reasonable compensation” is a question of pure fact. There is much in the law, however, to suggest that it is at least a mixed question of law and fact, and one should not automatically assume that anything with a reasonableness standard is necessarily a question of fact within the jury’s exclusive domain, or that even something that is a pure question of fact is for the jury to decide. For example, *Ohio v. Robinette*, 519 U.S. 33, 40 (1996), held that the issue of whether a defendant’s purported consent to a search was actually voluntary, though a question of fact, was for the court to decide. Ever since the Court announced *Terry v. Ohio*, 392 U.S. 1 (1968), the question of whether the police officer who initiates a *Terry* stop had “reasonable suspicion” upon which to do so has been a question for the court, not the jury. Fourth Amendment “unreasonableness” itself has always been a determination for the court to make, and United States Reporter fairly bristles with cases in which the Court has made that determination at the very highest level of appellate review. The Seventh Amendment, of course, has no application in the criminal context, but it would be a mistake to conclude that the courts’ treating reasonableness as at least a mixed question of law and fact is limited to that sphere.

Civil practice in the federal courts recognizes reasonableness as a matter of law eligible for judicial decision.

It is a well-established principle of the common law that although questions of fact must be decided by the jury . . . the question of whether there is sufficient evidence to raise a question of fact to be presented to the jury is a question of law that must be decided by the court.

9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, § 2522, at 226 (2008). Federal Rules 50 and 56, among others depend on that. Under Federal Rule 50, the court may grant judgment as a matter of law if “a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue. . . .” FED. R. CIV. P. 50(a)(1). Rule 56 adopts the same standard for summary judgments. See FED. R. CIV. P. 56A; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (Rule 56 standard “mirrors” Rule 50 standard). See also *Weisgram v. Marley*, 528 U.S. 440 (2000) (allowing Court of Appeals to direct district to enter judgment as a matter of law in favor of jury verdict loser).

169. See *Gasperini*, 518 U.S. at 431-39.

170. Under that analysis, a conflicting Federal Rule would violate REA, but Justice Ginsburg found no conflict in *Shady Grove*. See *supra* notes 128-32 and accompanying text.

physical examination.¹⁷¹ Surely the right of personal privacy embodied in such a rule is substantive as Justice Ginsburg uses the term. It is at least as substantive as section 901(b)'s freedom-from-class-action entitlement. *Sibbach* could not find a way to avoid the collision between Illinois law and Rule 35. The wording of Rule 35, then¹⁷² as now,¹⁷³ paralleled the wording of Rule 23. Both describe district court power in permissive terms and specify criteria. Neither suggests any exception in the case of conflicting state law. Yet Justice Ginsburg neither distinguished nor suggested overruling *Sibbach*.¹⁷⁴

It is possible that the major premise is overbroad. A common definition of remedy is "[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief."¹⁷⁵ Note, however, that "the" definition really is two. The first part sounds like it fits section

171. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 7 (1941).

172. *Id.* at 8 ("In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made." (quoting FED. R. CIV. P. 35(a) (amended 1970))).

173. See FED. R. CIV. P. 35(a).

174. She also did not suggest that the Court erred in *Burlington Northern R. Co. v. Woods*, 480 U.S. 1 (1987). Plaintiffs brought a diversity personal injury action sounding in Alabama tort law against the railroad and recovered a jury verdict. State law required a 10% penalty for unsuccessful appeals of money judgments. ALA. CODE § 12-22-72 (1986). When the Eleventh Circuit affirmed, it imposed the penalty. *Burlington* sought Supreme Court review, and a unanimous Court reversed, holding that Federal Rule of Appellate Procedure 38 governed in place of the Alabama law. *Burlington*, 480 U.S. at 7. The penalty statute, according to Justice Marshall, existed "to penalize frivolous appeals and appeals interposed for delay, . . . and to provide 'additional damages' as compensation to the appellees for having to suffer the ordeal of defending the judgments on appeal." *Burlington Northern*, 480 U.S. at 4 (citations omitted). Rule 38 makes an award of damages and additional costs for a frivolous appeal a matter of the court's discretion. The Court adopted the Fifth Circuit's reasoning with respect to a similar Mississippi statute, *Burlington Northern*, 480 U.S. at 6-7 (citing *Affholder, Inc. v. Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984)), emphasizing the discretionary nature of the federal remedy and its application only to frivolous appeals rather than to all unsuccessful appeals of money judgments.

Justice Ginsburg might respond that the collision in *Burlington Northern* was unavoidable, whereas she argued strongly in *Shady Grove* that the collision between Rule 23 and section 901(b) was avoidable. *Shady Grove*, 130 S. Ct. at 1465-66 (Ginsburg, J., dissenting). I suggest that would overstate the case. Both of the federal rules are permissive and appear to fly in the face of mandatory state rules that deny flexibility. In addition, Rule 23's effect is not substantive, as Justice Ginsburg would have it, because it does not speak to the defendant's total liability for violations of New York's prompt-payment statute. See *supra* notes 157-64 and accompanying text. See *infra* text accompanying note 332. One can dispute, therefore, that section 901(b) is substantive for REA purposes, but there is no gainsaying that the Alabama penalty statute in *Burlington* addressed itself directly to the total amount of damages a plaintiff could recover.

175. BLACK'S LAW DICTIONARY 1407-08 (9th ed. 2009).

901(b) because one could take “means” to refer to procedural devices, such as the class action or other forms of claim or party joinder. The second part does not fit; it speaks not of devices but rather of damages and equitable relief. Interestingly, almost all of the more specific definitions subsumed under “remedy” speak of the goal of the litigation, whether legal or equitable, not of the procedural devices the plaintiff employs to achieve those goals.¹⁷⁶

If Rule 23 is a remedy, it is difficult to see why any Federal Rule concerning joinder of claims or parties is not similarly a remedy.¹⁷⁷ That is certainly not the way in which one commonly thinks of the joinder devices. Moreover, there is considerable case law, unmentioned in the dissent, approving the applicability of the federal joinder rules despite state law that is either silent or explicitly to the contrary.¹⁷⁸

VI. THE TEMPEST THAT IS *SHADY GROVE*

A. *A (Very) Brief Review of Some Scholarly Commentary on REA*

There is voluminous commentary on REA. Much of it criticizes *Sibbach*¹⁷⁹ and the Court’s repetition of the *Sibbach* test in *Hanna*.¹⁸⁰ Most of it talks about how to approach making the distinction between substance and procedure in individual cases, both those that have arisen and those that might arise. Professor Ely, for example, while generally approving Justice Harlan’s primary-conduct approach from his *Hanna* concurrence, thought it did not go far enough:

For one thing, we probably should give “conduct” a coverage somewhat broader than that the term most naturally suggests, to include along with the encouragement of actual activity the fostering and protection of certain states of mind—for example, the feeling of release, the assurance that the possibility of ordeal has passed, that a state seeks to create by enacting a statute of limitations. Beyond that, we surely would want to count as substantive various sorts of immunizing laws—such as sovereign immunity and abatement laws,

176. See *id.* at 1320-21.

177. See FED. R. CIV. P. 13, 14, 18, 19, 20, 22, 24, 25.

178. See *supra* note 100. I acknowledge Justice Ginsburg’s statement that “the Second Circuit and every District Court to have considered the question in any detail” all agreed that section 901(b) was substantive for REA purposes. *Shady Grove*, 130 S. Ct. at 1465 (Ginsburg, J., dissenting) (footnote omitted). The difficulty with it is that none of the cases to which she refers discussed those precedents either.

179. See, e.g., Redish & Murashko, *supra* note 35, at 58.

180. See *infra* text accompanying notes 181-82.

married women and spendthrift statutes—which surely are not calculated to encourage those immunized to engage in the conduct involved, conduct for which the rest of us would be liable. They are, instead, based upon a judgment that although the conduct involved is undesirable and indeed ought to be deterred, other and, in context, more important goals will be served by immunization from liability. Yet the laws remain substantive: in none is the “greater” goal to which the interests in deterrence and compensation are subordinated a procedural goal concerned only with the most sensible way to manage a litigation process.¹⁸¹

He noted with approval the Court’s “recent appreciation that the Enabling Act constitutes the only check on the Rules—that ‘Erie’ does not stand there as a backstop . . .”¹⁸² and then argued that the Court should “take the [Enabling] Act’s limiting language more seriously than it has in the past . . .”¹⁸³ He clearly thought that the *Hanna* Court had done a disservice in limiting its discussion of an REA test to the “arguably procedural” standard, as Justice Harlan characterized it.¹⁸⁴ He criticized *Sibbach* as unrealistically viewing substance and procedure as mutually exclusive concepts,¹⁸⁵ and argued that *Sibbach*’s really-regulates-procedure standard ignored REA’s limiting language.¹⁸⁶ But he also offered definitions of procedure and substance.

[A] procedural rule is . . . one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes The most helpful way, it seems to me, of defining a substantive rule—or more particularly a substantive right, which is what the Act refers to—is as a right granted for one or more nonprocedural reasons,

181. Ely, *supra* note 9, at 726 (footnotes omitted).

182. *Id.* at 698.

183. *Id.*

184. *Hanna v. Plumer*, 380 U.S. 460, 476 (1965) (Harlan, J., concurring) (“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.”).

185. Ely, *supra* note 9, at 719.

186. *Id.* at 723 (noting REA’s limiting language in its “second sentence (the one the Court and the commentators have ignored)”).

for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.¹⁸⁷

The difficulty with these formulations is their underlying assumption that a rule has only one purpose, or at least one primary purpose. The former is often not true. The latter is true, at least by definition, but the difficulty inheres in discerning what the “primary” purpose of a statute or rule is. Ely recognized that rules may have multiple purposes, some substantive and some procedural, but he offered no way to deal with such rules. Although offering numerous examples in which state rules that appear procedural on their face might nonetheless have some substantive purpose,¹⁸⁸ he did not suggest a particular method for determining which of several possible goals a state rule embodies.¹⁸⁹ What is missing is any sort of inductive conclusion about how federal courts considering REA challenges should proceed in their thinking. In the end, therefore, he left the courts with what seems like an *ad hoc* approach to these difficult questions.

Professor Burbank, whose exhaustive study¹⁹⁰ of the history of REA in the decades leading up to its enactment in 1934 gives the reader a clear understanding of just how difficult it was to get congressional approval for a system of uniform federal judicial procedure, left a similar gap. He made a persuasive case that the concerns motivating REA’s limiting language related only to the allocation of power between Congress and the Supreme Court, not to problems concerning the intersection of federal and state law.¹⁹¹ He analyzed each of the areas in which controversies concerning the legitimacy of a Federal Rule under REA have arisen. In some cases, he disagreed with the Court’s result; in others he concurred. He did a masterful job of discussing the cases that have arisen under Federal Rules 3, 4, 15, 17, 35 and 37.

One is left, however, at the end of the article, with the same kinds of questions that linger after Professor Ely’s study. Three quarters of a century after Congress passed REA, we still lack an analytical technique for making the admittedly difficult decisions about whether something is

187. *Id.* at 724-25 (footnotes omitted).

188. *See id.* at 726-38.

189. At this point one might begin to appreciate more fully Justice Scalia’s philosophy of legislative interpretation, which shuns resort to legislative history (often sparse at the state level) in favor of attempting to discern a statute’s purpose from its own language, not the individual expressions of lawmakers or committees as a possible guide to what the statutory language means. *See generally* Scalia, *supra* note 14. The difficulty is that the statutory language may give an insufficient clue about a statute’s purposes.

190. *See* Burbank, *supra* note 35.

191. *See infra* text accompanying note 316.

substantive or procedural for REA purposes where rational arguments exist for either characterization. Professor Burbank does suggest an approach. "The history suggests, at the least, a prohibition against Federal Rules that have an effect on rights recognized by the substantive law that is predictable and identifiable."¹⁹² The problem with the formulation is that it is essentially question-begging. It presumes a common understanding of the term "substantive law" without seeming to acknowledge that the language has different meanings in different contexts. One need look no further than Professor Ely's article¹⁹³ to find acknowledgement that the term has different meanings for RDA and REA purposes.

Professor Carrington agreed with Professor Burbank that the limiting language of REA reflects Congress's concerns about separation-of-powers, not federalism.¹⁹⁴ Echoing Walter Wheeler Cook, he cautioned against viewing "substance" or "procedure" as terms of mutually exclusive and immutable meaning, noting that "the characterization of a law as substantive or procedural depends on the purpose of the characterization."¹⁹⁵ He then tried to discern a purpose of the second sentence of the original REA, the one with the limiting language, but ultimately concluded that it may have been unnecessary, but "more likely is a reflection of Congress's awareness that the terms 'substance' and 'procedure' are not mutually exclusive."¹⁹⁶ By way of demonstration, he discussed how statutes of limitation fit both categories, characterizing limitations rules as "neither grass nor hay, being at once both substantive and procedural."¹⁹⁷

Professor Carrington criticized *Hanna* for failing to appreciate "the separation of powers issue that lay under the surface of the Rules Enabling Act but was concealed by the fashionable preoccupation with *Erie*."¹⁹⁸ He thought that *Burlington Northern* did a better job, but was still unsatisfied. He proposed a working test that drew on Cook's teachings:

192. Burbank, *supra* note 35, at 1160.

193. See Ely, *supra* note 9, at 698.

194. Carrington, *supra* note 35, at 283 ("The concern expressed in Congress was that an expansive reading might be given to the statutory term 'procedure' to enable a court rule to override political decisions made by Congress.").

195. *Id.* at 284 (footnote omitted).

196. *Id.* at 287.

197. *Id.* at 290.

198. *Id.* at 298.

[A] rule is functionally one of "practice and procedure," within the meaning of the first sentence, if the rule pertains to the operation of the federal courts and is integrated in a system generally applicable to all civil actions and suitably designed to achieve "just, speedy, and inexpensive" determinations. Such a rule does not affect a substantive right, within the meaning of the second sentence of the Act, if its application is sufficiently broad to evoke no organized political attention of a group of litigants or *prospective* litigants who (reasonably) claim to be specially and adversely affected by the rule.¹⁹⁹

It is difficult to see how such an approach would work in practice. As Professor Carrington pointed out,²⁰⁰ interest groups have the six-month window²⁰¹ between formal proposal of a rule and congressional acquiescence in it (at least by inaction) in which to make their arguments against it. He argues that REA's supersession clause provides ample incentive for opposition to a rule that overreaches.²⁰² That might be an effective oversight mechanism for rules the Court designed to affect identifiable substantive rights associated with particular groups in the political culture.²⁰³ The approach appears to assume, however, that every substantive right has one or more champions in the political arena, a proposition that is by no means certain.

Leaving the question of what is substantive for REA purposes to the political process creates another problem as well. It is not clear what the relevant point in time is. If a proposed rule survives the six-month waiting period without successful organized political opposition, should that function as the conclusive determination that the rule is not substantive within the meaning of REA's limiting language, or would a

199. *Id.* at 308.

200. *Id.* at 323.

201. See 28 U.S.C. § 2074 (2006) (requiring that the Supreme Court transmit proposed rules to Congress by May 1 of the year in which rules are to take effect and providing that they not take effect before December 1 unless Congress provides otherwise).

202. See Carrington, *supra* note 35, at 323.

203. Some might argue that Congress is unlikely to peruse proposed rules sufficiently to provide an efficient check on Supreme Court overreaching. Perhaps that is so, although the initial experience with the Federal Rules of Evidence suggests that the concern is overstated. See, e.g., Ely, *supra* note 9, at 693 ("The ones I feel sorry for are the people who paid \$150 for the cassette tapes explaining the Federal Rules of Evidence. It is hard to say it was their own fault: everything certainly seemed to be going according to plan. The Rules had been forwarded to the Supreme Court by the Advisory Committee, and the Court had duly blessed them and sent them on to Congress. That meant that unless something went wrong, they would automatically take effect on July 1, 1973. Something went wrong, however. A statute was passed preventing the Rules from taking effect unless another statute approved them, and they were referred to committee." (footnotes omitted)).

litigant subject to the rule be able to argue that it violates REA? In other words, does six months of calm betoken that, with respect to a particular rule, there can be no storm? Perhaps this is what Professor Carrington intends, but it seems to place in the hands of an imprecisely defined group the practical power to foreclose by inaction a non-member's entitlement to rely on REA's limiting language (whatever it may mean).

Professor Redish and Mr. Murashko implicitly criticize the scholarly community with respect to its inability to formulate a generalized working standard under REA's limiting language. "[W]hen dealing with ambiguous legislation, it is common sense and an attempt to translate underlying purpose into legal reality, rather than narrow, shortsighted adherence to textual literalism or legislative history, that more effectively further the goals of representative democracy."²⁰⁴ Their article has a dual purpose: first, to teach a lesson about statutory interpretation in general, and second, positing a reading of REA that gives the limiting-language clause independent meaning rather than suggesting, as one interpretive approach to REA does,²⁰⁵ that the clause is surplusage.

Redish and Murashko denominate the first section of REA "the enabling provision" and the second as "the limiting provision."²⁰⁶ The article sets out "three plausible interpretations of a synthesis of the two provisions."²⁰⁷ First, there is the "redundancy" construction, which views the limiting language as surplusage, expressing no more than the negative of the enabling language.²⁰⁸ Second, they posit the "strict separation" reading, which means "that having *any* effect whatsoever on a substantive right will invalidate a rule."²⁰⁹ They note that no Court majority has ever formed around this view, though Professors Ely and Burbank appear to favor it.²¹⁰ Third, they identify as a separate approach that they call "relaxed separation," characterizing it as a variation on the strict separation approach by permitting Federal Rules to have an "incidental effect" on substantive rights. *Burlington Northern*, they say, essentially adopted this approach, but they criticize the Court

204. Redish & Murashko, *supra* note 35, at 95.

205. *Id.* at 36-37.

206. *Id.* at 35, 36.

207. *Id.* at 36.

208. They include a discussion of why the familiar canon of statutory interpretation discouraging such an interpretation of any statute should not give pause in the case of REA. *See id.* at 37-38.

209. *Id.* at 29.

210. *Id.* One might wonder whether Justice Ginsburg's outcome-affective approach implicitly adopts this view. *See supra* note 133 and accompanying text.

for “not explain[ing] why the relaxed separation construction should prevail over the other two.”²¹¹ Nonetheless, they adopt this approach because it “most effectively promotes the two background purposes of the Enabling Act,”²¹² which they identify as “(1) creating a uniform and effective system of procedural rules for the federal courts, while (2) preserving the substantive lawmaking power for Congress, free from challenge or threat from the Supreme Court’s newly created rulemaking authority.”²¹³

That is well enough, but it seems to me that it still leaves hanging the question of what is substantive and what is procedural for REA purposes. Redish and Murashko appear to approve of Professor Ely’s formulations.²¹⁴ In one way, that is ironic, since they also criticize the mutually-exclusive view of the terms.²¹⁵ They seem to assume, as do their colleagues discussed above, that there is some commonly understood distinction (fuzzy at times) between the two. But the absence of a working definition or common understanding of those terms has created the uncertainty and dissatisfaction with the Court’s approach to REA problems from *Sibbach* to *Burlington Northern*. There is no reason to think that *Shady Grove* will in any way alleviate those feelings; if anything, it will intensify them.

B. A Better Way, with Thanks to Justice Harlan

The burden of the critic, at least in the minds if not the words of those upon whom he inflicts his views, is to come up with something better. The first question is whether the text of the Federal Rule actually addresses the precise choice-of-law issue the court must decide. If it does not, then neither the Rule nor REA has any application. If it does, there are two ways to ask the questions necessary to give meaning to “substantive right” in REA.²¹⁶ They are similar, but they differ slightly in the breadth of insulation from displacement that they offer to state law. I do not intend to suggest that either approach would do away with difficult cases under REA (although the first approach set out below

211. Redish & Murashko, *supra* note 35, at 31.

212. *Id.* at 33.

213. *Id.* at 32-33.

214. *Id.* at 62. See *supra* text accompanying note 187.

215. *Id.* at 58-61.

216. This suggestion only applies to cases where the applicability (and hence the legitimacy) of a Federal Rule promulgated under the authority of REA is at issue. It has no application to cases that RDA governs, such as *Erie*, *Guaranty Trust* and *Byrd*.

might tend to because of its rigidity). The Justices' current approaches, however, resolve nothing on the basis of any clear rationale.

Perhaps the Court has been so hesitant because it is highly averse to creating an approach or a rule that will give a "bad" result in some cases. Both separation of powers and federalism are sensitive issues in our legal culture, and the advantage in not having an identifiable approach lies in the Court's ability to reach the "right" result in each individual case.²¹⁷ The Court's caution is understandable but unrealistic. It is difficult to think of any legal rule, substantive or procedural, that does not on occasion produce results with which the decision-maker or society more generally are uncomfortable. When those decisions occur with unacceptable frequency, the law changes, whether by legislative enactment, administrative rule-making or common law development. That is the process that the Anglo-American legal systems have followed for close to a millennium. Whether we are aware of it or not, the standard we actually use in judging the utility of a particular rule is whether it works well *most of the time*. Otherwise the legal system ends up caught between the Scylla of constant *ad hoc* adjudication that defies prediction by bench or bar and the Charybdis of wholly procrustean rules. Predictability is a value in our system, albeit certainly not the only one. The Court's REA jurisprudence has yielded only unpredictability, of which *Shady Grove* is only the most recent example. I propose, therefore, that we need some predictability in REA cases, and I see two possibilities for working rules that might help produce it.

First, the courts might ask whether the state law and Federal Rule at issue tend to establish or negate an element of the claimant's cause of action or a defense on the merits. If the state law *does not*, then it is procedural, but that is not the end of the inquiry. One must still ask whether the Federal Rule *does* tend to establish or negate an element. If so, it trenches upon REA-forbidden territory; otherwise it is "procedural" for REA purposes and can apply. Courts seem to have had far less trouble agreeing on what goes to the merits than on what constitutes substance *versus* procedure. I shall refer to this as the elements approach. It is the narrower of the two possible approaches. It has two advantages. It focuses attention on how people order their conduct on a day-to-day basis, not on how they litigate once a claim has arisen. The second advantage is that it is far easier to apply and far less

217. I set to one side Justice Jackson's observation that whatever the Court does is "right" by definition. See *Brown v. Allen*, 344 U.S. 443, 540 (1953) ("We are not final because we are infallible, but we are infallible only because we are final."). It is true, but not analytically useful.

amorphous than the Court's current approach—even if one can say at this point that the *Court* has a current approach. There is a significant disadvantage, however. Focusing narrowly on the elements of the claim or of a defense on the merits subordinates rules intended to govern day-to-day behavior that are nonetheless not elements of any cause of action. As Justices Stevens and Ginsburg pointed out in *Shady Grove*, rules that ostensibly regulate procedure may have true non-procedural goals.²¹⁸ A procedural rule may exist to regulate non-litigation conduct, as Professor Ely suggested.²¹⁹

It may be better, therefore, to ask whether, before the litigation began and assuming the parties were fully aware of the competing rules, they would rationally have ordered their conduct in accord with one of the rules. Alternately stated, does the rule exist to govern conduct outside of the courthouse and before commencement of litigation? I shall refer to this as the behavioral approach. It is somewhat broader than Justice Harlan's primary-conduct approach in his *Hanna* concurrence,²²⁰ because the behavioral approach would consider the decision of whether or not to sue to be antecedent to the litigation process itself, whereas it seems unlikely that Justice Harlan would have regarded that decision as substantive within the meaning of REA. In some cases—not many, I think—one would classify a rule as procedural under the elements approach but substantive under the behavioral approach. Given the cloudiness of Congress's "any substantive right" language and the sensitivity of separation-of-powers and federalism issues, caution may counsel the Federal Rule to yield.

In *Shady Grove*, both approaches yield the same result. Under the elements approach, one would look at the choice-of-law issue—whether to certify a plaintiff class—and ask whether the availability of the class action device goes to any of the elements of the penalty claim or a defense on the merits. The elements of the penalty claim are simple: a properly documented claim and payment more than thirty days thereafter. Available defenses on the merits appear to include timely payment or that the plaintiff did not properly document the claim. Whether there can be a class action or not on behalf of similarly situated

218. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1453 (2010) (Stevens, J., concurring in part and concurring in the judgment); *id.* at 1463 n.2, 1465 (Ginsburg, J., dissenting).

219. See Ely, *supra* note 9, at 727-28. See also *infra* notes 239-44, 245-52 and accompanying text. One apparent example of that arose in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *infra* notes 239-244 and accompanying text.

220. See *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

claimants does not go to the elements of a claim or merits defense. A class action, after all, is not itself a cause of action; it is a consolidation device for claims that may sound in torts, contracts, property or under a statute. Under the elements approach, the Court reached the correct result.

Let us consider the behavioral approach. Assuming *arguendo* that Allstate had an established practice of paying claims late, one should ask whether the underlying legislative purpose of section 901(b) was to enable late payment of claims—telling insurers, in effect, that they could ignore New York’s statutory prompt-payment obligation with relative impunity. That seems unlikely, since the legislature would have been undermining one of its own statutes.²²¹ It would, in effect, have been authorizing violations of the law. It is far more likely that the statute, rather than intending to regulate behavior, sought merely to limit one of the devices otherwise available to seek redress for bad behavior. If section 901(b) is not directed at regulating behavior—providing incentive either to undertake or to refrain from undertaking some action—then it is not substantive within the meaning of the behavioral approach, and the *Shady Grove* Court reached the correct result.

Examining some of the Court’s vertical choice-of-law cases from the perspectives I posit produces interesting results.²²² *Sibbach* involved a personal privacy²²³ right that conflicted with Rule 35. Nonetheless, the five-to-four majority ruled that Rule 35 applied, rejecting the defendant’s broad reading of “substantive” in REA:

We are thrown back, then, to the arguments drawn from the language of the Act of June 19, 1934. Is the phrase “substantive rights” confined to rights conferred by law to be protected and enforced in accordance with the adjective law of judicial procedure? It certainly embraces such rights. One of them is the right not to be injured in one’s person by another’s negligence, to redress infraction of

221. One might hypothesize that this is exactly what the legislature intended because of purely political reasons. Perhaps the legislature wanted to look like it was doing something for consumers while not significantly affecting the corporate base from which many political candidates draw considerable funding. There is no evidence of that, which of course may mean nothing more than that the legislature accomplished its purpose well, but I am not so much of a cynic as to give such a presumption weight in the legal balance. *But see supra* note 75.

222. Bear in mind that REA’s prohibition addresses only federal rules that REA authorizes, presently consisting of the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. *Hanna* made quite clear that its approach with respect to the Federal Rules applied only to those created under the authorization of REA; in all other cases, one must deal with what Chief Justice Warren called the “relatively unguided *Erie* Choice. . . .” *Hanna*, 380 U.S. at 471.

223. *See supra* notes 89-94 and accompanying text.

which the present action was brought. The petitioner says the phrase connotes more; that by its use Congress intended that in regulating procedure this court should not deal with important and substantial rights theretofore recognized. Recognized where and by whom? . . .

The asserted right, moreover, is no more important than many others enjoyed by litigants in District Courts sitting in the several states, before the Federal Rules of Civil Procedure altered and abolished old rights or privileges and created new ones in connection with the conduct of litigation. The suggestion that the rule offends the important right to freedom from invasion of the person ignores the fact that as we hold, no invasion of freedom from personal restraint attaches to refusal so to comply with its provisions. If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. 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.²²⁴

The majority connoted that REA's limiting language referred only to the substantive rights and duties directly involved in the plaintiff's claim and defenses on the merits. The four dissenting Justices argued that personal privacy was special and Rule 35's contrary provision should have been a matter of legislation, not rule-making by the Supreme Court.²²⁵

Under the elements approach, *Sibbach* presents no problem. The right not to be subject to a court-ordered physical examination is no part of the plaintiff's claim or a defense on the merits. Wilson sued for personal injuries.²²⁶ The elements of her tort claim were defendant's duty of care, breach of duty, injury and causal connection between breach and injury. The state-law entitlement to avoid a physical examination²²⁷ does not address any element of her claim. Wilson had no obligation to establish such an entitlement as part of her case-in-chief, nor would *Sibbach*'s demonstrating its absence tend to establish any defense. The elements approach supports the *Sibbach* result.

The behavioral approach yields the same result, though by looking at the events antecedent to the litigation rather than the elements of claims and defenses. The action for damages arose out of an automobile

224. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13-14 (1941).

225. *See id.* at 17-18 (Frankfurter, J., dissenting).

226. *Id.* at 6.

227. *Id.* at 7 & n.3.

accident.²²⁸ How likely is it that Wilson's agent drove as he did because he or the company thought it could use Rule 35 to avoid the Illinois law? Assume for the sake of discussion that the accident occurred when the Wilson & Co. vehicle struck Sibbach, a pedestrian, while she was crossing the street. Is it likely that Sibbach decided to cross in front of the oncoming vehicle rather than after it passed because she knew that Illinois law shielded her from being ordered to undergo a physical examination? The mind reels at the suggestion.²²⁹ It is absurd to believe that either party ordered its conduct in light of the Illinois privilege. Assuming that the parties even knew of the Illinois privilege, it not something that would have caused either of them to act or refrain from acting in a particular way—nor is it conceivable that the rule-maker had such a purpose in mind when creating the rule. The *Sibbach* majority was correct that Rule 35 was not substantive for REA purposes.²³⁰

The Court's next encounter with the applicability of the Federal Rules came in the 1949 trio.²³¹ In *Ragan v. Merchants Transfer & Warehouse Co.*, the issue was whether state law, which provided that service of process stopped the running of the statute of limitations, or Federal Rule 3, which made filing the complaint the commencement of an action, governed whether the action was timely.²³² Rule 3, then as now, said nothing about stopping a limitations period.²³³ The Court ruled that state law governed because the choice between federal and

228. *Sibbach v. Wilson & Co.*, 108 F.2d 415, 415 (7th Cir. 1939), *rev'd*, 312 U.S. 1 (1941).

229. The actual situation makes the suggestion even more absurd. The accident occurred in Indiana, yet the dispute was over whether the *Illinois* privilege governed. *Sibbach*, 312 U.S. at 7. In the 1930's the prevailing choice-of-law rule was *lex loci delicti* (the law of the place of the wrongs). PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 794-95 (5th ed. 2010). The reader may well ask why the parties would have referred to the law of Illinois at all. The answer is that the action was in the Illinois federal court, and under the conflicts regime of the time, the forum would apply the substantive law of the place where the accident occurred but would apply its own procedural law. Illinois law was involved precisely because it was procedural for horizontal choice-of-law purposes. How likely is it that the parties had that in mind when they acted in Indiana? Even if their attorneys were well versed in the complexities of conflict of laws, it is doubtful that such considerations would have entered their thinking if they had known that their clients planned to drive in Indiana.

230. The majority reversed the district court's order holding Wilson in contempt for her refusal to submit to examination. *Sibbach*, 312 U.S. at 16. It did so only because Rule 35's text explicitly excluded contempt as a sanction. *Id.* Had Rule 37 not contained that limitation, the contempt citation would have been justified. Rule 37 was not substantive under the test of the time, and the majority opinion is clear that only Rule 37's internal limitation prevented the citation. *Id.* Notably, the Court did not rule out any other sanction under Rule 37.

231. See *supra* note 41 and accompanying text.

232. 337 U.S. 530 (1949).

233. See MOORE'S FEDERAL PRACTICE § 3.01, at 3-5 (2011); FED. R. CIV. P. 3.

state law was outcome-determinative.²³⁴ When the Court revisited the issue in *Walker v. Armco Steel Co.* thirty-one years later, it used *Hanna's* approach and relied on the Rule's silence to find that there was no direct conflict.²³⁵ The result was the same though the method of reaching it differed.

The elements approach is consistent with *Walker* for the reason upon which *Walker* relied. Rule 3 does not speak directly to the question of the event that stops a state statute of limitations from running,²³⁶ thus falling outside of *Hanna's* direct collision requirement. Neither the Rule nor REA has anything to say about the case, and therefore, one comes back to *Byrd* balancing, at which point the elements approach does not apply.²³⁷ Under RDA, the appropriate question is whether some dominant federal interest requires stopping the statute of limitations for a state-created claim on the date of filing rather than the date of service. Neither Congress nor the courts have ever suggested that there is. The state rule governs by default.²³⁸

The behavioral approach reaches that result but reasons differently. The service rule that state law established supported no interest in how the parties conducted themselves in the events leading up to the accrual of the cause of action and the decision to commence a lawsuit. *Ragan* was an automobile accident case. Whatever the purposes of service-of-process rules and statutes of limitations are, no one has ever suggested that they exist to control how people drive or whether they decide to sue following an accident. Rather, they exist to control how people litigate.

In *Cohen v. Beneficial Industrial Loan Corp.*,²³⁹ the issue was whether the plaintiff in a shareholder's derivative action had to post a bond for defense expenses, which state law required. Federal Rule 23²⁴⁰ imposed no such requirement. Applying *Guaranty Trust*, the Court ruled that the state law governed, reasoning that it created a new substantive liability for the plaintiff and that *Erie's* policy of achieving

234. *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532-33 (1949).

235. 446 U.S. 740 (1980).

236. The Rule does, however, control with respect to federal limitations periods. See, e.g., *United States v. Wahl*, 583 F.2d 285, 289 (6th Cir. 1978) (holding that Rule 3 governs federal limitations periods, relying in part on 28 U.S.C. § 2415(a) (statute of limitations specifying filing as the critical date)). The Supreme Court strongly implied this in *Walker v. Armco Steel Co.*, 446 U.S. 740, 750-51 (1980) ("There is no indication that the Rule was intended to toll a state statute of limitations." (emphasis added)).

237. See *supra* note 222.

238. See Doernberg, *supra* note 11, at 645.

239. 337 U.S. 541 (1949).

240. Rule 23 then governed derivative actions. See *Cohen*, 337 U.S. at 556. Today FED. R. CIV. P. 23.1 governs; the requirements are unchanged.

the same substantive results in diversity litigation as in state litigation mandated applying the state rule.²⁴¹

The Court has not faced that question again, so one can only speculate how *Hanna*'s approach would have decided the case. The *Hanna* Court might have reached the same result as *Cohen* because Rule 23.1 does not mention bonds. Thus, the Court might have found the Rule inapplicable.²⁴² On the other hand, it might have concluded that Rule 23.1 sets out the exclusive list of conditions for maintaining a derivative action in the federal courts and that the state was attempting to modify the Rule.²⁴³ Either approach has some traction.

The elements approach would regard the bond requirement as procedural because it does not go to any element of the shareholder's claim against the corporate fiduciaries, nor is it part of any defense on the merits that they might offer. Thus under the elements approach, there is no REA problem; the remaining (but really preliminary) question is whether Rule 23.1 really does address the issue. That, however, is a question about the Rule's scope, not its legitimacy.

For the behavioral approach, *Cohen* presents a difficult problem. One doubts the state legislature enacted the bond requirement to encourage or facilitate mismanagement by corporate fiduciaries. It is a veritable certainty that the corporate fiduciaries did not undertake their actions (whatever they were and whether or not they were unlawful) in reliance on the law requiring a shareholder to post a bond in a derivative suit. On the other hand, it is not hard to see the purpose of the requirement as an attempt to regulate shareholders' behavior by discouraging groundless actions undertaken in order to extort settlements not supported by the merits and benefiting only the individual plaintiff and counsel.²⁴⁴ Thus viewed, the rule intends to discourage the decision to commence litigation for the wrong reasons. In that sense, it intends to

241. See *Cohen*, 337 U.S. at 556. But as in *Ragan*, it was less than clear that there was unavoidable conflict between the state and federal rules, although Justice Scalia's *Shady Grove* approach might have found one on the ground that Rule 23.1's listing of the requirements for maintaining such an action excludes by clear implication a court-ordered bond.

242. Cf. *Walker v. Armco Steel Co.*, 446 U.S. 740 (1980) (holding Rule 3's non-mention of statutes of limitation meant state rule governed).

243. This was Justice Scalia's approach to Rule 23 in *Shady Grove*. See *supra* notes 76-78 and accompanying text.

244. See Ely, *supra* note 9, at 729. The statute (Chapter 131, New Jersey Laws of 1945, N.J.S.A. 14:3-15 to 17 (current version at N.J.S.A. 14A:3-6(3) (2006))) actually aimed more broadly. It penalized any unsuccessful plaintiff whose holdings in the company were less than five percent and did not exceed \$50,000 in value, not merely one whom the court determined not to have had reasonable grounds for bringing the action. See *Cohen*, 337 U.S. at 543. (Apparently shareholders with greater holdings could bring meritless actions without such official disapproval.)

control behavior antecedent to the commencement and conduct of the litigation itself, so the behavioral approach would not apply Rule 17. This is one example of the elements approach and the behavioral approach differing in outcome. *Cohen* also exemplifies a rule that is procedural in form but has a substantive, extra-litigation purpose.

The final case, *Woods v. Interstate Realty Co.*,²⁴⁵ involved a direct collision between an explicit Federal Rule and state law. Mississippi law²⁴⁶ required foreign corporations doing business in the state to designate an in-state agent for service of process and barred non-compliant corporations from being plaintiffs in any state court.²⁴⁷ The Supreme Court held that the state law governed, basing its decision explicitly on *Guaranty Trust* despite Federal Rule 17's unambiguous declaration that the law of a corporation's home state governed its capacity to sue.²⁴⁸

The *York* case was premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case; that where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court. The contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that *Erie Railroad Co. v. Tompkins* was designed to eliminate.²⁴⁹

245. 337 U.S. 535 (1949).

246. MISS. CODE 1942, § 5319.

247. *Woods* argued that Mississippi law voided the contract. The Fifth Circuit declined that interpretation, *Woods v. Interstate Realty Co.*, 168 F.2d 701 (1948), *rev'd on other grounds*, 337 U.S. 535 (1949), and ruled that Mississippi could not control the access of a litigant to the federal courts.

248. FED. R. CIV. P. 17(b) ("Capacity to sue or be sued is determined as follows: . . . (2) for a corporation, by the law under which it was organized.").

249. *Woods*, 337 U.S. at 538. The Court relied on its earlier decision in *Angel v. Bullington*, 330 U.S. 183 (1947), involving the same point but with a different state's law.

The Court conflated two matters it should have considered separately. When the Court referred to the plaintiff as being "barred from recovery in the state court," *Woods*, 337 U.S. at 538, it should have distinguished between whether or not the bar went to the elements of the case. Inability to plead or prove one or more elements of the cause of action may bar recovery. Inability to pay the state's filing fee may also bar recovery. The first is substantive; the second clearly is not. If the state's filing fee were higher than the federal, would even the *Woods* Court have declared it outcome-determinative and used the state rule? Certainly the *Hanna* Court would not have. This exemplifies the persistent problem with the outcome-determinative test: it asks whether a particular rule is outcome-determinative, but it does not ask why. To decide whether a Federal Rule of Civil Procedure is within REA, that question is essential.

When the Court decided *Interstate Realty*, however, *Hanna v. Plumer*'s approach to conflicts involving a Federal Rule of Civil Procedure was not in place. Under *Hanna*, the Court might come out the other way. It would be disingenuous to read Rule 17 not to address the question of capacity to sue.²⁵⁰ Then the issue would be whether the Rule violated REA. *Hanna*'s approach was to ask whether the rule "really regulates procedure," borrowing from *Sibbach*.²⁵¹ The Court might decide that regulating access to the courts is procedural, or, as Professor Ely argued,²⁵² it might read the Mississippi rule to address the substantive goal of encouraging out-of-state corporations doing business there to register and find that as applied, Rule 17 violated REA's substantive-rights limitation.

The elements approach would clearly have *Interstate Realty* come out differently from its actual result. *Interstate Realty*'s claim sounded in contract to recover a broker's commission on a real estate transaction.²⁵³ The elements of the contract claim are familiar to all, and they do not include capacity to sue. Rule 17 would therefore be legitimate under REA using the elements approach.

The behavioral approach would probably reach the opposite result. It would depend on whether Mississippi wanted the state rule as a means of controlling the conduct of litigation, in which case it would not affect extra-litigation behavior or, as Professor Ely suggested, it was serving the substantive purpose of having foreign corporations doing business in Mississippi register and pay required state fees. If Professor Ely's surmise was correct, then the behavioral approach would reject Rule 17's application and diverge from the elements approach.

Since *Hanna*, the Court has decided only a few cases involving the applicability of a Federal Rule. Generally, the Court has read the Rule not to reach the critical issue with sufficient explicitness to qualify under *Hanna*'s direct-collision standard. The first such case was *Walker v. Armco Steel Co.*, involving Rule 3 and its effect on statutes of limitations, and the Court read Rule 3 not to reach the question.²⁵⁴ The elements and behavioral approaches lead to the same result for the same reason.

250. See *supra* note 216.

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

252. See Ely, *supra* note 9, at 728.

253. *Woods*, 337 U.S. at 535-36.

254. *Walker v. Armco Steel Co.*, 446 U.S. 740 (1980). See *supra* notes 113-16 and accompanying text.

The second was *Semtek International Incorporated v. Lockheed Martin Corporation*.²⁵⁵ *Semtek* asked whether state or federal law governed the preclusive effect of a federal judgment dismissing a diversity case on state statute-of-limitations grounds.²⁵⁶ The Court considered the effect of Rule 41(b), which stated in pertinent part that “Unless the dismissal order states otherwise . . . any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.”²⁵⁷ *Semtek* had brought a diversity action in a California federal court seeking damages for breach of contract and business torts.²⁵⁸ The district court dismissed on the basis of California’s statute of limitations,²⁵⁹ and the Ninth Circuit affirmed.²⁶⁰

Semtek then sued on the same claims in Maryland state court.²⁶¹ Maryland had a longer limitations period, and Lockheed, a citizen of Maryland, could not remove.²⁶² Instead, it sought dismissal on the ground of claim preclusion. The Maryland court granted the motion, reasoning that federal law governed the preclusive effect of a federal judgment and that Rule 41(b) made the limitations dismissal “an adjudication on the merits.”²⁶³ No one raised an REA question. A unanimous Court held that Maryland was correct about federal law governing²⁶⁴ but incorrect in its reading of Rule 41(b).²⁶⁵ Justice Scalia, writing for the Court, declined to read “on the merits” to have preclusive effect.²⁶⁶ In his view, “The original connotation of an ‘on the merits’ adjudication is one that actually ‘pass[es] directly on the substance of [a] claim’ before the court.”²⁶⁷ Justice Scalia concluded that the phrase in

255. 531 U.S. 497 (2001).

256. *Id.* at 499.

257. FED. R. CIV. P. 41(b).

258. *Semtek*, 531 U.S. at 499.

259. The district court was quite explicit, dismissing *Semtek*’s claims “ ‘in [their] entirety on the merits and with prejudice.’ ” *Id.* at 499 (quoting the district court’s order of dismissal).

260. *Id.*

261. *Id.*

262. See 28 U.S.C. § 1441(b) (2006).

263. FED. R. CIV. P. 41(b); *Semtek*, 531 U.S. at 500. Claim preclusion requires dismissal when there is a valid, final judgment on the merits. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979); JACK FRIEDENTHAL, ARTHUR R. MILLER & MARY KAY KANE, *supra* note 27, § 14.4, at 619-20.

264. *Semtek*, 531 U.S. at 507.

265. *Id.* at 509.

266. *Id.* at 505-06.

267. *Id.* at 501 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 19, cmt. a, at 161) (1982)).

Rule 41(b) did not refer to the preclusive effect of a dismissal,²⁶⁸ so that the Federal Rule did not apply by its terms. That was the end of the discussion of the Federal Rule.²⁶⁹

268. *Id.* at 503 ("Rule 41(b) sets forth nothing more than a default rule for determining the import of a dismissal (a dismissal is 'upon the merits,' with the three stated exceptions, unless the court 'otherwise specifies'). This would be a highly peculiar context in which to announce a federally prescribed rule on the complex question of claim preclusion, saying in effect, 'All federal dismissals (with three specified exceptions) preclude suit elsewhere, unless the court otherwise specifies.' And even apart from the purely default character of Rule 41(b), it would be peculiar to find a rule governing the effect that must be accorded federal judgments by other courts ensconced in rules governing the internal procedures of the rendering court itself. Indeed, such a rule would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules 'shall not abridge, enlarge or modify any substantive right. . . .'" (citations omitted)).

This parallels the *Walker* Court's approach. See *supra* note 116 and accompanying text. The interpretive method Justice Scalia employed in *Semtek* may seem at odds with his general disdain for divining the intent of the drafters of legislation. He was notably skeptical of Justice White's attempt to piece together Congress's intent underlying two statutes in *Pennsylvania v. Union Gas Co.*:

That methodology is appropriate, and Justice White's conclusion is perhaps correct, if one assumes that the task of a court of law is to plumb the intent of the particular Congress that enacted a particular provision. That methodology is not mine nor, I think, the one that courts have traditionally followed. It is our task, as I see it, not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.

491 U.S. 1, 29-30 (1989) (Scalia, J., concurring in part and dissenting in part). That approach is why scholars refer to Justice Scalia as a textualist. See, e.g., Bernard W. Bell, *R-E-S-P-E-C-T Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1253, 1277 (2000) (characterizing Justice Scalia as "perhaps the premier new textualist"). But then, Justice Scalia does as well, and he embraces the appellation. See Scalia, *supra* note 14, at 23-24. It is important, however, to understand that Justice Scalia does not espouse a purely mechanical reading of statutory and constitutional text. He recognizes that every enacted law has a purpose, but he thinks courts should determine that purpose from the words of the provision and the context in which it became law rather than isolated comments—or even committee reports—from legislators who supported or opposed passage. See generally, Scalia, *supra* note 14.

269. Justice Scalia noted that if Rule 41(b) had the effect that Lockheed urged, there might have been an REA problem. *Semtek*, 531 U.S. at 503.

There being no dispositive Federal Rule, the Court asked whether state or federal law should govern—the "relatively unguided *Erie* choice." *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). Because the question involved the preclusive effect of a federal judgment, the Court held that federal common law should govern—hardly a shocking conclusion. (In my terms, the Court found that the federal interest in controlling the preclusive effect of federal judgments was dominant. The *Byrd* balance thus tipped to the federal side.) That left the question of finding content for the federal common law. Using a straightforward interest-balancing approach, Justice Scalia concluded that there was no need for a uniform federal rule. *Semtek*, 531 U.S. at 508. This distinguished *Semtek* from *Byrd*, see *supra* notes 43-45, 78 and accompanying text, in which the Court had found a dominant federal interest sufficient to displace the state rule that otherwise would have governed. In *Semtek*, "there is no conceivable federal interest in giving that [California] time bar more effect in other courts than the California courts themselves would impose." *Semtek*, 531 U.S. at 509. He noted further that creating a new rule rather than using the state rule would simultaneously create the kind of incentive for parties to forum-shop that *Erie* and *Hanna* condemned. *Id.* at 508-09.

The elements approach would reach the same result. Given the Court's reading of Rule 41(b) not to address preclusion at all, there can be no REA problem, so one never need ask whether preclusion is an element of a claim or a defense on the merits. If the Court had read Rule 41(b) to address preclusion, then the elements approach would follow what the Court found to be the dictates of the Rule, because preclusion is not an element of any claim or any defense on the merits.²⁷⁰

The behavioral approach would agree with the elements approach. Given that the Federal Rule does not reach the issue, there is nothing further to analyze. If the Court had read the Rule to prescribe the applicable test for preclusion, then the behavioral approach would apply it because the rules of claim preclusion address intra-litigation conduct only, being designed to encourage consolidation of all claims from a single incident into a single action. This might differ from the result the *Hanna* Court might reach because preclusion so often controls disposition of the case because of its effect on adjudication of the merits. Moreover, one might regard the rules of claim preclusion as having the same kind of dual purpose as do statutes of limitations, first to make litigation more timely and efficient, but second to provide repose to the defendant. Thus, whether preclusion rules "really regulate[] procedure" or have only an "incidental" effect on substantive rights is a matter for guesswork and argument. That is one of the problems *Hanna* bequeathed.

*Gasperini v. Center for Humanities, Inc.*²⁷¹ involved a Federal Rule, but not an REA problem. The case presented a collision between a state rule and the Seventh Amendment.²⁷² The Supremacy Clause²⁷³ dictates the result of that clash: federal law prevails. Justice Ginsburg then examined, in service of *Erie*'s same-outcome policy,²⁷⁴ whether it

Accordingly, the Court adopted California law as the content of the federal common law rule in this case and remanded to the Maryland courts for determination of the California rule of preclusion. *Id.* at 509.

270. To be sure, its application may decide a claim. But that is true of virtually any procedural rule. The fact that it may be dispositive (or, in *Guaranty Trust*'s terms, outcome-determinative) does not transform it into an element of claims for business torts or breach of contract.

271. 518 U.S. 415 (1996).

272. See *supra* notes 119-24, 164-69 and accompanying text.

273. U.S. CONST. art VI, § 2.

274. In writing *Guaranty Trust*, Justice Frankfurter referred several times to *Erie*'s "policy." See, e.g., *Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945) ("Our starting point must be the policy of federal jurisdiction which *Erie* . . . embodies."); *Guaranty Trust*, 326 U.S. at 109 ("The nub of the policy that underlies *Erie* . . . is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result."). The reference to policy was necessary, because *Erie* purported to

would be possible for the federal courts to accommodate the substantive part of the New York rule (the limitation of damages) while ignoring the procedural part that created the Seventh Amendment conflict.²⁷⁵ The Court decided that Rule 59's new-trial power offered the judicial determination of unreasonableness that New York sought without running afoul of the Seventh Amendment's²⁷⁶ prohibition of judicial re-examination of facts determined by a jury.²⁷⁷

The *Gasperini* majority apparently did not perceive any REA problem, since there is no significant mention of REA in the opinion. Justice Scalia also did not think there was an REA problem, because he saw the matter as entirely procedural, not substantive, within the meaning of REA.²⁷⁸ His dissent rested on Seventh Amendment grounds.²⁷⁹ Therefore *Gasperini* is not a true REA case. REA cases concern themselves with situations where someone argues that a Federal Rule overreaches—treads on the substantive area that REA removes from Federal Rules competence. *Gasperini* did not involve that sort of problem. Justice Scalia did think there was federal overreaching in the case, but he laid it at the feet of the Courts of Appeals and the *Gasperini* majority for what he saw as their infidelity to common law history.²⁸⁰ He had no quarrel with Rule 59 itself.

The elements approach would reach the result the Court reached. The New York materially-deviates standard goes to an element of the case—it operates as a cap on a defendant's total exposure to damages, albeit a vague one.²⁸¹ One might regard it as an element of the plaintiff's claim, though I think it is better to regard it as an element of a defense on the merits. Legislatures or the common law prescribe what is compensable. *Gasperini*'s state-law claims sounded in contract and in

rest on constitutional grounds, and the decision in *Guaranty Trust* could not; Congress clearly has the power to prescribe statutes of limitations for actions brought in the federal courts. See *supra* note 156.

275. *Gasperini*, 518 U.S. at 431-38.

276. U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact, tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

277. Justice Scalia dissented on this point. He viewed Rule 59 as enshrining the federal "seriously erroneous result" standard, *Gasperini*, 531 U.S. at 468 (Scalia, J., dissenting) (citation omitted), fatally in conflict with the New York reasonableness standard, which he also characterized as procedural. *Id.* at 464. Thus, he thought it would be error for a district court to use the New York standard.

278. *Id.* at 437-38.

279. See *id.* at 450-61.

280. *Id.* at 451-58.

281. See *supra* notes 120-24 and accompanying text.

tort (conversion and negligence). The New York legislature had established a recovery limit,²⁸² and *Gasperini* said that it must apply. The statutorily imposed limit on damages is an element of a defense on the merits, because the legislature made it so. Thus, under the elements approach it is substantive for *Erie* and REA purposes.²⁸³

The problem then is how to apply the New York damages limitation without violating the Seventh Amendment. Rule 59 is available for that purpose. Federal trial judges have always had the power to order new trials if the verdict is against the weight of the evidence.²⁸⁴ The reasonableness of a damages award is another application of the weight-of-the-evidence standard. For a trial judge to find that the damages are excessive or insufficient, she need only decide that the evidence does not support damages in the amount the jury awarded. It is at least questionable, however, whether she can grant remittitur directly. The Supreme Court has not held either that remittitur is or is not constitutional.²⁸⁵ It appears, however, to have accepted the use of the conditional new-trial device under Rule 59 for that purpose.²⁸⁶

282. No one seems to doubt that a legislature can place an absolute cap on damages. The *Gasperini* parties accepted that. See *Gasperini*, 518 U.S. at 428-29. Justice Stevens spoke of such caps as being without Seventh Amendment problems and went further, endorsing New York's definition "in less mathematical terms" as "not requir[ing] a different constitutional conclusion." *Id.* at 442 (Stevens, J., dissenting). Justice Scalia appeared tacitly to accept the legitimacy of absolute legislative monetary caps, but argued that New York's limitation was a standard of judicial review rather than a substantive rule of law. *Id.* at 464-65 (Scalia, J., dissenting).

283. There is another Federal Rule that no Justice mentioned that supports the majority's approach. FED. R. CIV. P. 54(c) provides that a judgment other than a default judgment "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." It is law, not fact, that establishes a party's entitlement to relief within the meaning of the Rule. If that were not so, fixed statutory caps on damages, which the Court allows, would be of no effect if a jury decided to ignore them.

284. See CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 95, at 680 (6th ed. 2002) (noting excessiveness of damages as one of the "usual grounds" for grant of new trial). See generally 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2807, at 78-86 (1995).

285. In *Dimick v. Schiedt*, 293 U.S. 474 (1935), the Court found *additur* unconstitutional because it was unknown to the common law. "[T]he established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to increase the amount of damages awarded by a jury in actions such as that here under consideration." *Id.* at 482. Thus, insufficiency of damages was not a ground upon which a federal trial court could order a new trial (even conditionally to allow the losing party to stipulate to the entry of judgment in a higher amount). (Interestingly, the Court rested its decision on the plaintiff's entitlement to a jury trial, not on the defendant's. See *id.* at 486-87.)

In *dictum*, the Court cast doubt on the legitimacy of *remittitur*, but noted remittitur's long history of acceptance in the federal courts and acceded to it. *Id.* at 482-85. The Court also implied that it would decline to reconsider the matter. *Id.* at 485.

[I]t therefore may be that, if the question of *remittitur* were now before us for the first time, it would be decided otherwise. But, first announced by Mr. Justice Story in 1822,

Under the behavioral approach, New York's limit is conduct-regulating in the extra-litigation sense. The potential loss that an actor faces for running afoul of the law defines, at least in part, society's judgment about the degree of care the actor should exercise to avoid the loss. Judge Learned Hand's famous "formula" from *United States v. Carroll Towing Co.*²⁸⁷ demonstrates that. In his terms, if the economic burden of taking precautions against harm is less than the risk of harm multiplied by the probability of its occurring, the law of negligence demands that the actor undertake the burden. There is nothing so surprising about this; it mirrors the calculus that every rational person undertakes before acting.²⁸⁸ The New York reasonable-damages standard limits size of the risk of injury and therefore simultaneously limits the precautions that the wise actor will take.

C. "*The Road Not Taken*," with Thanks to Robert Frost²⁸⁹

Despite their differences about the result in *Shady Grove*, the Justices are unanimous about the process in which they engage to find an answer. All are balancing state and federal interests, which is actually

the doctrine has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving a *remittitur*, which this case does not, the doctrine would not be reconsidered or disturbed at this late day.

Id. at 484-85.

286. See WRIGHT, MILLER & KANE, *supra* note 284, § 2815, at 160-63.

If one reads Rule 59 not to apply, the issue then devolves to an application of RDA, not REA, with respect to the grant of a new trial. In other words, is it permissible for the federal courts to create federal common law to govern the situation? I suggest that it is, and the dominant federal interest is serving "the twin aim of *Erie*" (see *supra* note 135): avoiding forum-shopping that results in inequitable administration of the law.

287. 159 F.2d 169 (2d Cir. 1947). Judge Hand expressed himself in algebraic terms: "[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P . . ." *Id.* at 173.

288. The example I use when teaching is familiar to every law student and lawyer. The weary law student, facing extended preparation for the next day's class, must make a choice of whether to prepare or to get desperately needed sleep. It requires no extrasensory perception to know that she makes the decision after evaluating the likelihood of being called on to recite (probability), the penalty imposed (e.g., reduction in grade or temporary embarrassment) if the professor does call on an unprepared student (injury), and how much the student needs the extra sleep (the burden of taking precautions to avoid the event). Most children intuitively undertake exactly the same thought process whenever they contemplate violating a parental rule: the likelihood of discovery (probability), the potential penalty (injury), and the undesirability of foregoing the proposed action (i.e., the burden of taking precautions).

289. See Robert Frost, *The Road Not Taken*, in ROBERT FROST'S POEMS 219 (1971).

what the vertical choice-of-law doctrine demands.²⁹⁰ They differ only on what goes into the balance, not on balancing as the proper technique. The balance is sometimes predetermined. The Supremacy Clause²⁹¹ commands that a federal constitutional provision or a valid federal statute,²⁹² rule or regulation, tips the scales irretrievably to the side of federal law governing. With respect to the Federal Rules, REA determines their validity, and its criterion is that no Federal Rule shall “abridge, enlarge or modify” a substantive right. Thus, a Federal Rule that does modify a substantive right does not get into the balance at all because of REA, and one need not consult the Supremacy Clause.

The clash among the Justices concerns the scope of “substantive right” and the kind of evaluation in which the Court should engage when confronted with an REA question. Justice Scalia apparently believes that unless a Federal Rule purports to affect a substantive right, it is valid and applies on its own terms.²⁹³ He answers the REA question by looking only at the text of the Federal Rule.²⁹⁴ This is analogous to challenging the constitutionality of a statute “on its face,” and that is all that Justice Scalia thinks REA commands and permits.

Justice Stevens thinks one should look first at the state rule to determine whether it is substantive for REA purposes.²⁹⁵ If he characterizes the state rule as procedural, he will look no further, upholding the Federal Rule’s application. If the state rule is substantive, he apparently agrees with Justice Ginsburg on the proper course of action. One might therefore view Justice Stevens as closer to Justice Scalia on the result in *Shady Grove* but closer to Justice Ginsburg on REA technique more generally.

Whether the state rule is substantive or procedural, Justice Ginsburg also balances, but she reads “substantive” in REA to include not only the rules of decision that apply to the claim and defenses on the merits or to the parties extra-litigation behavior, but also any entitlement that may affect the amount of a judgment that a court can enter against a defendant in a single lawsuit.²⁹⁶ Thus, she treats section 901(b) as a substantive right although it does not affect the defendant’s total

290. See generally Doernberg, *supra* note 11.

291. U.S. CONST. art. VI, § 2.

292. Note the Supremacy Clause’s reference to “the Laws of the United States *which shall be made in Pursuance*” of the Constitution. *Id.* (emphasis added).

293. See *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1444 (2010).

294. See *supra* notes 104-06 and accompanying text.

295. See *supra* note 145 and accompanying text.

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

exposure to liability.²⁹⁷ Both Justices Stevens and Ginsburg, therefore, think that REA contemplates as-applied challenges, for only in that light is it necessary to examine the state rules involved. Thus, Justice Scalia thinks that the words of a challenged rule must explicitly abridge, enlarge or modify a substantive right to run afoul of REA. Justice Ginsburg thinks REA commands the Court to undertake a far more searching, difficult and amorphous examination into whether application of the Federal Rule would affect any substantive right that state law establishes.

In my view, this is symptomatic of a phenomenon that has made the *Erie* discussion more difficult: labeling something "substantive" as a shorthand way of saying that state law should govern the issue. That terminology comes from *Guaranty Trust*'s declaration that a matter was "substantive" (i.e., state law should apply) if the choice between state and federal law was outcome-determinative.²⁹⁸ That is how state statutes of limitation, ordinarily regarded as procedural,²⁹⁹ became substantive for *Erie* purposes. That was an unnecessary and unfortunate shorthand, because it prevented analysis rather than assisting it. State procedural rules often apply in diversity cases. Statutes of limitations are one example; burdens of proof are another.³⁰⁰

The basic vertical choice-of-law doctrine approach remains what it has been. State rules—substantive or procedural—apply by default unless federal law (i.e., a constitutional, statutory or regulatory provision or an existing rule of federal common law) displaces them or some dominant federal interest requires creating a new common law rule.³⁰¹ Justice Ginsburg's approach to REA would presage a more searching (and far more amorphous) examination of state procedural rules to see whether they "affect" a party's substantive rights.³⁰²

Justice Scalia's approach has the advantages of simplicity and predictability. If a Federal Rule does not address the elements that entitle a plaintiff or defendant to prevail on the merits or the parties' extra-litigation behavior, it passes muster under REA.³⁰³ Justice Stevens's approach begins at the other end, asking whether the state rule

297. See *supra* notes 128-33 and accompanying text.

298. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

299. See *supra* notes 30, 103, 153 and accompanying text.

300. See *supra* note 103 and accompanying text. See *infra* note 305 and accompanying text.

301. A federal common law rule would thereafter govern in the state courts as well, by reason of supremacy. See *supra* note 185. See generally Doernberg, *supra* note 11.

302. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1471 (Ginsburg, J., dissenting).

303. *Id.* at 1443 (Scalia, J., for himself, the Chief Justice, and Justices Thomas and Sotomayor).

addresses substance or procedure.³⁰⁴ He admits that the inquiry will not always be an easy one, noting that even rules designated as procedural may have substantive purposes and effects.³⁰⁵ That is one of the

304. *Id.* at 1449 (Stevens, J., concurring in part and concurring in the judgment).

305. *Id.* at 1453 n.8 (“I would apply [REA] . . . allowing for the possibility that a state rule that regulates something traditionally considered to be procedural might actually define a substantive right. Justice Scalia’s objection, moreover, misses the key point: In some instances, a state rule that appears procedural really is not. A rule about how damages are reviewed on appeal may really be a damages cap. See *Gasperini*, 518 U.S. at 427, 116 S. Ct. 2211. A rule that a plaintiff can bring a claim for only three years may really be a limit on the existence of the right to seek redress. A rule that a claim must be proved beyond a reasonable doubt may really be a definition of the scope of the claim. These are the sorts of rules that one might describe as ‘procedural,’ but they nonetheless define substantive rights. Thus, if a federal rule displaced such a state rule, the federal rule would have altered the State’s ‘substantive rights.’”). Justice Stevens overstates his point. First, the reference to *Gasperini* is misleading. The Court found N.Y. C.P.L.R. § 5501(c) (McKinney 1995 & Supp. 2010) to be both substantive and procedural. It applied the substantive part but not the procedural part. See *supra* notes 166-69 and accompanying text. His preceding statement about “a state rule that regulates something traditionally considered to be procedural” connotes that a cap on damages is in that category, but it is not. Damages caps are substantive, and federal courts must apply state caps unless some dominant federal interest calls for displacement. There has not been such a case.

His reference to limitations periods sometimes being substantive is correct, subject to the analysis of *Bournias v. Atlantic Maritime Co.*, 220 F.2d 152 (2d Cir. 1955). See *supra* notes 103, 153. The phenomenon occurs, but it does not occur often. Finally, I respectfully disagree with Justice Stevens that a burden of proof is substantive. It may have an important effect on adjudicating substantive rights, but it is not itself substantive. The Court’s closest discussion of burdens’ status came in *In re Winship*:

The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula “beyond a reasonable doubt” seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt. C. MCCORMICK, EVIDENCE § 321 (1954); see also 9 J. WIGMORE, EVIDENCE, § 2497 (3d ed. 1940). Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does “reflect a profound judgment about the way in which law should be enforced and justice administered.”

397 U.S. 358, 361-62 (1970) (citations omitted). *Winship* reflects the importance the Court attached to the burden. Far from classifying it as substantive, however, the Court spoke of it as a method of adjudication, not a rule of decision. The original Rules Enabling Act, ch. 651, 48 Stat. 1064, 1064 (1934), discussed the right of trial by jury in a separate section from REA’s “abridge, enlarge” language. See *supra* note 184. Section 1 contained the substantive rights limitation, but Congress addressed the jury trial right in § 2. It thus clearly did not regard the entitlement to a jury trial as a substantive right, and it is hard to believe that it would have felt differently about burdens of proof.

I recognize that I am squarely in conflict with a declaration in *Palmer v. Hoffman*:

Respondent contends in the first place that the charge was correct because of the fact that Rule 8(c) of the Rules of Civil Procedure makes contributory negligence an affirmative defense. We do not agree. Rule 8(c) covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which

difficulties with his position, because he does not set out a method for analyzing state rules in making that determination. Asking only whether a rule may have a substantive effect is not helpful.

The Court is quite right in stating that the

"outcome-determinative" test of *Guaranty Trust* . . . if taken literally, proves too much, for any rule, no matter how clearly "procedural," can affect the outcome of litigation if it is not obeyed. . . . To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether "substantive" or "procedural," is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.³⁰⁶

Justice Harlan rejected what he saw as the majority's rigid approach.³⁰⁷ I think Justice Harlan was correct, but a bit too narrow and insufficiently specific. He thought that REA focused on preventing the Federal Rules of Civil Procedure from affecting the laws under which people lived their everyday lives (rules of personal conduct), entered into commercial transactions (rules of contract) and conducted themselves to avoid harming others (rules of torts). To him, REA limited the Federal Rules to regulating the conduct of litigation in the

federal courts in diversity of citizenship cases must apply.

318 U.S. 109, 117 (1943). Justice Douglas's statement regarding the burden of proof in the state-created negligence claim in *Palmer* was the equivalent of declaring it substantive for *Erie* purposes. He borrowed directly from *Erie*'s language with his reference to "local law." See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 70, 74 & n.8. This does nothing so much as to demonstrate again the functional inutility of the labels "substantive" and "procedural." See WRIGHT & KANE, *supra* note 286, § 59, at 401 ("A particular issue may be classified as substantive or procedural in determining whether it is within the scope of a court's rulemaking power, or in resolving questions of conflict of laws, or in determining whether to apply state or federal. These are three very different kinds of problems. Factors that are of decisive importance in making the classification for one purpose may be irrelevant for another. To use the same name for all three purposes is an invitation to a barren and misleading conceptualism. . . ."). I am in conflict, however, only with the Court's stated reason, not with its result. No Federal Rule addresses burdens of proof. The matter then becomes one of *Byrd* balancing. With respect to a state-created claim or defense, there is no dominant federal interest in having a different burden of proof, so the state rule would apply by default. See *supra* text accompanying note 301; Doernberg, *supra* note 11, at 644-49. Professor Ely argued that the Court was correct to regard burdens of proof as substantive for REA purposes, but he also took the position that Congress could certainly legislate burdens of proof to apply in diversity cases because such matters are procedural and within Congress's legislative power to create and manage the federal courts. Ely, *supra* note 9, at 706-07 n.77. It is REA, not the Constitution, that prevents the Supreme Court from achieving that result through the Federal Rules.

306. *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

307. See *supra* note 184.

federal courts rather than conduct outside of and antecedent to litigation.³⁰⁸

I disagree with his implication that REA was only (or even primarily) intended as an instrument of federalism, particularly protecting *state* substantive rights from Federal Rules encroachment.³⁰⁹ REA does not limit itself to state-created substantive rights. If REA were an instrument of federalism, one might expect to see some reference to state law. One must therefore take REA's language to refer to substantive rights irrespective of the sovereign authority that creates them. REA antedated *Erie* by four years, so it is highly unlikely that Congress designed it to serve *Erie*'s purposes.³¹⁰ REA almost certainly was a separation-of-powers limitation,³¹¹ with Congress protecting its

308. See, for example, his reference to "a debilitating uncertainty in the planning of everyday affairs. . . ." *Hanna*, 380 U.S. at 474 (Harlan, J., concurring).

309. Professor Ely also saw REA as a statement of federalism. See Ely, *supra* note 9, at 718. In taking that position, he linked REA and RDA as "directed to the same general concern—protection of the prerogatives of state law. . . ." Ely, *supra* note 9, at 718. He does concede that there is "no evidence" that the Congress that enacted REA was thinking about RDA. Ely, *supra* note 9, at 721. Although Ely is accurate about the current understanding of RDA, there is evidence that the 1789 Congress was focused not on state prerogatives, but rather on the importance of applying American rather than English law. See generally WILFRED RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789* (1990).

310. *Sain v. City of Bend*, 309 F.3d 1134, 1137 (9th Cir. 2002) (citing Burbank, *supra* note 35). (The Ninth Circuit's opinion specifies Professor Burbank's article and gives the title correctly. The citation in the Federal Reporter, however, is "135 U. PA. L. REV. 909 (1987)," which refers to Steven N. Subrin, *How Equity Conquered Common Law*, 135 U. PA. L. REV. 909 (1987). Professor Subrin's article, however, does not discuss the point for which the court seems to have cited Professor Burbank.)

One should not forget that the Court's decision in *Erie* came as a shock; no one had anticipated it. See, e.g., Deborah Lynn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 356 (2006); Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675, 684 (1984). Justice Butler's opinion confirmed that: "No constitutional question was suggested or argued below or here." *Erie*, 304 U.S. at 82 (Butler, J., concurring in the result).

311. Presumably, REA would also forbid a Federal Rule from abridging, enlarging or modifying a right created by a foreign sovereign, although I can find no cases discussing that. Additionally, note that the original Rules Enabling Act, ch. 651, 48 Stat. 1064, 1064 (1934) refers to "the substantive rights of any litigant" at § 1. In § 2, after permitting the Supreme Court to unite the procedural rules of law and equity, REA specified, "Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate." This demonstrates that Congress was at least (though perhaps not exclusively) thinking of federal rights when it passed REA, because the Fourteenth Amendment, U.S. CONST. amend. XIV, had not then (and still has not) incorporated the Seventh Amendment right to jury trial into the Due Process Clause. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 10.2, at 397-98 (7th ed. 2004) ("Of the first eight Amendments the Supreme Court has held explicitly that only three of the individual guarantees are inapplicable to the states. The three unincorporated guarantees are: (1) the Second Amendment guarantee of the right to bear arms [but see *McDonald v. City of Chicago*, Ill., 130 S. Ct. 3020

role as the source of federal rights and master of their scope. It may have been instructing the Supreme Court, as the promulgator of the Federal Rules, to keep its procedural hands off congressionally-created substantive rights. Whether or not one agrees with this interpretation, REA's language may contemplate the explicitness approach: whether a procedural rule would formally "abridge, enlarge or modify" a substantive right.³¹² As Justices Scalia³¹³ and Harlan³¹⁴ have noted, relying broadly on a procedural rule's effect on litigation can make almost any procedural rule look substantive.

Professor Burbank's examination of REA³¹⁵ discussed REA's purposes at some length. He concluded:

Nothing could be clearer from the pre-1934 history of the Rules Enabling Act than that the procedure/substance dichotomy in the first two sentences was intended to allocate lawmaking power between the Supreme Court as rulemaker and Congress. The pre-1934 history also makes clear that the protection of state law was deemed a probable effect, rather than the purpose of, a limitation designed to allocate lawmaking power between federal institutions.³¹⁶

Thus, Professor Burbank criticized the *Sibbach* Court for linking REA's concern with substantive rights to constitutional limitations on federal power and concern for state-created rights.³¹⁷ He denied that Congress had any such purpose.³¹⁸ "It is difficult to find even a trace of concern that the uniform federal procedure bill might lead to an inappropriate displacement of state law in any of the reports and other material produced by its ABA sponsors during the long campaign" for its adoption,³¹⁹ which he noted lasted twenty years.³²⁰

(2010) (incorporating the Second Amendment)]; (2) the Fifth Amendment clause guaranteeing criminal prosecution only on a grand jury indictment; and (3) the Seventh Amendment guarantee of a jury trial in a civil case." (footnotes omitted)). It also connotes that Congress did not view the right to jury trial as substantive, because then there would have been no need to protect it separately.

312. 28 U.S.C. § 2072 (2006).

313. See *supra* text accompanying note 82.

314. See *supra* note 150 and accompanying text.

315. Burbank, *supra* note 35.

316. *Id.* at 1106.

317. *Id.* at 1108.

318. *Id.* at 1109-10 ("It is not surprising that the preservation of state law, as such, was not a primary concern when the Act was formulated or when it was passed. Even in 1934, *Erie* was four years away. In the 1920's, *Swift v. Tyson* was in full bloom, and *Erie* was considered by most to be an impossibility. Moreover, the Federal Rules contemplated by the Act were to apply in all civil actions tried in federal court, including those in which federal law furnished the rule of decision." (footnotes omitted)).

319. *Id.* at 1111.

If Professor Burbank's analysis is correct, then the Court's tendency to view the limitation of REA as sensitivity to federalism issues is misplaced. That then requires consideration of what REA did intend to make "out of bounds" for Supreme Court rule-making. Here it is important to note again REA's words in 1934: "neither abridge, enlarge nor modify the substantive rights of any litigant."³²¹

There is a certain ambiguity in those words. Does REA bar rules that explicitly change a substantive right (the explicitness approach) or does it mean, more expansively, that no Federal Rule should *affect* a substantive right (which I shall refer to as the affective approach, borrowing from Justice Ginsburg's "outcome affective" language in *Shady Grove*³²²)? The latter seems unlikely, not least because "affect" as a standard is hopelessly vague, and any procedural rule may affect a substantive right. *Hanna* appears to support this position.³²³ But there are better ways to ask the question³²⁴ that enmesh one less in the murky vocabulary of "substance" and "procedure," which, as Justice Frankfurter pointed out, has little analytical value in the abstract.³²⁵

That is why I urge shifting the focus of the REA inquiry to whether the vertical choice-of-law decision concerns a rule having the purpose of regulating extra-litigation conduct or otherwise affecting people in the non-litigation world³²⁶—the behavioral approach.³²⁷ The focus should

320. *Id.* at 1023-24. See also Steven N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 909 (1987) ("After almost twenty-five years of battle, Congress passed the Enabling Act of 1934. . .").

321. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064. See *supra* note 50.

322. See *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1471 (2010) (Ginsburg, J., dissenting). See *supra* text accompanying notes 133-34.

323. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) ("Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights.").

324. See *supra* notes 216-221 and accompanying text.

325. *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 key-words 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.").

326. I use this phrase because I recognize, for example, that some rules intend to affect the way people feel, the prime example being a statute of limitations' goal of repose, as Professor Ely noted. See Ely, *supra* note 9, at 726. He also used the example of immunity doctrines, which in the case of government officials, for example, may have the purpose of removing from officials exercising discretionary power the constant worry of being sued if someone disagrees with their exercise of discretion. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 817-19 (1982).

be on non-litigation-conduct regulation. This approach includes, but does not limit itself to, the elements approach, which would consider only the elements of the cause of action (e.g., whether there was an offer to contract, an acceptance, legally sufficient consideration and performance on the part of the plaintiff) and the elements of merits defenses (e.g., whether the contract violates the Statute of Frauds). There are ostensibly procedural rules on the state level that exist for the purpose of furthering some substantive goal, and the intensity of more than two centuries³²⁸ of debate over federalism suggests caution in federal law displacing state law.

Neither Rule 23 nor section 901(b) addresses those things. To take as broad a view of "substantive" as the dissent urged would require the conclusion that Congress prescribed the affective approach, a hopelessly unbounded standard reminiscent of the now-discarded *Guaranty Trust* outcome-determinative rule. The Court ultimately rejected that approach,³²⁹ perhaps recognizing that continued application would qualify the Federal Rules of Civil Procedure for the EPA's Endangered Species List.³³⁰ *Hanna* recognized that the true *Erie* choice-of-law questions pose considerable difficulties; that is why it spoke of "the typical, relatively unguided *Erie* [c]hoice."³³¹ That connotes that the REA question is not so amorphous, and it should not be. Focusing on either whether a rule is extra-litigation conduct-regulating (the behavioral approach) or whether it goes to the merits of the dispute (the elements approach) will help to make that view a reality. Either approach offers a different and more comprehensible method of analyzing REA problems than the Court now has.

Looking at *Shady Grove* in light of Justice Harlan's distinction between substantive and procedural rights suggests that the Court reached the right result. The "substantive right" on which Justice Ginsburg rested her dissent is in reality only procedural. Section 901(b)

327. The elements approach is a good second choice, but it gives less leeway to state's interest in regulating extra-litigation conduct. Nonetheless, I suggest it would do a better—and clearer—job than the Justices' current approaches.

328. I mark the debate as having begun in 1787 at the Constitutional Convention, though I suppose one could take the discussion of the Articles of Confederation as the starting point. The important thing, however, is that the debate continues (witness *Shady Grove*) and is likely to continue indefinitely.

329. See *Byrd v. Blue Ridge Elec. Coop.*, 356 U.S. 525, 537-38 (1958).

330. See FRIEDENTHAL, KANE & MILLER, *supra* note 27, § 4.3, at 212. See also WRIGHT & KANE, *supra* note 286, § 59, at 403 ("Many observers believed [after the 1949 trio] . . . that there was no longer much, if any, room for independent federal regulation of procedure.").

331. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

concerns the conduct of litigation, not anything outside the court house. Justice Ginsburg's own figures³³² illustrate the point. The damages Shady Grove could collect individually were apparently in the vicinity of \$500.³³³ Suppose that Allstate (as Shady Grove charged) routinely paid claims late, and that it did so with respect to \$500 claims from 10,000 beneficiaries. The total amount of liability Allstate would face would be the \$5,000,000 that Justice Ginsburg mentioned. Nothing in New York law shields Allstate from having to pay out all \$5,000,000. The only thing section 901(b) says is that it takes more than a single lawsuit for that to occur. With all respect to Justice Ginsburg, section 901(b) makes no effort to regulate "the primary conduct and affairs" of the citizenry. It certainly does not invest Allstate with any right to pay claims late.

At the end of the day, *Shady Grove* generates much heat but sheds little light on how to approach REA problems, and that is unfortunate,³³⁴ because the Justices missed an opportunity to lift at least some of the analytical fog that has shrouded the area for so long. They still balance. They differ about what goes into the REA-prescribed balance, and they may differ in particular cases on which way the balance tips, but they do not differ on the technique they use. I think they ultimately will come to the conclusion that the affective approach is neither true to Congress's purpose nor certain enough to apply with any consistency from case to case.³³⁵ Justice Scalia's approach is far more certain, but it rejects the idea that one should look at the state rule in evaluating whether the choice-of-law dispute concerns matters of substance or procedure within the meaning of REA. Justice Stevens's approach may end up being the best, although it leaves the judiciary short of a way to make the decision even when it does focus on the state rule. That is what either the elements approach or the behavioral approach supplies.

Finally, one should keep in mind how few cases have come to the Court's attention, and how few are likely to, concerning an ostensibly

332. See *supra* text accompanying note 110.

333. See *supra* note 70.

334. Scholars have long lamented the Court's inability to develop a consensus of interpretation. See, e.g., Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 27 (2008) (referring to "this troubling state of affairs" and the problems it has engendered); Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 49 (1998) ("Despite the passage of more than six decades, neither the Court nor the commentators have managed to produce a workable definition of the 'substantive rights' limitation.").

335. To borrow vocabulary from the Court's political-question doctrine, one might even ask whether the affective approach is a "judicially discoverable and manageable standard[] for resolving . . ." REA questions. *Nixon v. United States*, 506 U.S. 224, 228 (1993).

procedural state rule that may have a purposeful substantive effect relating to either the merits of the case or the parties' extra-litigation conduct. For those few that do reach the Court, however, and for the many cases that do not, the choice-of-law discussion would benefit from a better way to distinguish conduct-regulating rules from litigation-regulating rules. Focusing on either the elements of claims and defenses on the merits or on whether a rule aims to influence non-litigation behavior would be far more useful and understandable than continuing to bandy the unhelpful terminology of substance and procedure. To borrow again from the Bard, future cases involving the legitimacy of a Federal Rule under REA may demonstrate that *Shady Grove* ultimately was "full of sound and fury, [s]ignifying nothing."³³⁶

336. WILLIAM SHAKESPEARE, *MACBETH*, act 5, sc. 5. I hasten to add, however, that I in no way suggest that *Shady Grove* is "a tale told by . . . idiot[s]." *Id.*