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HORTON THE ELEPHANT INTERPRETS THE FEDERAL RULES OF CIVIL PROCEDURE: HOW THE FEDERAL COURTS SOMETIMES DO AND ALWAYS SHOULD UNDERSTAND THEM

*Donald L. Doernberg**

I. INTRODUCTION

*Shady Grove Orthopedic Associates P.A. v. Allstate Insurance Co.*¹ made it worse, and that was after Dr. Seuss had pointed the way.² The Rules Enabling Act (“REA”),³ authorizing the Supreme Court to promulgate rules of civil procedure for the federal courts, limited the Court’s power: “Such rules shall not abridge, enlarge or modify any substantive right.”⁴ The Court has always struggled with that language, from its first encounter in *Sibbach v. Wilson & Co.*⁵ to the present. The *Sibbach* test was whether “a rule really regulates procedure”⁶—hardly a test of great precision. However, as the Court struggled to elaborate on

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1. 132 S. Ct. 1431 (2010) (plurality opinion).
2. See DR. SEUSS, *HORTON HATCHES THE EGG* 16, 21, 26, 34, 38 (Random House 1990) (“I meant what I said, and I said what I meant.”).
3. 28 U.S.C. § 2072 (2006).
4. *Id.* § 2072(b).
5. 312 U.S. 1 (1941).
6. *Id.* at 14.

the vertical choice-of-law doctrine⁷ stemming from *Erie Railroad Co. v. Tompkins*,⁸ the REA was eclipsed for some years.

Questions involving the Federal Rules of Civil Procedure (“Federal Rules” or “Rules”) and the REA are simply a subset of that larger problem—the choice between having state law or federal law apply to an issue. The Judiciary Act of 1789⁹ addressed that problem in two provisions that have come to be known as the Rules of Decision Act (“RDA”)¹⁰ and the Process Act of 1789.¹¹ Since *Erie*—which is now over the three quarters of a century old—the Court has spent considerable energy addressing the vertical choice-of-law problem, but with only mixed success.

In *Shady Grove*, the Court considered whether a federal class action was maintainable in a diversity case where state law forbade class actions.¹² The justices were sharply split into shifting majorities. One majority concluded that Rule 23 was not substantive for REA purposes and that it applied, but its members could not agree on why.¹³ Four justices thought it was proper to look only at the Federal Rule in question to see whether it addressed substance or procedure on its face.¹⁴ A different majority supported an approach to REA questions that

7. Vertical choice of law refers to a choice between federal and state law governing a particular issue. See Donald L. Doernberg, *The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest a More Straightforward Erie Analysis*, 109 W. VA. L. REV. 611, 612 n.2 (2007) [hereinafter Doernberg, *The Unseen Track*].

8. 304 U.S. 64 (1938).

9. ch. 20, 1 Stat. 73.

10. 28 U.S.C. § 1652 (2000). The RDA states:

And be it further enacted, That 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.

Id.

11. ch. 21, § 2, 1 Stat. 93 (repealed 1948). The Process Act of 1789 states:

And be it further enacted, That until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.

Id.

12. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 132 S. Ct. 1431, 1436 (2010). There is precedent for federal procedure permitting joinder in circumstances where state law would not. See, e.g., *Jeub v. B/G Foods, Inc.*, 2 F.R.D. 238, 240-41 (D. Minn. 1942). In *Jeub v. B/G Foods, Inc.*, the defendant was allowed to implead a third-party defendant under Rule 14 even though state law provided no impleader, but it did allow indemnity actions. *Id.* The court determined that Rule 14 merely accelerated the timing of the state-recognized indemnity action, and therefore Rule 14 had no forbidden substantive effect. *Id.*; see *infra* note 201.

13. See *infra* notes 173-98 and accompanying text.

14. *Shady Grove*, 132 S. Ct. at 1442-44.

required evaluating state law to determine whether the Federal Rule was substantive.¹⁵ Because those justices forgot the lesson of *Hanna v. Plumer*,¹⁶ the seminal 1965 REA case, their approach introduced new uncertainties to an area that had been clearer¹⁷—which was a mistake. The Court’s approach to Federal Rules problems from *Hanna*, in 1965, until *Shady Grove*, in 2010, is preferable. It provides a historically justifiable bright-line test for how to read a Federal Rule—as concerning only matters to which the Rule directly speaks.

This Article proceeds in four further Parts. Part II briefly summarizes the *Erie* doctrine and canvasses the Court’s approach to the Federal Rules from 1938, when they took effect, to 1965, when the Court decided *Hanna*.¹⁸ Part III takes a close look at *Hanna*, which declared that a Federal Rule must speak with read-my-lips clarity to apply to an issue.¹⁹ *Hanna* did not say that federal courts may read a Rule for more than appears on its face, and *Walker v. Armco Steel Co.*²⁰ continued that approach.²¹ Part III also discusses the implications of the *Hanna* analysis and subsequent cases that have applied *Hanna*’s approach.²² Part IV briefly canvasses the opinions in *Shady Grove* with respect to the two approaches to REA questions.²³ Part V argues that the *Hanna-Walker* line of cases exemplifies the proper method of inquiry under the REA and that REA questions need not be as hard as the Court, particularly in *Shady Grove*, has made them look.²⁴

II. VERTICAL CHOICE OF LAW FROM *ERIE* TO *SHADY GROVE*

From 1938 (*Erie*) to 1965 (*Hanna*), the Court used a single analytical technique to decide: (1) whether federal common law could exist, and (2) the scope of a Federal Rule. *Hanna* forever changed that, holding that the REA calls for an analytical technique distinct from that of the RDA, which governs whether federal common law can exist.²⁵ Accordingly, it is a bit artificial to separate the *Erie* cases—regarding

15. See *infra* note 218 and accompanying text.

16. 380 U.S. 460 (1965).

17. See discussion *infra* Part V.

18. See *infra* text accompanying notes 29-82.

19. See *infra* text accompanying notes 83-111.

20. 446 U.S. 740 (1980).

21. See *id.* at 750.

22. See *infra* text accompanying notes 112-58.

23. See *infra* text accompanying notes 172-209.

24. See *infra* text accompanying notes 212-42.

25. See *Hanna v. Plumer*, 380 U.S. 460, 471, 473 (1965).

federal common law—from the Federal Rules cases in the pre-*Hanna* era. Nonetheless, looking backward from the post-*Hanna* era, the importance of doing so is clear.

A. *An Erie Précis*

In 1842, *Swift v. Tyson*²⁶ interpreted the RDA to permit federal courts to determine common law rules independently of the states' views, limiting the RDA's command to state constitutions, statutes, and "local" common law principles applying to immovables, chiefly real property.²⁷ *Swift* seems to have intended to foster development of nationally recognized principles of general common law, leading to greater uniformity in decisions among the states and in the federal courts.²⁸ That hope died when the states did not adopt those principles, which ironically meant that *Swift* practically guaranteed disuniformity by interpreting the RDA not to require application of states' common law rules. Not until 1938 did *Erie* overrule *Swift*.²⁹ Justice Louis Brandeis's majority opinion sounded almost plaintive about *Swift*'s ineffectiveness: "Persistence of state courts in their own opinions on questions of common law prevented uniformity, and 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."³⁰ But *Erie* created problems because it did not clearly set out what areas were appropriate for federal common law. Thus, it bequeathed to future courts the set of issues subsumed under vertical choice of law.

Make no mistake; *Erie* did not contemplate the demise of federal common law, which explains why Justice Brandeis, quoting Justice Oliver Wendell Holmes, was careful to specify the defect in *Swift*'s doctrine:

[It] rests upon the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,' that federal courts have the power to use

26. 41 U.S. 1 (1842).

27. *Id.* at 18-19.

28. A word of explanation about "general law" is in order. Before *Erie*, there were three kinds of law in the United States: federal law, state law, and general law. Doernberg, *The Unseen Track*, *supra* note 7, at 617. The general law arose from a natural law conception, and it existed apart from any sovereignty. *Id.* It was not federal law created under the Constitution. *See id.* For that reason, the Supremacy Clause did not compel the states to fall into line. *Id.*; *see* U.S. CONST. art. VI, § 2. *Erie* represents, among other things, the rejection of natural law theory in the United States in favor of a positivist conception, long championed by Justice Oliver Wendell Holmes. *See* Doernberg, *The Unseen Track*, *supra* note 7, at 617, 621, 623-25.

29. *Erie R.R. v. Tompkins*, 304 U.S. 64, 69, 79-80 (1938).

30. *Id.* at 74.

their judgment as to what the rules of [general] common law are; and that in the federal courts ‘the parties are entitled to an independent judgment on matters of general law’:

‘But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.’³¹

Thus, Justice Holmes had articulated the positivist thesis, which *Erie* adopted.³² That clearly did not eliminate the category of federal common law because, in the very next case after *Erie* in the U.S. Reports, Justice Brandeis, speaking for a unanimous Court, applied a federal common law rule.³³

Erie left questions in its wake. When can federal common law exist and when must the federal courts use state law? *Erie* was cryptic: “Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or ‘general,’ And no clause in the Constitution purports to confer such a power upon the federal courts.”³⁴ The second sentence suggests that the federal courts’ common law powers are at least no broader than Congress’s legislative powers. The first sentence may be even more important because it connotes that Congress and the federal courts might have the power to declare rules of procedure—a good thing, since Congress had passed the REA in 1934, and the Court thereafter promulgated the Federal Rules.³⁵ *Erie* also bequeathed the question of how to distinguish substantive from procedural law. *Erie* itself gave no further clue; the word “substantive” appears nowhere else in the opinion, and “procedural” does not appear at all.

The next attempt to distinguish substantive from procedural rules for *Erie* purposes came in *Guaranty Trust Co. v. York*,³⁶ but it did not involve the Federal Rules. The Court declared that, if applying a federal law to a particular issue would change the outcome of the case, then the matter was substantive for *Erie* purposes, meaning that the federal courts

31. *Id.* at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533-34 (1928) (Holmes, J., dissenting)).

32. *See Black & White Taxicab & Transfer Co.*, 276 U.S. at 533-34; *see also Erie*, 304 U.S. at 79; Doernberg, *The Unseen Track*, *supra* note 7, at 617.

33. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

34. *Erie*, 304 U.S. at 78.

35. *See generally* 28 U.S.C. § 2072 (2006). The Federal Rules first became effective in 1938. *See McCrone v. United States*, 307 U.S. 61, 65 (1939).

36. 326 U.S. 99 (1945).

had to use the state law.³⁷ In diversity cases, the Court said that a federal court is, “in effect, only another court of the state.”³⁸ But it is easy to over-read that statement to connote either that all conflicts between federal and state law result in the application of state law, or that *Erie* commands so narrow a reading of federal law that it cannot conflict with state law. The Court’s blanket assertion elides the Supremacy Clause consideration.

*Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*³⁹ introduced a balancing approach. The substantive issue was whether the plaintiff’s decedent was a statutory employee.⁴⁰ If so, only workers’ compensation remedies were available.⁴¹ The procedural issue on which the Court focused was whether the judge or the jury should resolve that substantive issue. Under state law, that was an issue for the court; federal law made it a jury question.⁴² The Supreme Court weighed the state interests in application of the state rule against the federal interests in application of the federal rule, and applied the federal practice because it found the federal interest in controlling the internal working procedures

37. *Id.* at 109-10. Changing the outcome does not necessarily mean that one party or the other achieves final victory. *See id.* More often, the choice between state and federal law either ends the case or permits it to continue. *See id.* In *Guaranty Trust*, the choice of the state limitations period ended the case with a dismissal. *Id.* at 100-01. Choosing federal law would not have given Grace York a judgment for damages; it simply would have permitted the case to go forward for a decision on the merits. *See id.* The limitation of *Erie*’s purposes is important. Laws may be substantive for some purposes and procedural for others, as the law surrounding statutes of limitations illustrates. *See id.* *Guaranty Trust* involved the question of whether York’s action was timely. *Id.* at 107. Under state law, it was not. *Id.* York urged application of the federal rule of laches. *See id.* at 101. Choosing the Federal Rule would have allowed the action to proceed; applying the state law obviously would end it. *Id.* at 109-10. The Court applied the state law because it was outcome determinative; that was the vertical choice-of-law rule. *See id.* at 110-12. On the other hand, in most circumstances, for horizontal choice-of-law purposes, statutes of limitations are procedural. *See, e.g.,* PETER HAY ET AL., CONFLICT OF LAWS § 3.10 (5th ed. 2010) (noting “the traditional American (procedural) characterization of the Statute of Limitations”). Suppose a second accident on the *Erie* footpath occurred after *Guaranty Trust* and that the victim, as in *Erie*, sued in the Southern District of New York. Assume that the relevant New York limitation was three years and that the relevant Pennsylvania limitation was only two. The federal court, following *Guaranty Trust*, would apply the limitations period that the New York courts would use because statutes of limitations are *substantive* for vertical choice-of-law purposes. That requires the federal court to determine whether the New York courts would use the New York or Pennsylvania statute of limitations. The New York state courts would apply the New York limitations period rather than Pennsylvania’s because statutes of limitation are almost always *procedural* for horizontal choice-of-law purposes. Thus, the federal court would use the three-year period because it is substantive for *Erie* purposes, and New York state court would have chosen the three-year period because it is procedural.

38. *Guaranty Trust*, 326 U.S. at 108-09.

39. 356 U.S. 525 (1958).

40. *Id.* at 527.

41. *Id.*

42. *Id.* at 533-35.

of federal courts to be dominant.⁴³ Outcome determinativeness was still a factor, weighing in favor of state law, but it was no longer the entire test.⁴⁴ Important federal interests could outweigh outcome determinativeness, as *Byrd* demonstrated.

Throughout those years, the Court did not distinguish the *Erie* choice-of-law problem from issues involving the Federal Rules. Eight years after *Byrd*, *Hanna* recognized that the inquiries were radically different.⁴⁵ After *Hanna*, with respect to choice-of-law matters not involving the Federal Rules, the Court continued the analysis that animated *Erie* and *Byrd*. *Gasperini v. Center for Humanities, Inc.*⁴⁶ considered a New York statute dealing with both substance and procedure.⁴⁷ On the substantive side, in cases where New York law requires an itemized damages verdict, the statute makes the verdict unlawful “if it deviates materially from what would be reasonable compensation.”⁴⁸ On the procedural side, the statute directs New York’s intermediate appellate court to make that evaluation.⁴⁹

In an opinion by Justice Ruth Bader Ginsburg, the Court divided how it approached the New York law.⁵⁰ The deviates-materially standard was substantive for *Erie* purposes and, hence, had to govern in the diversity action.⁵¹ The Court, however, balked at assigning the job of determining whether an award violated the substantive standard to the federal circuit court because of the conflict that would arise with the Seventh Amendment.⁵² So, the Court played Solomon: while recognizing that the damage cap applied, it assigned applying it to the federal trial judge under Federal Rule 59, which, reflecting the common law, had always allowed that court to order a new trial if the verdict was

43. *Id.* at 538-39.

44. *Id.* at 539-40.

45. *See Hanna v. Plumer*, 380 U.S. 460, 471 (1965); discussion *infra* Part III.

46. 518 U.S. 415 (1996).

47. *See id.* at 426.

48. N.Y. C.P.L.R. § 5501(c) (McKinney 1995 & Supp. 2013).

49. *See id.*

50. *See Gasperini*, 518 U.S. at 428-31.

51. *Id.*

52. *See* U.S. CONST. amend. VII (“[N]o fact tried by a jury[] shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”); *Gasperini*, 518 U.S. at 438. Before *Gasperini*, several circuits had reviewed a trial judge’s denials of motions for new trials based on the excessiveness of the verdict, using an abuse-of-discretion standard. *Id.* at 434-35. *Gasperini* explicitly approved such review. *Id.* at 434-36. Note, however, that the suggested standard falls far short of the more searching appellate review that New York had prescribed in section 5501(c). *See* N.Y. C.P.L.R. § 5501(c); *Gasperini*, 518 U.S. at 438.

“against the weight of the evidence.”⁵³ That avoided the Seventh Amendment problem.

Note, however, that *Gasperini* was not a Federal Rules case. There was no Federal Rule addressing damage caps. The Court called Rule 59 into service to accommodate New York’s substantive interest, using a substitute federal procedural device rather than allowing the Second Circuit to emulate New York’s Appellate Division.⁵⁴ Above all, *Gasperini* was a case in the *Erie* line, not in the *Hanna* line. Accordingly, the *Byrd* analytical technique—balancing the state and federal interests—led the Court to apply the state damages limit, but to supplant the state’s procedural mechanism for enforcing the limit, replacing it with a procedure consonant with the internal workings of the federal judiciary.⁵⁵ That is precisely what the Court had done in *Byrd*.

B. *The Jurisprudence of the Federal Rules of Civil Procedure to 1965*

Sibbach was a diversity action sounding in tort—automobile negligence—presenting both horizontal and vertical choice-of-law issues.⁵⁶ The state in which the accident occurred and Federal Rule 35 permitted physical examinations of injured plaintiffs; however, the forum state did not.⁵⁷ The district court ordered the petitioner to submit to a physical examination and, upon her refusal, held her in contempt.⁵⁸ The Seventh Circuit affirmed, finding Rule 35 valid under the REA.⁵⁹ The Supreme Court affirmed that conclusion.⁶⁰

The petitioner in *Sibbach* conceded that Rule 35 was procedural, but argued that the forum state’s law conferred on her a substantive right—a privilege to avoid physical examination—that Rule 35 abridged.⁶¹ The Court noted that, “[i]n order to reach this result [the petitioner] translate[d] substantive into important or substantial rights. And she urge[d] that if a [merely procedural] rule affect[ed] such a right, . . . its prescription [was] not within the statutory grant of power embodied in the [REA].”⁶² The Court clarified that “[t]he test must be

53. *Gasperini*, 518 U.S. at 431-33 (quoting *Byrd v. Blue Ridge Rural Elec. Coop. Inc.*, 356 U.S. 525, 540 (1958)).

54. *See Gasperini*, 518 U.S. at 431-33.

55. *See id.* at 436-38.

56. *See Sibbach v. Wilson*, 312 U.S. 1, 6-7 (1941).

57. *Id.* at 7-8.

58. *Id.* at 6, 16.

59. *Id.* at 7-11 (discussing both the circuit court’s decision and the validity of Rule 35).

60. *Id.* at 16. However, the Court reversed the judgment, remanding the case because the Federal Rules did not authorize contempt as a sanction for refusing an order pursuant to Rule 35. *Id.*

61. *Id.* at 11.

62. *Id.* (internal quotation marks omitted).

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. That the rules in question are such is admitted.”⁶³

Thus, the Court rejected her argument, but the case is less important for its holding than for its method. The majority never discussed whether the state rule was substantive; it only found that—consistent with the petitioner’s concession—Rule 35 was procedural within the meaning of the REA, and, for that reason, it did not transgress the forum state’s statute.⁶⁴

Justice Felix Frankfurter saw it differently. He agreed with the petitioner that the state law privilege, which the Court had recognized before the REA, had ancient common law roots.⁶⁵ Justice Frankfurter thought this made Rule 35 substantive for REA purposes and a matter of policy for Congress to resolve.⁶⁶ He rejected the argument that Congress’s acquiescence to the Federal Rules implied a change in that policy.⁶⁷ Thus, unlike the majority, he felt compelled to go beyond merely considering whether a Federal Rule in the abstract addressed substance or procedure, anticipating the Court’s division in *Shady Grove* almost seventy years later.⁶⁸

In *Palmer v. Hoffman*,⁶⁹ the issue was whether the plaintiff or the defendant had the burden of persuasion with respect to contributory negligence.⁷⁰ A state statute required the plaintiff to prove the absence of contributory negligence.⁷¹ The plaintiff argued that, because Federal Rule 8(c) made contributory negligence an affirmative defense, the burden shifted to the defendant.⁷² The plaintiff’s argument was hardly unreasonable; “affirmative defense” ordinarily signifies that the defendant has the burden of proof on the issue.⁷³ Yet, the unanimous Court ruled against the plaintiff.⁷⁴ Once again, the Court’s method, not

63. *Id.* at 14.

64. *Id.* at 11, 15-16.

65. *See id.* at 16-17 (Frankfurter, J., dissenting).

66. *Id.* at 18.

67. *Id.* (“Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality.”).

68. *See* discussion *infra* Part IV.

69. 318 U.S. 109 (1943).

70. *Id.* at 116-17.

71. *Id.* at 117-18.

72. *Id.* at 116-17.

73. *See, e.g.*, BLACK’S LAW DICTIONARY 482 (9th ed. 2009) (“The defendant bears the burden of proving an affirmative defense.”).

74. *Palmer*, 318 U.S. at 117.

the result, commands attention: “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 federal courts in diversity of citizenship cases . . . must apply.”⁷⁵ *Palmer* is the first example of the Court reading a Federal Rule absolutely literally, refusing to infer from it any meaning beyond that explicitly stated.⁷⁶

Two years later, the Court decided *Guaranty Trust* and adopted the outcome-determinative approach for resolving vertical choice-of-law issues.⁷⁷ It took only four years for *Guaranty Trust*’s draconian effects on the Federal Rules to become apparent. A trio of cases in 1949 rejected applying three Federal Rules, two of which were clearly on point.⁷⁸ It became clear that, under *Guaranty Trust*’s approach, a Federal Rule could apply only when it made no difference in the outcome of the litigation.

The critical case was *Hanna*, and it demands close inspection. *Hanna* departed from *Guaranty Trust*’s approach to the Federal Rules. For the first time, the Court distinguished the vertical choice-of-law inquiry in Federal Rules cases from the inquiry that *Erie* prescribed in common law cases.⁷⁹ *Hanna* held that a court evaluating a Federal Rule should test its legitimacy under the REA, not under the RDA,⁸⁰ and that made all the difference. The REA and the RDA have radically different emphases. The default position under the RDA is that state law applies, whereas the REA makes the Federal Rules applicable by default, unless they “abridge, enlarge or modify substantive rights.”⁸¹ The question is what sort of inquiry that limiting language compels—a critical issue that the Court did not consider until *Shady Grove*, more than four decades later. Cases from *Palmer* (1943) to *Hanna* (1965) to *Walker* (1980)

75. *Id.* (internal citation omitted).

76. *Palmer*’s method thus anticipated the Court’s approach in both *Hanna* and *Walker*. See *supra* notes 48-74 and accompanying text; *infra* Part III.

77. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-09 (1944).

78. *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 531 & n.1, 532-33 (1949) (rejecting the application of Federal Rule 3); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 550 & n.4, 555-56 (1949) (rejecting the application of Federal Rule 23); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949) (rejecting the application of Rule 17). In *Ragan v. Merchants Transfer & Warehouse Co.*, there was a question as to whether Rule 3 actually covered the precise issue for which the Court had to make a choice-of-law decision. 337 U.S. at 531 & n.1, 532-33. In *Walker v. Armco Steel Co.*, the Court subsequently held that it did not. 446 U.S. 740, 750 (1980). However, the other two of the three cases—*Cohen v. Beneficial Indus. Loan Corp.* and *Woods v. Interstate Realty Co.*—involved Federal Rules that were unambiguously on point. See 337 U.S. at 541; 337 U.S. at 535; *infra* notes 95-105 and accompanying text.

79. See *Hanna v. Plumer*, 380 U.S. 460, 471, 473-74 (1964).

80. *Id.* at 472-74.

81. Compare 28 U.S.C. § 1652 (2006) (creating a default application of state law), with 28 U.S.C. § 2072 (2006) (creating a default application of federal law).

actually provide the answer, but *Shady Grove* overlooked the lessons of those precedents, and, thus, went astray—making a relatively easy problem appear much more difficult.⁸²

III. *HANNA V. PLUMER*: A NEW ANALYSIS FOR THE FEDERAL RULES OF CIVIL PROCEDURE

Hanna's facts were simple. Plaintiff was in an automobile accident with defendant's decedent.⁸³ Plaintiff filed a diversity action in Massachusetts against the executor of the other driver's Massachusetts estate.⁸⁴ The process server left a copy of the summons and complaint with the executor's spouse at their residence, in full compliance with then-Rule 4(d)(1).⁸⁵ The problem arose because the Federal Rule's service method was incompatible with a Massachusetts statute that required personal delivery of process in actions against an estate.⁸⁶ The Supreme Court had to decide whether the state or federal provision governed.⁸⁷

The REA analysis was, to say the least, not overly rigorous. The Court quoted the test it had articulated in *Sibbach*—"whether a rule really regulates procedure."⁸⁸ A rule that governs service seems quintessentially procedural, but the Court buttressed that conclusion, referring to *Mississippi Publishing Corp. v. Murphree*.⁸⁹ *Murphree* recognized that:

[M]ost alterations of the rules of practice and procedure may and often do affect the rights of litigants. [Congress's] prohibition of any alteration of substantive rights of litigants was obviously not addressed

82. See discussion *infra* Part IV.

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

84. *Id.*

85. *Id.* At the time, the relevant part of Rule 4, describing the method of administering service upon a person, read as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein

FED. R. CIV. P. 4(d)(1), in *Proposed Rules of Civil Procedure for the District Courts of the United States Before the Advisory Committee on Rules for Civil Procedure* 7, 7-8 (1937) (codified as amended in FED. R. CIV. P. 4(e)(2)).

86. *Hanna*, 380 U.S. at 462 (quoting MASS. GEN. LAWS ANN., ch. 197, § 9 (West 1958) (repealed 2008)).

87. The lower federal court had dismissed on the authority of the Massachusetts statute, relying, for that choice, on *Ragan*—one of the trio of cases that applied *Guaranty Trust*'s outcome-determinative test to the Federal Rules. See *Hanna*, 380 U.S. at 462; *supra* note 78; *infra* notes 95-105 and accompanying text.

88. *Hanna*, 380 U.S. at 462 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

89. 326 U.S. 438 (1946).

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.⁹⁰

Justice John Marshall Harlan agreed, but he urged a more practical analysis: asking whether the rule in question would “substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.”⁹¹ He distinguished what one might call real-world conduct from litigation conduct.⁹² His approach was more specific than the majority’s, but it was still too vague about what constitutes “primary activities.”

Hanna’s most important contribution was its recognition that the RDA and the *Erie* line of cases are irrelevant to vertical choice-of-law problems regarding the Federal Rules.⁹³ The Court made a highly nuanced distinction concerning *Erie*’s effect on Federal Rules cases:

The *Erie* rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law.⁹⁴

It is critical to understand *Erie*’s current role in Federal Rules cases. It plays no part in deciding what a Federal Rule means, to what situations it applies, or whether it violates the REA. If a Federal Rule does not apply, either because it is not broad enough or because the court determines that it violates the REA, then the absence of a Federal Rule creates a vacuum. Only then does the *Erie* analysis come into play, filling the choice-of-law vacuum and directing that state law applies to many, but not all, issues.⁹⁵

90. *Id.* at 445; see also *Hanna*, 380 U.S. at 464-65 (referring to the Court’s decision in *Murphree*).

91. *Hanna*, 380 U.S. at 475 (Harlan, J., concurring) (“[A]ny rule, no matter how clearly ‘procedural,’ can affect the outcome of litigation if it is not obeyed.”).

92. See 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, 1203-04 (2011) [hereinafter Doernberg, *The Tempest*].

93. *Hanna*, 380 U.S. at 469-70 (majority opinion).

94. *Id.* at 470.

95. See, e.g., *Byrd v. Blue Ridge Elec. Coop.*, 356 U.S. 525, 538-39 (1958) (demonstrating the exception that state rules cannot disrupt the judge-jury relationship in federal courts); *supra*

Some of *Hanna*'s less sweeping language applies to the REA problem: "[T]he clash [between the Federal Rule and the state rule] is unavoidable; Rule 4(d)(1) says—implicitly, but with unmistakable clarity—that in-hand service is not required in the federal courts."⁹⁶ Later, the Court characterized the conflict as a "direct collision with the law of the relevant State."⁹⁷ The Court noted that it had not previously considered a case with such a direct conflict, and that the circuit courts had anticipated *Hanna*'s approach.⁹⁸ Lower federal courts⁹⁹ and secondary sources have since uniformly recognized that a direct collision is necessary for a Federal Rule to oust a conflicting state rule.¹⁰⁰

notes 35-40 and accompanying text; *see also* *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 437 (1996) (holding that state law may define the monetary limits of recovery, but federal law governs which part of the federal judiciary evaluates the question). There are also cases involving law that is substantive by any measure, but the Court has required the use of a federal common law rule. *See, e.g.*, *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988) (approving the Fourth Circuit's creation of a federal-contractors' defense to a state tort action); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 439 (1964) (approving the use of a judicially generated act of state doctrine in a state contract case). I have previously suggested that the vertical choice-of-law problem yields to a different analysis from the one that the Court has articulated. Doernberg, *The Unseen Track*, *supra* note 7, at 657-60. If one begins by presuming that state law applies to every issue in every case in the federal courts, the presumption is rebuttable only by the existence of a dominant federal interest—a federal constitutional rule, statute, or other rule—any of which displace conflicting state law under the Supremacy Clause. *See* U.S. CONST. art. VI, § 2; Doernberg, *The Unseen Track*, *supra* note 7, at 657-60. I stand by that analysis, but it does not purport to deal with the quite distinct question of whether a Federal Rule is consistent with the REA. *See* Doernberg, *The Unseen Track*, *supra* note 7, at 659-61.

96. *Hanna*, 380 U.S. at 470.

97. *Id.* at 472; *see also* *Burlington N. R.R. v. Woods*, 480 U.S. 1, 4 (1987) ("The initial step is to determine whether, when fairly construed, the scope of [the Federal Rule] is sufficiently broad to cause a direct collision with the state law . . ." (internal quotation marks omitted) (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 & n.9 (1980), and *Hanna*, 380 U.S. at 471-72)).

98. *Hanna*, 380 U.S. at 472-73.

99. *See, e.g.*, *Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273, 1276-77 (10th Cir. 2011) (choosing state law where there was no direct conflict between a state statute and a Federal Rule); *Exxon Corp. v. Burglin*, 42 F.3d 948, 950-51 (5th Cir. 1995) (finding direct conflict between state law and the Federal Rules, and finding that applying the Federal Rule was constitutional and within the scope of the REA); *Robinson v. Baxter Healthcare Corp.*, 724 F. Supp. 2d 840, 842-43 (N.D. Ohio 2010) (citing the Court's decision in *Hanna* as requiring a direct-collision between state law and the Federal Rules, and applying the relevant Federal Rule).

100. *See, e.g.*, ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 330-31 (5th ed. 2007); JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 222 (4th ed. 2005) (noting that the court must act within the scope of power authorized by the REA when there is a "direct conflict" between the state practice and a Federal Rule); GEOFFREY C. HAZARD, JR. ET AL., *CIVIL PROCEDURE* 92 (6th ed. 2011); LARRY R. TEPLY & RALPH U. WHITTEN, *CIVIL PROCEDURE* 484 (4th ed. 2009); CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 403 (7th ed. 2011) (noting the difficulty in the choice between state law and a Federal Rule where there is no direct conflict).

Walker exemplifies how direct the collision must be. In *Walker*, the petitioner sued in diversity to recover for personal injuries.¹⁰¹ The state statute of limitations period required commencement of the action within two years of the claim's accrual.¹⁰² State law mandated that an action commenced for statute-of-limitations purposes upon service—not filing—of the summons and complaint.¹⁰³ The petitioner filed within the two-year period, but service did not occur until months after the limitations period expired.¹⁰⁴ The only relevant Federal Rule said nothing about statutes of limitations: “A civil action is commenced by filing a complaint with the Court.”¹⁰⁵ The district court granted the defendant's motion to dismiss for untimeliness, and the circuit court affirmed.¹⁰⁶ The unanimous Supreme Court traced the development of the vertical choice-of-law doctrine with respect to procedural rules, characterizing *Hanna* as requiring that “the Federal Rule [is] clearly applicable,” and as requiring a “direct collision” that is “unavoidable.”¹⁰⁷ Federal Rule 3 did not speak of the event that stops the running of a limitations period: “There is no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations.”¹⁰⁸ The Court explained:

Since there is no direct conflict between the Federal Rule and the state law, the *Hanna* analysis does not apply. Instead, the policies behind *Erie* and *Ragan* [*v. Merchants Transfer & Warehouse Co.*]¹⁰⁹ control the issue whether, in the absence of a federal rule directly on point, state service requirements which are an integral part of the state statute of limitations should control in [a diversity] action¹¹⁰

101. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 741 (1980).

102. *Id.* at 742-43.

103. *Id.* Service was good if made within sixty days of timely filing. *Id.* at 743. The Oklahoma statute (since repealed) provided in pertinent part:

An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; But such attempt must be followed by the first publication or Service of the summons, or if service is sought to be procured by mailing, by a receipt of certified mail containing summons, Within sixty (60) days.

Lake v. Lietch, 550 P.2d 935, 937 (Okla. 1976) (quoting OKLA. STAT. tit. 12, § 97 (1971) (repealed 1984)) (internal quotation marks omitted).

104. *Walker*, 446 U.S. at 742.

105. FED. R. CIV. P. 3.

106. *Walker*, 446 U.S. at 743-44.

107. *Id.* at 748-49 (internal quotation marks omitted).

108. *Id.* at 750-51 (footnote omitted).

109. 337 U.S. 530 (1949).

110. *Walker*, 446 U.S. at 752-53 (footnote omitted).

Hanna and *Walker* thus require read-my-lips clarity from a Federal Rule on the precise vertical choice-of-law issue before the Federal Rule can displace state law. *Hanna* had it; *Walker* did not.¹¹¹

*Burlington Northern Railroad Co. v. Woods*¹¹² echoed *Hanna* and distinguished *Walker*. The issue was whether an unsuccessful appellant in a diversity case was subject to the forum state's mandatory affirmance-penalty statute¹¹³ or to Federal Rule of Appellate Procedure 38, which vests the federal appellate court with discretion to impose penalties.¹¹⁴ The unanimous Court reiterated the *Hanna-Walker* standard, "whether, when fairly construed, the scope of [the Federal Rule] is 'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law."¹¹⁵ The Court emphasized that it clearly intended Rule 38 to penalize only frivolous appeals, whereas the state statute penalized "every unsuccessful appeal, regardless of merit."¹¹⁶ *Burlington* recognized an unmistakable conflict between the two provisions. Rule 38 was within Congress's power to regulate federal procedure, which the REA had delegated to the Supreme Court, so the state statute could not apply.

111. The lower federal courts have followed that explicitness approach. *See, e.g.,* *Robinson v. Baxter Healthcare Corp.*, 724 F. Supp. 2d 840, 843 (N.D. Ohio 2010) (finding that *Walker* calls for a plain-meaning reading of the Federal Rules, and eschewing the notion that the lower court is required to construe Federal Rules narrowly to avoid direct collisions); *Schach v. Ford Motor Co.*, 210 F.R.D. 522, 525 (M.D. Pa. 2002) (noting that, since Rule 3 plainly fails to address tolling of limitations periods, state rules apply).

112. 480 U.S. 1 (1986).

113. *Id.* at 2; *see also* ALA. CODE § 12-22-72 (2012). The Alabama Code states:

When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, and the costs of the appellate court

ALA. CODE § 12-22-72.

114. FED. R. APP. P. 38 ("If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.").

115. *Burlington*, 480 U.S. at 4-5 (quoting *Walker*, 446 U.S. at 749-50, and *Hanna v. Plumer*, 380 U.S. 460, 472 (1965)). In holding that Rule 38 governed, the Court relied heavily on *Affholder, Inc. v. Southern Rock, Inc.*, 746 F.2d 305, 308-09 (5th Cir. 1984), which refused to apply an analogous statute from another state. *Burlington*, 480 U.S. at 6-7.

116. *Burlington*, 480 U.S. at 6 (citing *Affholder*, 746 F.2d at 308-09).

The following table illustrates the Court's approach with respect to the Federal Rules:

Table 1

Case	Issue	State Rule	Federal Rule	Choice	Rationale
<i>Hanna</i>	How must service of process on an executor occur?	In-hand delivery only	Fed. R. Civ. P. 4: substituted service permitted	Federal	Rule 4 clashes directly with the state rule and involves only procedure
<i>Walker</i>	What event stops the statute of limitations from running?	Service of process on the defendant	Fed. R. Civ. P. 3: "A case is commenced by the filing of a complaint"	State	Rule 3 is silent on statutes of limitation—it is not directly on point; it does not govern
<i>Burlington</i>	Does a mandatory penalty apply to an unsuccessful appellant who has gotten a stay of execution of the judgment pending appeal?	Automatic penalty of ten percent of the judgment plus appellate costs	Fed. R. App. P. 38: Court of Appeals has discretion to impose penalty for frivolous appeals	Federal	Rule 38 directly clashes with the state rule—state law cannot control the internal workings of the federal courts (similar to <i>Byrd</i>)

Note that this is not the approach that the Court requires or uses with respect to federal statutes. *Stewart Organization, Inc. v. Ricoh Corp.*¹¹⁷ provides a good example of the difference. The parties contracted for plaintiff to market defendant's copiers.¹¹⁸ Plaintiff was an Alabama corporation; defendant was incorporated in Delaware and had its principal place of business in New Jersey.¹¹⁹ The contract contained both choice-of-forum and choice-of-law clauses.¹²⁰ The choice-of-forum clause specified a state or federal court in Manhattan.¹²¹ When a dispute arose, plaintiff sued in a federal court in Alabama, and defendant moved for transfer to the Southern District of New York.¹²² The district court denied the transfer motion because "Alabama looks unfavorably upon contractual forum-selection clauses."¹²³ The circuit court reversed.¹²⁴

The Supreme Court majority, as had the Eleventh Circuit, characterized the problem as an issue of venue.¹²⁵ Having done that, it

117. *Stewart Org., Inc. v. Ricoh Corp. (Stewart Org. I)*, 487 U.S. 22 (1988).

118. *Id.* at 24.

119. *Id.*; Petitioner's Brief on the Merits at 3, *Stewart Org. I*, 487 U.S. 22 (1988) (No. 86-1908).

120. *Stewart Org., Inc. v. Ricoh Corp. (Stewart Org. II)*, 810 F.2d 1066, 1067 (11th Cir. 1987) (per curiam), *aff'd*, 487 U.S. 22 (1988).

121. *Stewart Org. I*, 487 U.S. at 24. The Eleventh Circuit found:

Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy.

Id. at 24 n.1.

122. *Id.* at 24.

123. *Id.* The district court relied on *Redwing Carriers, Inc. v. Foster*, 382 So. 2d 554 (Ala. 1980), *abrogated by* *Professional Ins. Corp. v. Sutherland*, 700 So. 2d 347 (1997). *See Stewart Org. II*, 810 F.2d at 1073 (Tjoflat, J., concurring). In *Redwing Carriers*, the relevant contract provision purported to specify the venue for disputes. 382 So. 2d at 555. The Alabama Supreme Court, however, read the provision as an attempt to limit Alabama courts' jurisdiction:

In the instant case the agreement does not govern venue, rather it waives the jurisdictional privilege of any domicile that the parties may be entitled to, divesting all courts of the power to hear and determine the cause except the courts of Hillsborough County, Florida.

.....

We consider contract provisions which attempt to limit the jurisdiction of the courts of this state to be invalid and unenforceable as being contrary to public policy.

Id. at 556. The contractual provision in *Stewart Org. II* appears to fit the Alabama Supreme Court's mold even more precisely than the provision that this Alabama court was considering. *See supra* note 116. Nonetheless, the federal court in *Stewart Org. II* read it differently. *See Stewart Org. II*, 810 F.2d at 1069-70.

124. *Stewart Org. I*, 487 U.S. at 25.

125. *See Stewart Org. II*, 810 F.2d at 1067-68; *see also Stewart Org. I*, 487 U.S. at 28 (referring to "the parties' venue dispute"). Justice Antonin Scalia, dissenting, vigorously contested this characterization, viewing the matter instead as a dispute over the validity of the forum-selection clause:

[T]he Court's description of the issue begs the question: what law governs whether the

was a small step for the Court to find that section 1404 also concerned venue: “This question involves a straightforward exercise in statutory interpretation to determine if the statute covers the point in dispute”—and, accordingly, the Court concluded that the statute did.¹²⁶ That conclusion is unimportant for present purposes. The Court’s method of construing the statute, however, is critical. “We believe that the statute, fairly construed, does cover the point in dispute.”¹²⁷ The Court noted that it had already construed section 1404 to vest district courts with case-by-case discretion about whether to transfer a case. Justice Thurgood Marshall noted that a forum-selection clause might be a powerful consideration in the exercise of that discretion. “The flexible and individualized analysis Congress prescribed in [section] 1404 thus encompasses consideration of the parties’ private expression of their venue preferences.”¹²⁸

forum-selection clause is a valid or invalid allocation of any inconvenience between the parties. If it is invalid, i.e. should be voided, between the parties, it cannot be entitled to any weight in the § 1404(a) determination. Since under Alabama law the forum-selection clause should be voided . . . in this case the question of what weight should be given can be reached only if as a preliminary matter federal law controls the issue of the validity of the clause between the parties.

Stewart Org. I, 487 U.S. at 35 (Scalia, J., dissenting) (citations omitted). Pointing out that state law almost invariably controls issues of contract validity, Justice Scalia argued that there was no dominant federal interest, therefore, no reason to displace the state law that made the clause invalid. *See id.*; Doernberg, *The Unseen Track*, *supra* note 7, at 645, 647, 658-59. Justice Scalia also argued that the policy underlying vertical choice-of-law doctrine in general supported his approach. *Stewart Org. I*, 487 U.S. at 39 (noting that *Hanna* emphasized “discouragement of forum-shopping” as one of *Erie*’s aims (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)) (internal quotation marks omitted)). The Court in *Hanna* had observed: “Though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of a forum.” *Hanna*, 380 U.S. at 469. In *Stewart Org. I*, it was easy to see that the difference in the federal and state approaches would affect the choice of forum. *See Stewart Org. I*, 487 U.S. at 24 (majority opinion). There seems little doubt that, if the case had proceeded in the Alabama state courts, the defendant could not have relied successfully on the choice-of-forum clause. *See id.* Thus, even had plaintiff filed there, defendant would have had enormous incentive to remove and then to seek transfer. *See* 28 U.S.C. §§ 1404, 1441 (2006 & Supp. 2012).

Justice Scalia had a strong point, despite the disagreement of the other eight justices. Nonetheless, for purposes of this Article, the critical issue is how the Court interpreted § 1404 for vertical choice-of-law purposes, not whether it should have been looking at that section at all.

126. *Stewart Org. I*, 487 U.S. at 26.

127. *Id.* at 29.

128. *Id.* at 29-30. That may well be true, but, as Justice Scalia pointed out, perhaps the Court’s first consideration should have been whether the clause was part of the contract under state law in the first place. *See supra* note 123. Alabama law seemed to say it was not. *See Stewart Org. I*, 487 U.S. at 24. That does not necessarily mean that the district court should have granted defendant’s motion, but, if Justice Scalia’s description of Alabama law was accurate, then the district court would have had to find some other basis on which to rest a transfer order, and none was apparent in this case. After all, defendant was a Delaware corporation with its principal place of business in New Jersey, plaintiff was an Alabama corporation operating only in Alabama, and there was no

The important thing is what the Court did not do. It did not rely exclusively on the statute's wording, but rather considered what it inferred to be congressional intent, as well.¹²⁹ Section 1404 says nothing explicit about forum-selection clauses; it merely states general considerations to which a forum-selection clause may be relevant.¹³⁰ Contrast the Court's inferential approach to the statute with its literal approach to Rule 3 in *Walker*.¹³¹ Rule 3 says nothing about stopping statutes of limitation from running, and the Court refused to read it to have any such effect in diversity cases.¹³² Arguably, the case for giving Rule 3 the effect *Walker* urged was considerably stronger, because Rule 3 does prescribe the stopping point in cases governed by federal statutes of limitation.¹³³ But because Rule 3 was silent on the limitations issue, the *Walker* Court ruled that it did not apply in diversity cases.¹³⁴ Parallel treatment in *Stewart* would have resulted in the conclusion that section 1404, silent on the issue of forum-selection clauses, also did not control. Finally, if *Walker* had used the *Stewart* approach, it might well have found that Rule 3, which does specify the event that stops federal limitations periods, had the same effect on state limitations periods in diversity cases.¹³⁵

Thus, the Court treats statutes differently from Federal Rules for vertical choice-of-law purposes. It looks to congressional intent and

apparent connection between the contract and New York. *Id.*

129. *Stewart Org. I*, 487 U.S. at 29-30.

130. See 28 U.S.C. § 1404.

131. Compare *Stewart Org. I*, 487 U.S. at 29-30 (considering inferred congressional intent), with *Walker v. Armco Steel Co.*, 446 U.S. 740, 750 (1980) (requiring a literal interpretation of Rule 3); see also *supra* notes 95-105 and accompanying text.

132. *Walker*, 446 U.S. at 750-51 & n.10.

133. See, e.g., *United States v. Wahl*, 583 F.2d 285, 287-89 (6th Cir. 1978); *Bomar v. Keyes*, 162 F.2d 136, 140-41 (2d Cir. 1947). The requirements of Rule 3 are also described in David D. Siegel, *Practice Commentary*, 28 U.S.C.A. Rule 3 cmt. (2008). Siegel explains:

Rule 3 provides the rule of federal practice that the filing of the complaint marks the commencement of the action. The moment of filing is the key time to look to determine whether the statute of limitations has been satisfied. As long as the complaint has been filed on or before the last day—the assumption would run—the action is timely and the summons and complaint can be served at any time during the 120 days that follow. (The 120-period comes from Rule 4[j].)

The foregoing is true enough as a general principle when jurisdiction is based on a federal question, or any other ground of jurisdiction except diversity of citizenship. When diversity is the jurisdictional basis for the federal action, however, Rule 3 emphatically does not govern for purposes of the statute of limitations. The rule applicable in a diversity case to determine whether the statute of limitations has been satisfied is taken from the law of the state in which the federal court happens to be sitting.

Id.

134. *Walker*, 446 U.S. at 750-51 & n.10.

135. See discussion *supra* notes 121-25 & accompanying text.

makes inferences from federal statutes in this area, just as it does in other areas. But it will not draw inferences from a Federal Rule; instead requiring explicitness if the Rule is to apply.¹³⁶ *Stewart* muddled that distinction to some extent because of its reliance on *Walker* and *Hanna*, but, although it referred to the “direct collision” language of both cases, it did not find a direct collision between the language of section 1404 and the Alabama rule.¹³⁷ Justice Marshall’s opinion tacitly acknowledged the difference: “[T]he ‘direct collision’ language, at least where the applicability of a federal statute is at issue, expresses the requirement that the federal statute be sufficiently broad to cover the point in dispute.”¹³⁸ There would have been no reason to make the distinction if the Court intended to use the same approach with statutes and the Federal Rules.

The distinction makes sense. The REA limits the Federal Rules by specifying that the Rules “shall not abridge, enlarge or modify any substantive right.”¹³⁹ No similar limitation applies to Congress’s legislative powers; as long as Congress acts within its delegated powers, it can, and often does, alter substantive rights, abolishing some and creating others. That is what the Federal Rules cannot do, and a structural reason underlies that limitation.

The Court, not Congress, creates and promulgates the Federal Rules.¹⁴⁰ Congress has effectively retained a veto power, but the Rules are the Court’s.¹⁴¹ Whereas Congress is a majoritarian body, the federal courts are counter-majoritarian. Therefore, the REA keeps the federal judiciary from regulating substance, a majoritarian concern, in the guise of regulating the federal courts’ internal procedure.

136. There is one case in which the Court held that apparently explicit language did not compel application of the relevant Federal Rule. *See Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001). *Semtek* concerned the meaning of Federal Rule 41(b), specifically its language about dismissal “operat[ing] as an adjudication on the merits.” *Id.* at 505 (citing FED. R. CIV. P. 41(b)). The Court concluded that the language did not mean that, in a case dismissed as untimely, res judicata prevented the plaintiff from filing in another forum with a longer statute. *Id.* at 509. Note, however, that *Semtek* is a case where even language one might characterize as read-my-lips clear might not cause a Federal Rule to apply. *See id.* at 505-06, 509. It has nothing to say about the propriety of going beyond the explicit language of a Federal Rule to expand its area of application.

137. *Stewart Org. I*, 487 U.S. 22, 26 & n.4 (1987).

138. *Id.* at 26 n.4.

139. 28 U.S.C. § 2072(b) (2006).

140. *Id.* § 2072(a).

141. *See id.* § 2074(a) (“Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.”). Congress occasionally exercises that power, most notably with respect to the Court’s first submission of the Federal Rules of Evidence in 1973. *See Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9. See generally* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974) (discussing the problems with regard to the application of the *Erie* doctrine to both statutory and constitutional interpretation).

In *Ragan*, *Hanna*, and *Walker*, no one argued that Rules 3 and 4 established new substantive rights or abolished old ones. The Rules were substantive only in the crabbed sense of *Guaranty Trust*, which declared a federal rule substantive if the choice of a state or federal rule was outcome determinative. Recall that *Guaranty Trust* itself did not concern a Federal Rule; it dealt instead with laches. To say, as later courts did, that a Federal Rule would have a forbidden substantive effect if applying it was outcome determinative was a considerable over-reading of *Guaranty Trust*. *Hanna* reflected that distinction:

[T]here have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that Erie commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, Erie commanded the enforcement of state law.¹⁴²

Now, if any court other than the Supreme Court had taken such a position, the laughter would not even have been muffled because *Cohen v. Beneficial Industrial Loan Corp.*¹⁴³ involved a Rule arguably on point, and the very same day, two other cases the Court decided—*Woods v. Interstate Realty Co.*¹⁴⁴ and *Ragan*—involved Federal Rules unambiguously on point.¹⁴⁵

Cohen was a shareholder's derivative suit wherein the plaintiff held a minuscule percentage of the corporate shares.¹⁴⁶ While the case was pending in a New Jersey state court, the New Jersey legislature enacted a law requiring shareholders with small holdings to post a bond to indemnify the corporation for "the reasonable expenses, including counsel fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which it may become subject," in the event that the derivative action was unsuccessful.¹⁴⁷

142. *Hanna v. Plumer*, 380 U.S. 460, 470 (1965).

143. 337 U.S. 541 (1949).

144. 337 U.S. 535 (1949).

145. See *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 531-33 (1949); *Cohen*, 337 U.S. at 555-56; *Woods*, 337 U.S. at 536.

146. *Cohen*, 337 U.S. at 543-44.

147. *Id.* at 544 & n.1 (quoting N.J. STAT. ANN. § 14:3-15 to -17 (West 1946) (repealed 1968)). The statute applied to shareholders with holdings of less than five percent or \$50,000 of corporate shares. N.J. STAT. ANN. § 14:3-15 to -17. The Court ruled that the statute's imposition of the security burden only on shareholders with a limited financial interest did not violate the Due Process Clause. *Cohen*, 337 U.S. at 551-52.

The New Jersey bond requirement was potentially inconsistent with then-Rule 23.¹⁴⁸ Although the Rule prescribed requirements for derivative actions, it did not require a bond.¹⁴⁹ The Court found that the state law had a substantive purpose—limiting strike suits by shareholders with little to lose—and was, therefore, more than simply a procedural rule to control litigation in New Jersey courts.¹⁵⁰ All of the explicit requirements of Rule 23 could apply to the case without conflicting with the New Jersey statute. Thus, the majority refused to read Rule 23’s silence to oust the state-imposed bond requirement. In this respect, *Hanna*’s characterization is accurate.

Justice Frankfurter, the author of *Guaranty Trust*, joined Justice William O. Douglas’s dissent on this point.¹⁵¹ They argued that the New Jersey bond requirement for a shareholder’s derivative action “does not add one iota to nor subtract one iota from that cause of action. It merely prescribes the method by which stockholders may enforce it.”¹⁵² Thus, the dissent focused only on the elements of the shareholder’s cause of action, and finding that the security requirement addressed none of them, deemed it procedural for vertical choice-of-law purposes and therefore inapplicable.¹⁵³

Woods involved a state rule that forbade unregistered corporations doing business in the state to sue in the state courts.¹⁵⁴ Mississippi courts had construed the law as governing only the capacity to sue, rather than the validity of any underlying contract.¹⁵⁵ Nonetheless, the majority ruled that the state law closed the federal courts also, preventing a diversity case from having an outcome different from what would have happened in the state courts.¹⁵⁶ The Court’s short majority opinion never

148. See *Cohen*, 337 U.S. at 551-52, 555-57.

149. See *id.* at 555-57.

150. *Id.* at 556. “A suit (esp[ecially] a derivative action), often based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement.” BLACK’S LAW DICTIONARY 1572 (9th ed. 2009).

151. *Cohen*, 337 U.S. at 557 (Douglas, J., dissenting).

152. *Id.*

153. *Id.*; see Doernberg, *The Tempest*, *supra* note 92, at 1185-92 (discussing an “elements” approach and a “behavioral” approach to construing the Federal Rules for REA purposes).

154. See *Woods v. Interstate Realty Co.*, 337 U.S. 535, 536 & n.1 (1949).

155. *Id.* at 539 (Jackson, J., dissenting). Justice Robert H. Jackson’s dissent explains:

The [state] statute follows a pattern general among the states in requiring qualification and payment of fees by foreign corporations. State courts have generally held such Acts to do no more than to withhold state help from the noncomplying corporation but to leave their rights otherwise unimpaired. This interpretation left such corporations a basis on which to get the help of any other court—federal or state—that could otherwise take jurisdiction

Id.

156. See *id.* at 537-38 (majority opinion).

so much as mentioned Federal Rule 17, which spoke directly to a party's capacity as a litigant and contained no disqualification.¹⁵⁷ Justice Robert H. Jackson's dissent also failed to mention Rule 17, focusing instead on the impropriety of federal courts giving state laws greater effect than the states themselves did.¹⁵⁸ It is, therefore, quite a stretch to say, as *Hanna* did, that *Woods* construed Rule 17. *Woods* did not construe it; it ignored it.

Ragan, like *Hanna* and *Walker*, involved service of process. It resembles *Walker* (when to serve process) more than *Hanna* (how to serve process). *Ragan* filed a federal complaint stating a negligence claim within the two-year period that Kansas law allowed.¹⁵⁹ Service, however, did not occur until almost four months later, and almost three months after the two-year period ended.¹⁶⁰ The defendant sought summary judgment for untimeliness, and succeeded in the Tenth Circuit despite plaintiff's argument that Rule 3 defined commencement as the time that he had filed, not served, the complaint.¹⁶¹ The Supreme Court adopted the Tenth Circuit's view that under Kansas law, only service, not filing, commenced the action.¹⁶² "[The] local law undertook to determine the life of the cause of action. We cannot give it a longer life in the federal court than it would have had in the state court without

157. See *id.* at 535-59; FED. R. CIV. P. 17(b) (1946) (amended 1948). Federal Rule 17(b) stated:

Capacity to Sue or be Sued. The capacity of an individual, other than the one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the State in which the district court is held; except (1) that a partnership or other unincorporated association, which has no such capacity by the name of such State, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Rule 66.

FED. R. CIV. P. 17(b).

158. *Woods*, 337 U.S. at 538-40 (Jackson, J., dissenting).

159. *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 531 (1949); see KAN. GEN. STATS. 1935, § 60-306.

160. See *Ragan*, 337 U.S. at 531.

161. See *id.* at 532. "A civil action is commenced by filing a complaint with the court." FED. R. CIV. P. 3.

162. See *Ragan*, 337 U.S. at 532-34; see also KAN. GEN. STATS. 1935, § 60-308 ("An action shall be deemed commenced within the meaning of this article, as to each defendant, at the date of the summons which is served on him . . ."). Although *Ragan* obviously viewed it differently, one could read the Kansas statute to be consistent with Rule 3, because the statute refers to "the date of the summons," not the date of the service. See § 60-308. But the Tenth Circuit, in an opinion that the Supreme Court noted "a distinguished member of the Kansas bar" had written, read it differently. *Ragan*, 337 U.S. at 534.

adding something to the cause of action. We may not do that consistently with *Erie*”¹⁶³

In *Ragan*, the clash between state rules and the Federal Rule was direct: each specified the date of commencement of a civil action. The Court’s selection of the state definition is, perhaps, not surprising since, by its terms, it applied to the limitations period in *Ragan*. It is a bit surprising that the Court never discussed the scope of Rule 3. It simply relied on *Guaranty Trust* in finding that using Rule 3 would produce a different result in federal court from the outcome that would result in state court, thus violating *Erie*. There was no mention of the REA; the Court passed up the opportunity to explore whether applying Rule 3 would have violated the REA. *Ragan* clearly rests on *Guaranty Trust*, not on the REA or any narrowing construction of Rule 3, so *Hanna*’s view of *Ragan*—as a case construing Rule 3—is as inaccurate as *Hanna*’s view of *Woods*.

Hanna criticized *Ragan* for misunderstanding the proper inquiry.¹⁶⁴ *Hanna*’s contribution to the vertical choice-of-law issue was recognizing that the analytical technique of *Erie*, *Guaranty Trust*, and *Byrd* is entirely inapplicable to: (1) the scope of a Federal Rule and (2) whether a Federal Rule contravenes the REA.¹⁶⁵ That is what some of the justices who decided *Shady Grove* forgot.

IV. SHADY GROVE’S UMBRA

Shady Grove is a difficult case to digest. New York requires automobile insurers to pay no-fault insurance claims within thirty days of receipt, or to pay two percent per month interest on the delayed amount plus reasonable attorney’s fees.¹⁶⁶ Shady Grove Orthopedic Associates (“Shady Grove”) claimed that Allstate Insurance Company (“Allstate”) improperly delayed payment and owed approximately five hundred dollars in interest.¹⁶⁷ Normally, the diversity jurisdiction

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

164. See *Hanna v. Plumer*, 380 U.S. 460, 476-77 (1965).

165. That is not to say that the *Erie* analysis is inapplicable to any procedural question. If there is no Federal Rule directly on point, or if there is such a Rule but the Court determines that the Rule violates the limiting language of the REA, then the *Erie* analysis becomes appropriate. See *supra* notes 86-94 and accompanying text. The *Erie* analysis operates only when there is a vacuum of positive federal law—where no constitutional, statutory, or regulatory provision governs the issue. See *supra* note 88 and accompanying text. Then, and then only, the question becomes whether the federal court should create federal common law, and the *Erie* analysis, as developed in the subsequent cases, addresses that question. See *supra* note 87 and accompanying text.

166. N.Y. INS. LAW § 5106(a) (McKinney 2009).

167. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467, 469 (E.D.N.Y. 2006), *aff’d*, 549 F.3d 137 (2d Cir. 2008), *rev’d*, 130 S. Ct. 1431 (2010). As the district court

statute¹⁶⁸ would bar the federal courts from hearing such a small claim, but Shady Grove had filed a federal class action under diversity jurisdiction, alleging “that Allstate routinely fails to pay covered claims for first-party no-fault benefits within the statutorily mandated time period and routinely ignores its obligation to pay the statutory interest owed in such cases.”¹⁶⁹ Pleading a class action raised the amount in controversy to more than five million dollars, which allowed Shady Grove to file in federal court under the Class Action Fairness Act (“CAFA”).¹⁷⁰ The problem arose because a provision of New York’s Civil Practice Law and Rules—section 901(b)—forbade maintenance of New York class actions to recover penalties.¹⁷¹ Both the district and circuit courts viewed the interest provision as a penalty, and, therefore, refused class certification.¹⁷²

The Supreme Court confronted two issues: (1) what the analytical technique should be, and (2) what the result in the case should be. Each issue produced a five-to-four majority vote, but the majorities’ membership shifted. Even within each majority there were serious differences. Five justices agreed that the class action could proceed, but Justice John Paul Stevens differed with Justice Antonin Scalia’s plurality about the appropriate analytical method.¹⁷³ Four other justices disagreed

recited, Allstate eventually paid the underlying claims, but withheld the interest payments it allegedly owed under the statute. *See id.*

168. 28 U.S.C. § 1332(a) (2006 & Supp. 2012).

169. *Shady Grove*, 466 F. Supp. 2d at 470.

170. 28 U.S.C. § 1332(d)(2) (2006); *see Shady Grove*, 130 S. Ct. at 1437 & n.3. Unlike the stringent requirements of general diversity jurisdiction, diversity jurisdiction under the CAFA requires only minimal diversity of the parties as long as at least five million dollars is in controversy. 28 U.S.C. § 1332(d)(2). Justice Ginsburg’s dissent specifically accused Shady Grove of “attempt[ing] to transform a \$500 case into a \$5,000,000 award.” *Shady Grove*, 130 S. Ct. at 1460 (Ginsburg, J., dissenting). There is a certain irresistible irony to the CAFA’s operation, as Justice Ginsburg described it. One of Congress’s clear purposes in enacting the CAFA was to make it possible for class action defendants to remove such actions from state “magnet jurisdictions” to the federal courts. *See generally* Symposium, *Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005*, 156 U. PA. L. REV. 1439 (2008) (discussing the purposes and impact of the CAFA). In *Shady Grove*, the CAFA had the (probably) unintended effect of making the federal court the magnet jurisdiction. *See Shady Grove*, 130 S. Ct. at 1437 & n.3. Adding to the irony, the United States is a magnet jurisdiction for international cases. *See, e.g.*, Russell J. Weintraub, *The United States as a Magnet Forum and What, if Anything, to Do About It*, in INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION 213, 216 (Jack L. Goldsmith ed., 1997).

171. *See* N.Y. C.P.L.R. § 901(b) (McKinney 2006) (“Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.”).

172. *See Shady Grove*, 549 F.3d at 146; *Shady Grove*, 466 F. Supp. 2d at 471, 473.

173. *See Shady Grove*, 130 S. Ct. at 1436-37, 1442-44. Justice Scalia announced the judgment and wrote a majority opinion with respect to the facts of the case, its procedural history, and the

both with the result and with Justice Scalia's analytical method.¹⁷⁴ Justice Stevens agreed with the dissent on method, but was unable to agree on how it applied in *Shady Grove*.¹⁷⁵

The split over the proper technique commands attention. Justice Scalia approached the REA issue from the federal side, looking only at Rule 23, not at state law, to decide whether Rule 23 was substantive within the meaning of the REA. "What matters is what the rule itself regulates: If it governs only 'the manner and 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."¹⁷⁶ Justice Scalia thus ruled out considering whether the conflicting state law had a substantive purpose. In *Shady Grove*, the state rule may have reflected a substantive policy, that is, the legislature's desire to avoid penalty cases

unavoidability of a direct clash between Federal Rule 23 and N.Y. C.P.L.R. section 901(b)—and, hence, the necessity of evaluating Rule 23 under the REA. *Id.* at 1436-42. Chief Justice John Roberts and Justices Stevens, Justice Thomas, and Justice Sonia Sotomayor joined in that view. *Id.* The remainder of his opinion discussed the proper technique for making REA evaluations. *Id.* at 1442-44. The Chief Justice, Justice Thomas, and Justice Sotomayor joined Part II-B and II-D of the opinion. *See id.* Only the Chief Justice and Justice Thomas joined Part II-C, which was a reply to Justice Stevens's partial concurrence and concurrence in the judgment. *Id.* at 1444-48. Justice Ginsburg, joined by Justices Anthony Kennedy, Stephen Breyer, and Samuel Alito, wrote an extended dissent. *See id.* at 1460 (Ginsburg, J., dissenting).

174. *Shady Grove*, 130 S. Ct. at 1436-42 (majority opinion). Justice Ginsburg dissented, joined by Justices Kennedy, Breyer, and Alito. *See id.* at 1460 (Ginsburg, J., dissenting).

175. *See id.* at 1463 n.2. As Justice Ginsburg pointed out, "a majority of this Court, it bears emphasis, agrees that Federal Rules should be read with moderation in diversity suits to accommodate important state interests." *Id.* *See generally* Symposium, *Erie Under Advisement: The Doctrine After Shady Grove*, 44 AKRON L. REV. 897 (2011) (containing several articles discussing the *Shady Grove* opinions in depth).

176. *Shady Grove*, 130 S. Ct. at 1442 (majority opinion) (quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 446 (1946)). Note, however, that Justice Scalia's position in *Semtek Int'l Inc. v. Lockheed Martin Corp.* seems more nuanced than *Shady Grove*'s simple statement. 531 U.S. 497 (2001). *Semtek*, begun in the California state courts and then removed by the defendant, suffered dismissal in the district and circuit courts because the plaintiff had overrun California's two-year limitation period. *Id.* at 499. The district court specified that it was dismissing plaintiff's claims—under Federal Rule 41(b)—"in [their] entirety on the merits and with prejudice." *Id.* (internal quotation marks omitted). The issue was whether that designation precluded litigation in Maryland, which had a longer limitations period. *Id.* The Court ruled that it did not, notwithstanding Rule 41(b)'s apparently clear language. *Id.* at 509. Justice Scalia declined to take the Rule's wording at face value: "[I]t 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." *Id.* at 503. Justice Scalia also added a statement that seems at odds with his later position in *Shady Grove*: "Indeed, such a rule would arguably violate the jurisdictional limitation of the Rules Enabling Act." *Id.* Perhaps so, but Rule 41(b) contains nothing with respect to "the rules of decision by which [the] court will adjudicate [those] rights," because, as Justice Scalia himself pointed out, "the traditional rule is that expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the substantive right, so that dismissal on that ground does not have claim-preclusive effect in other jurisdictions with longer, unexpired limitations periods." *Shady Grove*, 130 S. Ct. at 1442; *Semtek*, 531 U.S. at 504.

inflicting ruinous damages on a party.¹⁷⁷ For Justice Scalia and his three colleagues, “the substantive nature of New York’s law, or its substantive purpose, makes no difference.”¹⁷⁸ The issue was not whether the state law is substantive, but rather whether the Federal Rule is. Rule 23 addresses nothing substantive—no elements of a cause of action or defense on the merits¹⁷⁹—and, therefore, it does not violate the REA.

The other five justices saw it differently. They declined to say whether a Federal Rule has a REA-impermissible effect without first looking at the state rules and the extent to which they embody or reflect substantive state policies. On that principle the five were united, but they were unable to agree that section 901(b) represented a substantive state policy.

Justice Stevens concluded that New York’s limitation was, for REA purposes, procedural only.¹⁸⁰ He diverged from Justice Scalia, asserting that:

It is important to observe that the balance Congress has struck [in the RDA and REA] turns, in part, on the nature of the state 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 and remedies.¹⁸¹

For Justice Stevens, it was appropriate to focus both on the state and federal laws. Federal Rule 23 clearly covered whether *Shady Grove* could maintain its suit as a class action.¹⁸² Therefore, he, like Justice Scalia’s plurality, had to consider whether applying Rule 23 would violate the REA. Justice Scalia’s plurality had only to read Rule 23 to make that decision.¹⁸³ Justice Stevens apparently thought that approach was unrealistic because it considered the scope of the Federal Rule as if the Rule operated in a vacuum. In his view, the REA’s limitation

177. Justice Ginsburg’s dissent noted that there were several indications that the New York legislature had substantive goals in mind when it enacted section 901(b). *See Shady Grove*, 130 S. Ct. at 1465-66 (Ginsburg, J., dissenting) (discussing Governor Hugh Carey’s signing statement and the practice commentaries). Justice Scalia disputed the evidence. *See id.* at 1440 (majority opinion) (“This evidence of the New York Legislature’s purpose is pretty sparse.”).

178. *Id.* at 1444.

179. *See supra* notes 148-50 and accompanying text.

180. “The New York law at issue . . . is a procedural rule that is not part of New York’s substantive law.” *Shady Grove*, 130 S. Ct. at 1448 (Stevens, J., concurring in part) (internal citation omitted).

181. *Id.* at 1449.

182. *See id.* at 1456-57.

183. *See id.* at 1437 (majority opinion).

compelled examining the state law to see whether applying the Federal Rule would “abridge, enlarge or modify” some substantive right.¹⁸⁴ In effect, though not explicitly, Justice Scalia’s plurality thought that the REA required evaluating a Federal Rule only on its face, whereas Justice Stevens wanted to consider REA challenges on an as-applied basis.¹⁸⁵

Several factors persuaded Justice Stevens that New York’s rule was only procedural. He relied in part on New York’s designation of the rule as procedural.¹⁸⁶ He also noted the costs to the federal judiciary of trying to discern when an ostensibly procedural state provision, in fact, embodies a state substantive policy.¹⁸⁷ Finally, he effectively established a rebuttable presumption favoring the Federal Rule by stating that: “[t]he mere possibility that a federal rule would alter a state-created right is not sufficient. There must be little doubt.”¹⁸⁸

Justice Stevens also argued: (1) that since the New York rule applied to all penalty class actions—not only those based on New York law—the Court should not understand it to reflect New York’s substantive policy, and (2) before New York enacted the class action statute relevant to *Shady Grove*, plaintiff classes could maintain penalty class actions in the federal courts, “and New York had done nothing to prevent that.”¹⁸⁹ It is difficult to follow his reasoning here; his second point overlooked the possibility that section 901(b) was New York doing something. It is almost as if he was saying that New York’s legislature had let too much time elapse since the passage of the CAFA before attempting to limit penalty class actions in the federal courts, and, hence, was estopped from expecting the federal courts to read section 901(b) as such a limit.

Justice Stevens’s first point is similarly confusing. He seemed to assume that, because section 901(b) would affect class actions not based on New York law, the legislature must not have had a substantive policy. Why should that be so? That the limitation might have ancillary effects on non-New York claims tells nothing about the effect the legislature intended for claims that did sound in New York law. Perhaps the statute

184. *Id.* at 1449, 1451 (Stevens, J., concurring in part) (citation omitted) (internal quotation marks omitted).

185. *Id.* at 1459. Justice Stevens made that clear in the subheading he used—“*Applying Rule 23 Does Not Violate the Enabling Act*”—after finding, and using as a sub-heading, the fact that “*Rule 23 Controls Class Certification*.” *Id.* at 1456-57.

186. *Id.* at 1457. “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 state-created rights and remedies.” *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

had more than one purpose; the legislature may have designed it both to limit recovery of New York penalties in class actions and to prevent New York from becoming a magnet jurisdiction for penalty class actions based on other states' laws. It is impossible to tell; the sparse legislative history only hints that the legislature was concerned about "annihilating punishment of the defendant."¹⁹⁰

Finally, Justice Stevens mentioned the argument that class actions are unnecessary to give claimants incentive to sue in penalty cases and might be unduly cumbersome.¹⁹¹ This enabled him to view section 901(b) as a procedural calibration device,¹⁹² rather than as a substantive limitation reflecting a policy judgment on appropriate levels of liability in statutory penalty cases.¹⁹³

Justice Ginsburg's dissent interpreted section 901(b) and its history differently from Justice Stevens.¹⁹⁴ She traced the sparse legislative history, quoted the New York Court of Appeals at length, and concluded that the legislature included section 901(b) as a substantive limitation on statutory penalties.¹⁹⁵ "[T]he Court gives no quarter to New York's

190. *Id.* at 1458 (quoting N.Y. C.P.L.R. § 901 cmt. 11 (2006)) (internal quotation marks omitted); *see also supra* note 166.

191. *Shady Grove*, 130 S. Ct. at 1458-59.

192. *Id.* at 1459.

193. Consider also that section 901(b) does nothing to limit an insurer's total exposure to penalties. *See* N.Y. C.P.L.R. section 901(b). There is no limit on the number of individual claimants who can sue, and there is nothing in New York law that would prevent consolidation of such actions under article 6 of the C.P.L.R., which would lead to just as large a single judgment in the consolidated action as plaintiffs could obtain in a class action. *See Doernberg, The Tempest, supra* note 92, at 1174-75 & nn.159-61.

194. Justice Ginsburg's summary of the vertical choice-of-law doctrine, in Part I-A of her dissenting opinion, overstates the RDA's effect in diversity actions: "[T]he Rules of Decision Act . . . prohibits federal courts from generating substantive law in diversity actions." *Shady Grove*, 130 S. Ct. at 1460-61 (Ginsburg, J., dissenting) (footnote omitted). That statement is generally, but not universally, true. Two well known cases demonstrate that the federal courts can (and should) sometimes generate substantive law in diversity actions when there is a dominant federal interest. *See supra* note 88 and accompanying text. Justice Ginsburg did not cite either case. *See Shady Grove*, 130 S. Ct. at 1460-73.

195. *Shady Grove*, 130 S. Ct. at 1464. Justice Ginsburg stated in dissent:

While the Judicial Conference proposal was in the New York Legislature's hopper, "various groups advocated for the addition of a provision that would prohibit class action plaintiffs from being awarded a statutorily-created penalty . . . except when expressly authorized in the pertinent statute." These constituents "feared that recoveries beyond actual damages could lead to excessively harsh results." "They also argued that there was no need to permit class actions [because] statutory penalties . . . provided an aggrieved party with a sufficient economic incentive to pursue a claim." Such penalties, constituents observed, often far exceed a plaintiff's actual damages. "When lumped together," they argued, "penalties and class actions produce overkill."

Id. (alterations in original) (citations omitted) (quoting *Sperry v. Crompton Corp.*, 863 N.E.2d 1012, 1015 (N.Y. 2007), and Letter from Gary J. Perkinson, Exec. Dir., N.Y. Council of Retail Merchs., Inc., to Judah Gribetz, Counsel to Governor of N.Y. (June 4, 1975), *in* S. Rep. No. 1309-8, ch. 207

limitation on statutory damages.”¹⁹⁶ And yet, comparing section 901(b) to a statutory cap on damages, as Justice Ginsburg did when she likened section 901(b) to the New York statute involved in *Gasperini*, elides a highly significant difference.¹⁹⁷ In *Gasperini*, the New York statute expressly placed a limitation on total damages.¹⁹⁸

Contrast the *Gasperini* statute with the *Shady Grove* statute. The latter places no limit on an insurer’s exposure to statutory damages; it merely makes the total amount unrecoverable in a state class action.¹⁹⁹ Perhaps the New York legislature, yielding to pressure from insurers, wanted to take the class action device off the table, but it did not limit any insurer’s total liability for statutory damages.²⁰⁰ *Gasperini*, rather than buttressing the dissenters’ argument, should have been a caution. The New York legislature obviously knows how to limit

(N.Y. 1975)).

One might question the incentive argument in the context of *Shady Grove*. *Shady Grove*’s claim was for approximately \$500. *Shady Grove*, 130 S. Ct. at 1437 (majority opinion). One month’s interest at two percent thus would be less than ten dollars, a paltry incentive to undertake litigation with all of its attendant expenses and stress. *See id.* at 1460 (Ginsburg, J., dissenting).

That aside, the argument that the “various groups” made, referenced in Justice Ginsburg’s dissent, boils down to an argument against statutory penalties generally—or, at least, those that one might view as “disproportionate” to actual damages. *See id.* at 1464. Yet, the argument overlooks the reasons for having statutory penalties in the first place. Penalties are supposed to punish, and the Supreme Court has compared their purpose to that of punitive damages. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 418 (2003) (suggesting that punitive damages be compared to civil penalty amounts to help determine whether punitive damages are excessive).

196. *Shady Grove*, 130 S. Ct. at 1464.

197. *Id.* (citing *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996)).

198. “In reviewing a money judgment in an action in which an itemized verdict is required . . . the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.” N.Y. C.P.L.R. § 5501(c) (McKinney 1995 & Supp. 2010). That the limitation is not a specific dollar amount—see, for example, CAL. CIV. CODE § 3333.2 (West 1997) (requiring noneconomic losses to medical malpractice victim not to exceed \$250,000); COLO. REV. STAT. ANN. § 13-64-302 (West 2005) (limiting medical malpractice recovery amounts to \$1,000,000—though the court may make an exception “upon good cause shown”—of which no more than \$250,000 can be noneconomic loss); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-09(b)(1) (West 2011) (limiting noneconomic damages in medical malpractice cases to \$650,000 through 2008 with the limit to increase thereafter by \$15,000 per year); TEX. CIV. PRAC. & REM. CODE ANN. § 74.301(c) (West 2012) (limiting noneconomic damages in medical malpractice cases to \$250,000 per provider with an absolute maximum of \$500,000)—is unimportant. The legislature clearly believed that there was a figure that a court could determine was “reasonable compensation,” and the legislature instructed New York’s appellate courts not to permit more than an immaterial deviation from that figure.

199. *See Shady Grove*, 130 S. Ct. at 1471-72.

200. It is also possible that the legislature concluded that the nature of penalty class actions was such that, to borrow the wording of Federal Rule 23, “the questions of law or fact common to class members [*do not*] predominate over any questions affecting only individual members, and that a class action is [*not*] superior to other available methods for fairly and efficiently adjudicating the controversy.” FED. R. CIV. P. 23(b)(3).

total damages when it wants to, but it refrained in the context of statutory penalties.²⁰¹

Justice Ginsburg characterized New York's law as a limit on liability simpliciter.²⁰² It is not; it is, instead, a limit on New York's use of its class action device. As she correctly pointed out, New York law 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."²⁰³ She was speaking of recovery "in a single suit."²⁰⁴ But, by the same token, it does not prevent total recovery of statutory damages by every claimant whose insurer unlawfully delays reimbursement. Allstate has no right, under New York law, to an exemption from paying interest to each person to whom it unlawfully delayed paying benefits.

Finally, Justice Ginsburg argued that *Shady Grove* was inconsistent with *Cohen*.²⁰⁵ In *Cohen*, the Court had read then-Rule 23 to permit the New Jersey bond requirement to function as an "add-on" to the Federal Rule, since the Rule said nothing about bonds.²⁰⁶ Justice Ginsburg, in *Shady Grove*, argued that the Court should permit an analogous result by allowing the New York prohibition to function, even though it, like the *Cohen* bond requirement, might prevent actions that would otherwise have gone forward.²⁰⁷

The argument has some force, because the cases are similar in that way. But it overlooks the fact that *Cohen* used *Guaranty Trust's* talismanic outcome-determinative test, which *Byrd* rejected even for the *Erie* line of cases. Seven years after *Byrd*, *Hanna* declared the *Erie* analysis wholly inappropriate for Federal Rules cases. Thus, the *Cohen* approach, on which Justice Ginsburg relied, was twice outmoded. To borrow from Justice Douglas's dissenting opinion in *Cohen*, which Justice Frankfurter joined, New York's prohibition of the class action device "does not add one iota to nor subtract one iota from"²⁰⁸ the claim

201. For example, New York had a statutory cap on wrongful death damages in the mid-nineteenth century. See John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1168 & n.51 (2005). This lasted until the Constitution of 1894 forbade such a limit. See N.Y. CONST. art. I, § 18 (1894); Witt, *supra*, at 1169 & n.59. Nonetheless, the current version of that New York constitutional provision specifically permits the legislature to set limits on recovery for death in workers' compensation cases. See N.Y. CONST. art. I, § 18.

202. See *Shady Grove*, 130 S. Ct. at 1465-66.

203. *Id.* at 1466 (footnote omitted).

204. *Id.* at 1464.

205. See *id.* at 1462-63, 1468; *supra* notes 136-43 and accompanying text.

206. *Cohen v. Beneficial Indus. Loan. Corp.*, 337 U.S. 541, 544 & n.1, 555-57 (1949).

207. See *Shady Grove*, 130 S. Ct. at 1462-63, 1468.

208. *Cohen*, 337 U.S. at 557 (Douglas, J., dissenting).

that every insurance beneficiary (or its assignee) has against an insurer in Allstate's position.²⁰⁹

The justices' differing views about section 901(b), however, divert attention from the far more central question of how the Court ought to read the Federal Rules when considering an REA challenge. That requires understanding the purpose of the REA's limiting language. As Professor Stephen B. Burbank explains:

The historical evidence compels the view that the limitations imposed by the famous first two sentences of the Act . . . were intended to allocate power between the Supreme Court as rule-maker and Congress and thus to circumscribe the delegation of legislative power, that they were thought to be equally relevant in all actions brought in federal court, and that the protection of state law was deemed a probable effect, rather than the primary purpose, of the allocation scheme established by the Act. In this aspect the history starkly contradicts the notion, shared by the Supreme Court and many commentators, that the basic purpose of the Act's procedure/substance dichotomy is to allocate law-making power between the federal government and the states.²¹⁰

Therefore, to regard the REA's limiting language as a federalism instrument, rather than as a separation-of-powers instrument, is to indulge in a serious misreading of the REA's history and timing. As the Ninth Circuit has recognized, adopting Professor Burbank's view:

Because the Rules Enabling Act was enacted in 1934, four years before the Court decided *Erie Railroad Company v. Tompkins* . . . its proviso restricting the permissible scope of the rules could not have been designed to serve the purposes of *Erie* and thereby to ensure the primacy of state law. Rather, the proviso was designed to serve the

209. The court's decision in *Jeub v. B/G Foods, Inc.* is analogous. 2 F.R.D. 238 (D. Minn. 1942); see *supra* note 12 and accompanying text. The court in *Jeub* found:

That the rights over and against Swift and Company, which B/G Foods may have by reason of any loss sustained by it, must be governed by the substantive laws of this State is entirely clear. The invoking of the third-party procedural practice must not do violence to the substantive rights of the parties. However, an acceleration of an expedition of the presentation of such rights does not conflict with any Minnesota law.

Jeub, 2 F.R.D. at 240. Perhaps even more to the point, the court noted:

The apparent purpose of Rule 14 is to provide suitable machinery whereby the rights of all parties may be determined in one proceeding Otherwise, B/G Foods, Inc., would be required to await the outcome of the present suit, and then if plaintiffs recover, to institute an independent action for contribution or indemnity. The rule under consideration was promulgated to avoid this very circuitry of proceeding.

Id. at 241. One can make exactly the same point about Rule 23.

210. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1025-26 (1982) (footnotes omitted).

purposes of the anti-delegation doctrine by limiting the scope of rules that were adopted with minimal congressional involvement.²¹¹

Neither court nor commentator has disputed that characterization. Even if Professor Burbank and the Ninth Circuit were mistaken about the office of the REA's limiting language, that would neither explain nor justify the approach to the REA questions that, following *Shady Grove*, a majority of the justices appear to favor.

V. EVALUATING FEDERAL RULES FOR REA COMPLIANCE

For reasons that are not clear, the Court has used two quite distinct methods in reading the Federal Rules. To determine the scope of a Rule—whether it speaks to the issue *sub judice*—the Court looks only at its language, almost defiantly refusing to make inferences. *Walker* demonstrates that particularly well. Statutes of limitations prescribe how long a claimant has to commence his action on an accrued claim.²¹² Rule 3 defines commencement, yet the *Walker* Court declined to apply it because it does not mention statutes of limitations.²¹³ That is all the more remarkable because Rule 3 is the stopping point for federal limitations periods.²¹⁴ *Palmer*, which antedates *Guaranty Trust, Byrd, Hanna*, and

211. *Sain v. City of Bend*, 309 F.3d 1134, 1137 (9th Cir. 2002); *accord*, *United States v. Estrada*, 680 F. Supp. 1312, 1325 (D. Minn. 1988). In *United States v. Myers*, a decision antedating *Sain*, one district court cited Professor Burbank as taking the opposite position, but the district court overlooked that the language upon which it relied expressed not Professor Burbank's own view, but rather his summary of the mess the Court had made of interpreting the REA. 687 F. Supp. 1403, 1414-15 (N.D. Cal. 1988) (finding that the REA's substance/procedure distinction "enunciates for the purposes of demarcating state and federal rule-making power, not determining the proper allocation of power within the federal government"); *see also* Burbank, *supra* note 210, at 1027-28. In any event, the Ninth Circuit's contrary view supersedes that of the district court.

212. *See, e.g.*, BLACK'S LAW DICTIONARY 1546 (9th ed. 2009) ("[S]tatute[s] establishing a time limit for suing in a civil case, based on the date when the claim accrued."). The problem arises because different legal systems have different views about what constitutes commencement for the purposes of a given statute of limitation. For example, in 1992, New York shifted some of its courts from a commencement-by-service system to a commencement-by-filing system. David D. Siegel, *Appellate Judges Disagree – with Fatal Results for Plaintiff – About When and Whether to Extend to 120-Period for Summons Service When "Good Cause" Not Shown*, SIEGEL'S PRAC. REV., Jan. 2001, at 1, 2. Other courts, generally those inferior to the New York general jurisdiction trial court, remained on a commencement-by-service system, although New York subsequently added some lower courts to the commencement-by-filing system. *See* N.Y. C.P.L.R. § 304 cmt. 1 (McKinney 2010). Sometimes, even the same legal system has divergent views. *See, e.g.*, WASH. REV. CODE ANN. § 4.16.170 (West 2005) (marking commencement at either filing the complaint or serving the summons, "whichever occurs first").

213. *See supra* notes 95-105 and accompanying text.

214. *See, e.g.*, *West v. Conrail*, 481 U.S. 35, 39 (1987). The Court declared:

[W]e now hold that when the underlying cause of action is based on federal law and the absence of an express federal statute of limitations makes it necessary to borrow a limitations period from another statute, the action is not barred if it has been

Walker, is equally persuasive.²¹⁵ Just as Rule 3 says nothing about limitations periods, Rule 8(c) is silent about burdens of proof, and the Court refused to read it as affecting them.²¹⁶ It is no exaggeration to say that the Court has taken a read-my-lips approach to questions about the scope of Federal Rules.²¹⁷ In its view, Federal Rules reach only what their language says.

With respect to REA problems, however, some justices' approaches have been quite different. *Shady Grove* illustrates that. The justices divided sharply into two camps on how to determine whether a Rule violates the REA. Justice Scalia's plurality thought the Court should not look at state law at all to evaluate an REA challenge. That method is consistent with *Sibbach* and with the direct-conflict approach *Hanna* prescribed. The other justices thought it essential to look at the conflicting state law to see whether it is substantive, viewing state and federal law side-by-side.²¹⁸ The latter approach is reminiscent of *Byrd*, with its emphasis on balancing. Yet, as *Hanna* instructed, the *Erie-Guaranty Trust-Byrd* analysis is not appropriate if there is a Federal Rule directly on point.

The unanswered question is why some of the justices use such radically different approaches to determine: (1) to what situations a Federal Rule applies, and (2) whether it exceeds the limitations of the REA. Of course, it is commonplace to use different analyses for different purposes.²¹⁹ The point here, however, is that the purposes are

"commenced" in compliance with Rule 3 within the borrowed period.

Id. (footnote omitted) (internal quotation marks omitted); *see also Sain*, 309 F.3d at 1138 (finding that Rule 3 specifies the time at which borrowed state limitations periods start in § 1983 actions); *supra* note 127 and accompanying text.

215. *See Palmer v. Hoffman*, 318 U.S. 109, 116-17 (1943) (discussing Rule 8(c)'s silence as to which party has the burden of establishing contributory negligence); *supra* notes 63-70 and accompanying text.

216. *See supra* notes 63-70 and accompanying text.

217. *See supra* notes 76-106, 129-31 and accompanying text.

218. *See supra* text accompanying notes 176-84.

219. For example, equal protection analysis varies according to whether the individual is a member of a suspect class (requiring that the classification be narrowly tailored and necessary to achieve a compelling government interest), a quasi-suspect class (requiring the classification be substantially related to an important government interest), or the populace at large (requiring only that the classification bear a rational relationship to some permissible government goal). *See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 687-88 (7th ed. 2004)*. Similarly, one may be competent to make a will—

[t]estamentary capacity exists when the testator has intelligent knowledge of the natural objects of his bounty, the general composition of his estate, and what he wants done with it, even if his memory is impaired by age or disease, and the testator need not have the ability to conduct business affairs

—but incompetent to stand trial on a criminal charge, "measured by the capacity to understand the proceedings, to consult meaningfully with counsel, and to assist in the defense." *In re Bosley*, 26

the same. In both situations the question is whether a Rule speaks to an issue (without regard to whether the issue is substantive or procedural). On the application side, the Court is clear: if the Rule does not address the issue explicitly, the Rule does not apply. There is no good reason for not using the same approach on the REA side: if the Rule does not explicitly speak to a substantive issue, it does not govern that issue and therefore cannot violate the REA. The question should be whether the Rule articulates a procedural regulation or a substantive one. Read-my-lips clarity is the Court's approach, but only some of the time.

The advantage of the read-my-lips approach is obvious. It is a clearer, better-demarcated approach than the one that five of the *Shady Grove* justices urged. Justice Ginsburg's dissent talked about whether the state rule is "outcome affective," but that is the wrong question, and she asked it of the wrong rule.²²⁰ It is a throwback to *Guaranty Trust*, which is no longer appropriate even in non-Federal Rules cases. The issue is not whether a state rule is outcome affective; it is whether a Federal Rule "abridge[s], enlarge[s] or modif[ies] any substantive right."²²¹ The REA directs attention to what the Federal Rule seeks to accomplish, not to the incidental effects that a Federal Rule may have on state law.

Justice Ginsburg was concerned about forum shopping, as was *Erie*. Referring to the RDA, not the REA, Justice Ginsburg declared: "That Act directs federal courts, in diversity cases, to apply state law when failure to do so would invite forum-shopping and yield markedly disparate litigation outcomes."²²² That does not help solve the *Shady Grove* problem, because *Shady Grove* is not an RDA case. The issue is whether Rule 23 violates the REA. The Court has never read the REA to include, even implicitly, the same sorts of forum-shopping concerns as the RDA. The dissent conflated RDA analysis with REA analysis, but overlooked the lesson of *Hanna*.²²³

Justice Ginsburg's concern is perfectly understandable, but forum shopping is unavoidable in a multi-governmental system.²²⁴ More than

A.3d 1104, 1111-12 (Pa. Super. Ct. 2011); see BLACK'S LAW DICTIONARY 322 (9th ed. 2009).

220. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 132 S. Ct. 1431, 1471 (2010) (Ginsburg, J., dissenting).

221. 28 U.S.C. § 2072 (2006).

222. *Shady Grove*, 130 S. Ct. at 1461.

223. See *Hanna v. Plumer*, 380 U.S. 460, 469-74 (1965); *supra* Part III.

224. See *Shady Grove*, 130 S. Ct. at 1447-48 (majority opinion). Young children intuitively understand this principle, for it is the rare child who, needing parental permission for some proposed activity, fails to consider which parent to approach, and the likelihood of getting the desired answer from each.

that, despite courts' repeated inveighing against forum shopping,²²⁵ it is a duty that counsel owes to the client as part of the zealous representation to which the client is entitled.²²⁶ Many cases offer the opportunity for forum shopping, and counsel who fail to take advantage of that possibility do not serve their clients well. The removal statutes²²⁷ and the transfer statutes²²⁸ represent congressional recognition of the existence and legitimacy of forum shopping. In a perfect world, forum shopping would never produce different results, but we have to live in *this* world.

Forum shopping occurs with respect to vertical and horizontal choice-of-law problems. A single automobile accident may generate inconsistent outcomes depending on the forum. States have different choice-of-law rules that lead to different results. The Constitution has little to say about choice of law.²²⁹ It is possible that a particular choice in a particular case may violate the Due Process Clause²³⁰ or the Full Faith and Credit Clause,²³¹ but such cases are rare because the tests the Court uses are so narrow.

Litigants may prefer certain forums, perceiving substantive or procedural advantages. The REA Congress, however, was not concerned about forum shopping. It worried instead that the Supreme Court, in promulgating the Federal Rules, might tread on Congress's own prerogatives to create federal substantive law, a concern that subsequent action by the Court involving New Deal legislation demonstrated had a sound basis.²³²

225. See, e.g., *Hanna*, 380 U.S. at 467 (reiterating that unfairness results if forum shopping occurs); *Erie R.R. v. Tompkins*, 304 U.S. 64, 77-78 (using injustice and confusion as reasons against forum shopping); *Chamberlain v. Giampapa*, 210 F.3d 154, 159 (3d Cir. 2000) (quoting *Hanna* on the importance of avoiding forum shopping); *Feinstein v. Mass. Gen. Hosp.*, 643 F.2d 880, 884 (1st Cir. 1981) (discussing *Erie's* evils of forum shopping and inequitable administration of the law).

226. See MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2013); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1983).

227. See 28 U.S.C. §§ 1441-1447 (2006 & Supp. 2012).

228. See *id.* §§ 1404, 1406.

229. “[*Allstate Insurance Co.*] v. *Hague* and its progeny establish that choice-of-law doctrine is largely a matter of state law, and that constitutional intervention will be rare.” HAY ET AL., *supra* note 37, at 193; see *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981). *Hague* “indicated that, for now at least, only minimal constitutional scrutiny will be imposed on a state’s conflicts decisions.” RUSSEL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 669 (6th ed. 2010) (footnote omitted).

230. See, e.g., *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149-50 (1934); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407 (1930).

231. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 160 (1932).

232. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 133 (1995). William E. Leuchtenburg states:

Recall the historical context in which Congress passed the REA. The Depression was in full swing,²³³ and Franklin D. Roosevelt was in the second year of his presidency.²³⁴ The view that the Court was reactionary—out of touch with the times—was widespread,²³⁵ and eventually led to the ill-fated court-packing proposal.²³⁶ Suspicion of the Court ran high. Congress was willing to delegate procedural rule-making power to the Court, but it included three safeguards of its own

Early in the New Deal, the Supreme Court had appeared willing to uphold novel legislation, but in the spring of 1935 the roof had fallen in. Justice Roberts joined the Four Horsemen to invalidate a rail pension law, that thereafter Roberts voted consistently with the conservatives. Later that same month, on “Black Monday,” May 27, 1935, the Court, this time in a unanimous decision, demolished the National Industrial Recovery Act. In the next year, the Court, by a 6-3 vote . . . , struck down the Agricultural Adjustment Act with an opinion by Justice Roberts that provoked a blistering dissent from Justice Stone, took special pains to knock out the Guffey Coal Act in the *Carter* [*v. Carter Coal Co.*, 298 U.S. 238 (1936)] case, and in [*Morehead v. New York ex. rel. Tipaldo*], 298 U.S. 587 (1936) invalidated a New York minimum wage law. “Never in a single year before or since,” Max Lerner later wrote, “has so much crucial legislation been undone, so much declared public policy nullified.”

Id. (footnotes omitted).

233. See DAVID BRIAN ROBERTSON, *FEDERALISM AND THE MAKING OF AMERICA* 113 (2012).

234. See *id.* at 114.

235. For an extended discussion of the Court’s interaction with New Deal legislation and its effect on popular views of the Court, see LEUCHTENBURG, *supra* note 232, at 82-132. A *Daily News* editorial shortly after the 1936 election expressed this interaction as follows:

The power of the nine men whose average age is 71 must be curtailed somehow, or the will of the people as expressed in their return of the New Deal to power will be thwarted.

. . . .

. . . The power the Supreme Court has taken to itself—to nullify any laws it does not like—must be taken from it if our progress is to continue.

Op-Ed., *Roosevelt Wins*, DAILY NEWS, Nov. 4, 1936, at 35.

By the end of 1936, it had become commonplace to refer to the justices as “the nine old men.” LEUCHTENBURG, *supra* note 232, at 119. Leuchtenburg further describes this phrasing:

A.A. Berle, a member of the Brain Trust, had used the term [the nine old men] in passing in 1933, and a column in a Kentucky newspaper reflected a popular notion when it referred to the Court as ‘nine old back-number owls (appointed by by-gone Presidents) who sit on the leafless, fruitless limb of an old dead tree.’ But it was the publication on October 26, 1936, of *The Nine Old Men* by the widely circulated columnists Drew Pearson and Robert S. Allen that made the phrase a household expression.

Id. at 119.

236. See LEUCHTENBURG, *supra* note 232, at 112, 114-15 (discussing the court-packing proposal). The idea did not spring from President Roosevelt. PETER IRONS, *A PEOPLE’S HISTORY OF THE SUPREME COURT: THE MEN AND WOMEN WHOSE CASES AND DECISIONS HAVE SHAPED OUR CONSTITUTION* 313 (2006); see also LEUCHTENBURG, *supra* note 232, at 120. Peter Irons explains:

Back in 1914, an earlier attorney general had proposed adding one judge to lower federal courts for every sitting judge who had reached the age of seventy. ‘This will insure at all times,’ the proposal’s author wrote, ‘the presence of a judge sufficiently active to discharge promptly and adequately all the duties of the court.’ That proposal came from James McReynolds, now seventy-two and the most dogmatic of the Four Horsemen of Reaction on the Supreme Court.

IRONS, *supra*, at 313.

prerogatives: the limiting language of the REA,²³⁷ the preservation of Congress's power effectively to veto proposed rules before they went into effect,²³⁸ and the proviso that "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."²³⁹ It could hardly be clearer that Congress's concern in enacting the REA was its effect on separation of powers, not its effect on federalism.²⁴⁰ Finally, Congress's acquiescence in Rule 23's iterations from 1938 to the present is some evidence—not dispositive, certainly—that Congress did not perceive Rule 23 as violating the REA's limiting language.

The approach that Justices Stevens and Ginsburg advocated leaves the Court, as Rules promulgator, in an impossible position. If the content of state law is the measure of a Federal Rule's legitimacy, then, in order to ensure compliance with the REA, the Court needs to do a fifty-state survey before it propounds any Rule or amendment. It cannot otherwise ensure that the Rule complies with the REA even when drafted. Worse, the Stevens-Ginsburg approach means that a Federal Rule, compliant with the REA when promulgated, may become non-compliant when states change their laws.²⁴¹ Finally, a Federal Rule may simultaneously be REA-compliant in one state, but not so in an identical case in another—so much for uniform federal procedure. Surely the 1934 Congress could not have had that in mind when it enacted the REA.

Even if one thinks that Congress intended the limiting language of the REA to serve federalism rather than separation of powers,²⁴² it should make no difference. Since *Hanna* nearly half a century ago, the Court has consistently said that the Federal Rules mean only what they say explicitly. That compels the conclusion that, if a Federal Rule does not explicitly address a substantive right, it does not run afoul of the REA.

237. See 28 U.S.C. § 2072 (2006).

238. See *id.* § 2074(a).

239. *Id.* § 2074(b).

240. See Burbank, *supra* note 210, at 1036. Professor Burbank adds:

In the end, as in the beginning, of the movement, the high ground in the debate about the uniform federal procedure bill involved the allocation of lawmaking power between the Supreme Court as rule-maker and Congress. State interests as such were acknowledged only late in the course of the bill's pre-1934 history. Their protection was deemed a consequence, not the goal, of the bill's procedure/substance dichotomy.

Id.

241. To be sure, changes in the U.S. Constitution may have the effect of invalidating previously enacted legislation, but the apparent analogy is false. Under the Supremacy Clause, the Constitution is superior to ordinary legislation. State law, however, is not superior to federal law.

242. See *supra* notes 206-22 and accompanying text.

VI. CONCLUSION

The Court should heed its own approach in cases like *Palmer*, *Walker*, and *Burlington Northern*, and especially the wisdom of Dr. Seuss: the Federal Rules say what they mean, and they mean what they say²⁴³—and not anything else. If a Federal Rule does not specifically address a substantive right, then it does not violate the REA.²⁴⁴ The Stevens-Ginsburg approach threatens to undercut Congress’s desire that the federal courts have uniform rules of procedure, untethered to state law.²⁴⁵ It creates for the Federal Rules the same problem that *Guaranty Trust*’s outcome-determinative test did.²⁴⁶ To ask whether a state rule is “outcome-affective,” as Justice Ginsburg did, is to launch an inquiry both broad and formless. Even the sentence in which Justice Ginsburg adverted to “outcome-affective” raises problems:

In short, Shady Grove’s effort to characterize [section] 901(b) as simply ‘procedural’ cannot successfully elide this fundamental norm: When no federal law or rule is dispositive of an issue, and a state statute is outcome affective in the sense our cases on *Erie* (pre and post-*Hanna*) develop, the Rules of Decision Act commands application of the State’s law in diversity suits.²⁴⁷

At the outset, the sentence assumes the conclusion that no Federal Rule applied, but that was the first question in *Shady Grove*. Even the dissenters seemed to accept that Rule 23 applied by its own terms, though they urged that the Court should interpret it to avoid the conflict.²⁴⁸ The real issue was whether New York’s contrary rule could displace Rule 23. The *Shady Grove* dissent represents, in essence, a retreat to the method of *Guaranty Trust*, an implicit rejection of *Hanna*, and a concomitant return to the *Erie* analysis under the RDA, but the RDA does not control the Federal Rules.²⁴⁹

243. See *supra* notes 2, 69-76, 101-16 and accompanying text.

244. See *supra* notes 209-11 and accompanying text.

245. See *supra* notes 184-91 and accompanying text.

246. See *supra* Parts III-IV; see also *supra* notes 34-75 and accompanying text.

247. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1471 (Ginsburg, J., dissenting); see *supra* notes 195-200 and accompanying text.

248. See *Shady Grove*, 130 S. Ct. at 1465-69.

249. Even if one considers it possible that the RDA speaks to the Federal Rules (an interesting proposition, given that the 1789 Congress that passed both the RDA and the Process Act contemplated only that state procedure would govern litigation in the federal courts), the REA supersedes it because it is far more specific. See *Thompson v. Calderon*, 151 F.3d 918, 929 (9th Cir. 1998) (citing NORMAN J. SINGER, 2B STATUTES AND STATUTORY CONSTRUCTION § 51.02 (5th ed. 1992)) (“But it is elementary that a more recent and specific statute is reconciled with a more general, older one by treating the more specific as an exception which controls in the circumstances to which it applies.”); see also *supra* notes 10-11.

Any procedural rule can affect substantive rights; the Court's experience with, and *Hanna's* rejection of, *Guaranty Trust's* method as applied to the Federal Rules bear explicit witness to that. But the ancillary effect on substantive rights that a Federal Rule may have is not the issue at which the 1934 Congress aimed. The Federal Rules may not prescribe abridgments, enlargements or modifications of substantive rights, state or federal. As long as they refrain from doing so, they satisfy the REA's command.