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FOR LACK OF A BETTER RULE: USING THE CONCEPT OF TRANSSUBSTANTIVITY TO SOLVE THE *ERIE* PROBLEM IN *SHADY GROVE*

*Stephen R. Brown**

In the 2010 case, Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, the Supreme Court had to decide whether to apply Federal Rule of Civil Procedure 23 to allow the plaintiff to certify its claim as a class action or to apply a conflicting state law that precluded class treatment of the claim. In an opinion that implicated issues related to class actions, the* Erie *doctrine, federalism, and the allocation of power between Congress and the Supreme Court, five Justices held that Federal Rule 23 should apply. Dissenting with three other Justices, Justice Ginsburg argued that the Court had sanctioned the plaintiff's attempt to "transform a $500 case into a $5,000,000 award."*

Even the five Justices who agreed that Federal Rule 23 should apply, however, disagreed about the reasoning. The disagreement primarily was driven by the relative weight that each Justice assigned to the competing policy interests at stake—the need for an easily administrable rule, the need for fidelity to statutory text, and the need for deference to state legislatures. Shady Grove *so fractured the Court that one commentator has suggested that there is a "need to reconsider the problem from the ground up."*

In this Article, I argue that the competing policy interests that drove the disagreement do not actually have to be competing. Here, I propose a novel solution for deciding whether to apply a Federal Rule or a conflicting state law. Under this approach, a Federal Rule should trump a state law only when the conflicting state law is transsubstantive. This approach resolves the disagreement in Shady Grove *because it is easily administrable, is faithful to the statutory text, and is sufficiently deferential to state legislatures.*

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I. INTRODUCTION

The Rules Enabling Act, enacted in 1934, vests the Supreme Court with the authority to promulgate rules of procedure for federal courts, subject to the limitation that "[s]uch rules shall not abridge, enlarge or

modify any substantive right."[1] The meaning of this Enabling Act limitation was the crux of the Supreme Court's 2010 case *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*[2] There, Shady Grove sued Allstate and sought class treatment of a claim under New York law for statutory damages. New York law, however, precluded class treatment of a claim for statutory damages. The Court, therefore, had to decide whether allowing Shady Grove's claim to proceed as a class action under Federal Rule 23 in federal court—despite New York's prohibition on class treatment of the claim—would "abridge, enlarge or modify" a substantive right under New York law.[3]

This question produced a divided result: five Justices agreed on an answer—that Federal Rule 23 could apply—but the Court was divided four to one to four on what test to apply to reach an answer. So, in 2010, over seventy years after Congress first enacted the Enabling Act, when a Federal Rule of Civil Procedure must yield to a conflicting state law is still unsettled.[4]

The Justices' disagreement in *Shady Grove* is not particularly surprising. The "abridge, enlarge or modify" limitation is one part of the notoriously difficult[5] *Erie* doctrine—the set of principles governing the conflict between state law and non-statutory law from federal sources[6] in a federal diversity case.[7] But the Justices' disagreement has

1. 28 U.S.C. § 2072(b) (2006).

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

3. *See* 28 U.S.C. § 2072(b); *Shady Grove*, 130 S. Ct. at 1436–37.

4. *See* Joseph P. Bauer, *Shedding Light on* Shady Grove*: Further Reflections on the* Erie *Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939, 947 (2011) ("[E]ven after seventy-plus years, the Court has been unable to come up with definitions of 'procedural' and 'substantive' which predictably resolve that distinction."). The *Erie* decision itself was based, in part, on "the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74 (1938).

5. Walker v. Armco Steel Corp., 446 U.S. 740, 744 (1980) ("The question whether state or federal law should apply on various issues arising in an action based on state law which has been brought in federal court under diversity of citizenship jurisdiction has troubled this Court for many years."); *see also* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 18 (2010) ("Few subjects in the field of Procedure are characterized by greater legal abstraction than the collection of doctrines that govern the relationship between the federal and state courts."). Professors Burbank and Wolff have persuasively argued that the "animating concern" for the Enabling Act was "separation of powers." *Id.* at 27.

6. I use this somewhat clumsy phrase here to avoid characterizing common law announced by federal judges as federal common law. *See* Kermit Roosevelt III, *Choice of Law in Federal Courts:*

exacerbated the already confused state of the law.[8] To borrow an often used phrase from *Erie*'s progeny, the Supreme Court's failure to reach a majority resolution will likely cause "confusion worse confounded."[9]

There is more at stake in *Shady Grove*, however, than an academic debate about *Erie*. The Court's failure to agree on an approach for resolving the problem in *Shady Grove* will have important, concrete effects on the day-to-day practice in federal courts.[10] A lack of guidance on the choice between a state law and a conflicting Federal Rule can cause a case to turn on what can be fairly characterized as a technicality.[11] For example,[12] a litigant may have his otherwise meritorious claim dismissed as untimely commenced because he

From Erie *and* Klaxon *to CAFA and* Shady Grove 5–6 (Univ. of Pa. Pub. Law and Legal Theory Research Paper Series, Paper No. 10-28 2010), *available at* http://ssrn.com/abstract=1665092 (noting the distinction between federal law and "general law," which "included most of the classic common law subjects of tort and contract [and] was not created by any government, but rather deduced by judges").

7. *Erie*, 304 U.S. at 64; 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4501 (2d. ed. 1996) [hereinafter 19 WRIGHT & MILLER] ("Stated in general terms, the core of the *Erie* doctrine is that the substantive law to be applied by the federal courts in any case is state law, except when the matter before the court is governed by the United States Constitution, an Act of Congress, a treaty, international law, the domestic law of another country, or, in special circumstances, by federal common law.").

8. Professor Jay Tidmarsh has stated that "*Shady Grove*'s fractured opinions suggest the need to reconsider the [Enabling Act] problem from the ground up." Jay Tidmarsh, *Procedure, Substance, and* Erie, 64 VAND. L. REV. 877, 880 (2011).

9. *Cf.* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

10. *Cf.* Bauer, *supra* note 4, at 22 ("[U]niformity helps the parties, attorneys and judges know what the rules are. Uniformity in turn also leads to greater ease of administration of the judicial process; federal courts will have to look to fewer sources for resolving controversial issues, and they will be sources with which the courts are more familiar.").

11. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 711 (1974) ("[W]e can all agree that a situation where a person cannot predict or control where he will be sued, and will lose in one court if he does *X* and lose in the other if he doesn't, is one we should certainly try to avoid.").

12. *Cf.* Walker v. Armco Steel Corp., 446 U.S. 740, 742–44 (1980). In *Walker*, less than two years after an injury allegedly caused by the defendant's negligent manufacture of a nail, the plaintiff filed a suit in federal district court in Oklahoma. *Id.* The summons, however, was not served on the defendant until about two years and three months after the injury. *Id.* Oklahoma's statute of limitations required a plaintiff to "commence[]" an action within two years of the injury. Under Federal Rule 3, an action was "commenced by filing a complaint with the court." FED. R. CIV. P. 3. Under Oklahoma law, however, an action is not "commenced" until "service of the summons on the defendant." *Walker*, 446 U.S. at 742. The Supreme Court held that the plaintiff's suit must be dismissed because of his failure to serve the summons on the defendant within the time required by Oklahoma law, despite his "commenc[ing]" under Federal Rule 3 within two years of the injury. *Id.* at 751–53.

followed the Federal Rule (defining commencement as when a complaint is filed) instead of a state law (defining commencement as when a defendant is served).[13]

This Article will argue that the fractured result in *Shady Grove* was primarily driven by the relative weight that the Justices assigned to the competing policy interests underlying the choice between state law and non-statutory law from federal sources. Justice Scalia (writing for a plurality of four justices) stated that a Federal Rule must govern—regardless of the nature of the conflicting state law—when the Federal Rule "really regulates procedure."[14] This approach, according to Justice Scalia, was easy to apply and avoided the complicated issue of assessing the purpose of a conflicting state law.[15] Justice Stevens (writing for himself and concurring in the judgment) argued that the Federal Rule should usually govern unless the state rule is "so intertwined with a state right or remedy that it functions to define the scope of the state-created right."[16] Justice Stevens preferred this approach for its fidelity to the language of the Enabling Act.[17] Finally, Justice Ginsburg (dissenting with the support of three other Justices) argued that a court should, whenever possible, interpret the Federal Rule to avoid a conflict with an "important" state law.[18] This approach deferred to the judgments made by state legislatures consistent with the principles of federalism.[19]

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13. The obvious response to this objection is that a litigant can simply comply with the more demanding rule. *Cf.* Ely, *supra* note 11, at 711. One point made in support of the *Erie* doctrine generally is that it avoids "a situation where a person cannot predict or control where he will be sued, and will lose in one court if he does X and lose in the other if he doesn't." *Id.* Professor Ely undercuts this justification—with a point that is equally applicable to uncertainty about whether a state law or a Federal Rule will govern in federal court—by claiming that "in every case compliance with the *other* rule would have constituted compliance with both." *Id.*

14. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1445 (2010) (quoting *Sibbach*, 312 U.S. at 14).

15. *Id.* at 1447 n.15 (arguing that an "inquiry into the 'nature and functions' of a state law will tend to increase, rather than decrease, the difficulty of classifying Federal Rules as substantive or procedural").

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

17. *Id.* at 1454 (criticizing the plurality for "adopt[ing] a second-best interpretation of the Rules Enabling Act . . . in the service of simplicity").

18. *Id.* at 1449 (Ginsburg, J., dissenting) (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996)) ("[F]ederal rules must be interpreted with some degree of 'sensitivity to important state interests and regulatory policies' . . . .").

19. *Id.* at 1473 (criticizing the Court for its "erosion of *Erie*'s federalism grounding").

This was not an intractable[20] disagreement about the meaning of precedent.[21] Rather, the disagreement—along with the resulting difficulties it will cause for lower courts and litigants—exists only for lack of a better rule.

This Article proposes a new approach that, by accommodating the competing policy interests at stake, can potentially serve as that better rule and provide much-needed clarity. Briefly, when faced with a choice between a Federal Rule and a conflicting[22] state law, a federal court sitting in diversity should apply the Federal Rule when the state rule is transsubstantive.[23] Conversely, when the state law is not

20. Others have pointed out that the disagreement between the Justices may not have been as severe as it appeared. *See* Adam N. Steinman, *Our Class Action Federalism:* Erie *and the Rules Enabling Act After* Shady Grove, 86 NOTRE DAME L. REV. 1131, 1173 (2011) (arguing that "some areas of the purported disagreement between Scalia an Stevens may be more semantic than substantive").

21. It must be noted that Justice Scalia and Justice Stevens engage in a debate over the meaning of the *Sibbach* case, a 1941 Supreme Court precedent on the meaning of Enabling Act. *See Shady Grove*, 130 S. Ct. at 1444–47 (Justice Scalia arguing that the Enabling Act only requires a court to determine whether the Federal Rule at issue is procedural); *id.* at 1454–55 (Stevens, J., concurring) (arguing that the Enabling Act requires a court to also examine whether the state law to be trumped by the Federal Rule is substantive). Justice Scalia, however, acknowledges that his approach "is hard to square with [the Enabling Act]'s terms" and to an extent concedes that "[t]here is something to [Justice Stevens's approach]." *Id*. at 1445–46 (plurality opinion). So, although this disagreement exists, the disagreement appears to be driven by policy concerns. For an excellent discussion of the debate over *Sibbach*, see Allen Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The* Shady Grove *Debate Between Justices Scalia and Stevens* (Loyola–LA Legal Studies Paper No. 2010-36). As this debate has been substantially covered elsewhere, this Article is written under the assumption that Justice Scalia's really regulates procedure approach was not compelled or mandated by *Sibbach*.

22. Justice Ginsburg, writing in a dissent joined by three others, argued that there was, in fact, no conflict between the state rule and the Federal Rule. This Article will generally assume that a majority of the court was correct in holding that there was in fact a conflict between New York's Rule 23 and Federal Rule 23. Justice Ginsburg correctly points out that her approach to the *Shady Grove* case would give greater respect to principles of federalism, but her approach also causes uncertainly for litigants—courts have applied the accommodation approach that she suggests with inconsistency. *See* Richard D. Freer & Thomas C. Arthur, *The Irrepressible Influence of* Byrd, 44 CREIGHTON L. REV. 61, 70 (2010) ("Through the years, the court has been anything but consistent in its approach to the important funneling function of assessing the breadth of a Federal Rule."). This Article will show, however, that the state-law transsubstantivity approach proffered here will adequately respect principles of federalism without sacrificing certainty. *See infra* Part III.C. This new approach is directed at solving the specific problem at issue in *Shady Grove*—when the Enabling Act's abridge, enlarge or modify limitation requires a Federal Rule to yield to a conflicting state law. *See* 28 U.S.C. § 2072(b) (2006).

23. For an interesting discussion on the history and development of transsubstantive procedure, see David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59

transsubstantive, the federal court should apply the state law. As will be explained further below, this transsubstantivity-based approach (1) will not be materially more difficult to apply that Justice Scalia's really regulates procedure test, (2) is faithful to the text of the Enabling Act, and (3) is respectful of the judgments of state legislatures.

In Part II, this Article will begin by describing how the Supreme Court, prior to *Shady Grove*, approached conflicts between non-statutory federal law and state law. Part II will also describe the important cases on the specific conflict between a Federal Rule and a state law. In Part III, this Article will discuss the *Shady Grove* opinion in detail, highlighting how policy preferences had an effect on the three separate opinions. Part IV will describe the state-law transsubstantivity approach and discuss how it will better accommodate the various policy issues that produced the Court's fractured result in *Shady Grove*. Throughout Part IV, this Article will attempt to confront arguments that can be made against the state-law transsubstantivity approach. In Part V, this Article will use two examples to describe how the state-law transsubstantivity approach would apply in practice. Part VI briefly concludes.

II. THE CONFLICT BETWEEN STATE AND NON-STATUTORY FEDERAL LAW

For any diversity-of-citizenship case in federal court, when there is a conflict between state law and non-statutory law from federal sources, the general rule is that "federal courts are to apply state substantive law and federal procedural law."[24] Although this broad principle applies to all conflicts between state law and non-statutory law from federal sources, the precise analytical framework under which the conflict is resolved depends on the type of non-statutory law.[25]

A conflict between state law and non-statutory federal law as expounded by federal judges must be resolved under the framework

DEPAUL L. REV. 371 (2010).

24. Hanna v. Plumer, 380 U.S. 460, 465 (1965).

25. *See Hanna*, 380 U.S. at 466–69; *see also* Ely, *supra* note 11, at 699 ("For whatever *Hanna*'s other merits or demerits, the major point of the Court's opinion was its separation for purposes of analysis the Rules of Decision Act, the Enabling Act, and the constitutional demands to which the *Erie* opinion had alluded.").

announced in the *Erie* case.[26] A conflict between a state law and a Federal Rule, on the other hand, must be resolved under the Enabling Act.[27] The *Erie* framework is more flexible and allows a court to focus on the fairness of applying one of the two conflicting laws.[28] Conversely, the Enabling Act analysis more rigidly depends on the categorization of conflicting laws as substantive or procedural.[29] To avoid this rigidity, courts have sometimes interpreted the scope of a Federal Rule to avoid a conflict with state law.[30] With the scope of the Federal Rule thus limited, the extant conflict is then between state law and non-statutory federal law as expounded by federal judges and, therefore, is governed by the more flexible *Erie* analysis.[31]

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26. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 70 (1938). Tompkins sued in federal court and claimed that the Erie Railroad Company's negligence caused his injuries. Relevant to Tompkins claim, the Pennsylvania Supreme Court had held that (1) an individual walking along railroad tracks was a trespasser and (2) that a railroad "[wa]s not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or willful." *Id.* at 70. The federal trial court adjudicating Tompkins claim, however, declined to apply the rule announced by the Pennsylvania Supreme Court and did not require wanton or willful negligence.

27. *See Hanna*, 380 U.S. at 466–69.

28. *See id.* at 467 ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in federal court."); *see also* Ely, *supra* note 11, at 712 ("The Court was referring to the unfairness of affording a nonresident plaintiff suing a resident defendant a unilateral choice of the rules by which the lawsuit was to be determined."); *id.* (noting "[T]he unfairness of subjecting a person involved in litigation with a citizen of a different state to a body of law different from that which applies when his next door neighbor is involved in similar litigation with a cocitizen.").

29. If one accepts Justice Scalia's reading of the *Sibbach* case in *Shady Grove*, one can also say that the Enabling Act analysis is more rigid because it does not allow for the consideration of state law that is to be displaced—i.e., once a court determines that a Federal Rule is procedural, the Federal Rule automatically trumps the conflicting state law. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1444 (2010) ("In sum, it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule.").

30. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001) (reasoning that its adopted interpretation of Federal Rule 41(b) was supported by the fact that a contrary interpretation "would arguably violate the jurisdictional limitation of the Rule Enabling Act"); *Shady Grove*, 130 S. Ct. at 1462 (Ginsburg, J., dissenting) ("[W]e have avoided immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest."); *see also* Freer & Arthur, *supra* note 22, at 112 (discussing *Walker* and noting that "[T]he Court pretty clearly applied a substantive canon of construction: if possible, read Federal Rules narrowly to avoid trenching on state substantive interests and thus avoid raising serious issues under § 2072(b).").

31. *See Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring) ("And absent a governing federal rule, a federal court must engage in the traditional Rules of Decision Act inquiry, under the Erie line of cases."); *see id.* at 1460–65 (Ginsburg, J., dissenting) (summarizing Supreme Court jurisprudence

Thus, understanding *Shady Grove*, which involved a potential conflict between a state law and Federal Rule 23, requires an understanding of three lines of cases: (1) *Erie* and its progeny, (2) cases construing the Enabling Act, and (3) cases where a Federal Rule was interpreted to avoid a conflict with state law.

A. The Rules of Decision Act and Erie

A conflict between state law and non-statutory federal law as expounded by federal judges must be resolved under the framework announced in *Erie*.[32] *Erie* centered around the Rules of Decision Act, first enacted in 1789,[33] which directs that federal courts must apply state "law" unless a federal law "shall otherwise require or provide."[34] Prior to *Erie*, it had been held that a common law rule announced by a state's supreme court was not a "law" within the meaning of the Rules of Decision Act[35]; therefore, "federal courts [we]re free, in the absence of a

on "avoid[ing] immoderate interpretation of the Federal Rules" so that *Erie* will control"); *see also* 19 WRIGHT & MILLER, *supra* note 7, § 4508 ("If the federal rule does not control the point in dispute, and thus there is no conflict between state law and the federal rule, the court must apply the federal rule within its sphere of coverage, and determine whether to apply the state law to the point in dispute in light of the twin aims of Erie.").

32. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 70 (1938). In *Erie*, the plaintiff Tompkins had been walking at night on a "much used" path that ran parallel to railroad tracks in Pennsylvania. As he was walking, a freight train owned by the Erie Railroad Company came toward him. The train used its whistle and headlight to alert Tompkins of its approach but Tompkins did not move off of the path. When the train passed, Tompkins was struck and injured by an "open door swinging from the side of a car." *Id.* at 80–81. Tompkins sued in federal court and claimed that the Erie Railroad Company's negligence caused his injuries.

33. *See* 19 WRIGHT & MILLER, *supra* note 7, § 4502 (noting that the Rules of Decision Act was "amended slightly in 1948" but "has remained substantially unchanged" from its initial 1789 form).

34. Swift v. Tyson, 41 U.S. 1, 18 (1842). The Rules of Decision Act states 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." 28 U.S.C. § 1652 (2006).

35. In interpreting the Rules of Decision Act, the Supreme Court in *Swift*, 41 U.S. at 18, held that "the decisions of the local tribunals" were not "law" "[i]n the ordinary use of language." Wright & Miller notes that the "unarticulated assumption of *Swift* [is that] the federal judiciary has the power, indeed perhaps the duty, to reach the result that appears to it as just, regardless of what the states may regard as the proper outcome." 19 WRIGHT & MILLER, *supra* note 7, § 4502. For a thorough and informative discussion of the *Swift* case and how the holding in *Swift* expanded until *Erie*, see Bradford R. Clark, Erie*'s Constitutional Source*, 95 CAL. L. REV. 1289 (2007).

local statute, to exercise their independent judgment as to what the law [wa]s."[36]

In *Erie*, the Supreme Court overruled this earlier precedent and held that a federal court sitting in diversity must apply a common law rule announced by a state's supreme court.[37] The *Erie* Court supported its holding by identifying two problematic results that flowed from a failure to apply a state common law rule. First, the Court noted that the failure to apply state common law had encouraged forum shopping.[38] Because the outcome of a case could differ in federal court and state court, a party could select the most favorable forum. The Court cited one particularly egregious example, where, in anticipation of lawsuit, a corporation had re-incorporated under the law of another state to manufacture diversity jurisdiction to take advantage of the more favorable law applied in federal court.[39]

Second, the Court concluded, albeit somewhat cryptically, that the failure to apply state common law had "rendered impossible equal protection of the law" and had "prevented uniformity in the administration of the law of the State."[40] Essentially, because the "privilege of selecting the court in which the right should be determined was conferred upon the non-citizen," the non-citizen in litigation had an advantage over a citizen.[41] Congress intended diversity of citizenship jurisdiction to "prevent apprehended discrimination in state courts against those not citizens of the State."[42] So while diversity jurisdiction

36. *Erie*, 304 U.S. at 70 (quoting 90 F.2d 603, 604). Prior to *Erie*, Justice Field criticized this approach, suggesting that "what has been termed the general law of the country [] is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject." Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting).

37. *Erie*, 304 U.S. at 79–80. The *Erie* case focused on the language of the Rules of Decision Act. But the Court also held—in a passage about which commentators still debate today—that the Constitution compelled the interpretation of the Rules of Decision Act expounded in *Erie*. According to the Court, when a federal court sitting in diversity failed to apply a rule announced by a state's supreme court, the federal court "invaded rights which . . . are reserved by the Constitution to the several States." *Id.* at 80–81.

38. *Id.* at 73–74.

39. *Id.* (citing Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928)).

40. *Id.* at 75.

41. *See id*.

42. *Id.* at 74.

was meant to level the playing field for non-citizens, before *Erie*, diversity jurisdiction had tipped the scales in favor of non-citizens.[43] These two problematic results were later characterized by the Supreme Court as "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[44]

Separate from these "twin aims," the Court also reasoned that the practice of allowing federal courts to announce and apply general common law had "invaded rights which . . . are reserved by the Constitution to the several states."[45] This constitutional aspect of the *Erie* decision "rests on the principle that the federal government as a whole, including Congress and the federal courts, has no more authority than that given it by the Constitution."[46]

A later case sharpened the focus on the twin aims and suggested the rule that, in a diversity case, if application of federal common law over a conflicting state law will implicate these twin aims, *Erie* and its progeny require a court to apply the state law.[47] At bottom, *Erie* and its twin aims require application of state law when application of the conflicting federal law would be "unfair[]."[48]

B. The Rules Enabling Act

The framework announced in *Erie* was intended to resolve a conflict

43. *See id.* ("*Swift v. Tyson* introduced grave discrimination by non-citizens against citizens.").

44. Hanna v. Plumer, 380 U.S. 460, 468 (1965); *see also* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 426–28 (1996) (describing the *Erie* rule).

45. *Erie*, 304 U.S. at 80; *see also* 19 WRIGHT & MILLER, *supra* note 7, § 4505 ("Perhaps no aspect of the *Erie* decision has perplexed the commentators as much as this statement."); Clark, *supra* note 35 (exploring the constitutional underpinnings of the *Erie* case).

46. 19 WRIGHT & MILLER, *supra* note 7, § 4505.

47. *See Hanna*, 380 U.S. at 468 n.9 (noting that a court should apply a conflicting state law when "application of the [state] rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court").

48. Ely, *supra* note 11, at 712 ("The Court was referring to the unfairness of affording a nonresident plaintiff suing a resident defendant a unilateral choice of the rules by which the lawsuit was to be determined."); *id.* (noting "[T]he unfairness of subjecting a person involved in litigation with a citizen of a different state to a body of law different from that which applies when his next door neighbor is involved in similar litigation with a cocitizen.").

between a state law and non-statutory common law announced by federal judges. The Federal Rules are similarly non-statutory law from a federal source. In the Rules Enabling Act, Congress vested in the Supreme Court the authority to promulgate "general rules of practice and procedure" to govern in federal courts.[49] After the Supreme Court has proposed a Rule, the Rule is submitted to Congress for approval.[50] Because of this process, the Supreme Court has treated the Federal Rules differently than the law at issue in *Erie*.[51]

1. *Sibbach v. Wilson & Co.*

The earliest relevant Supreme Court decision on the meaning of the Enabling Act is *Sibbach v. Wilson & Co.*[52] There, Sibbach was injured in a car accident in Indiana.[53] She sued in the Northern District of Illinois to recover for injuries.[54] Wilson & Co. sought to require Sibbach to undergo a physical examination under the then newly promulgated Federal Rule 35,[55] which first came into effect after Sibbach filed her suit.[56]

To avoid undergoing the physical examination, Sibbach argued that Federal Rule 35 violated the Enabling Act's "abridge, enlarge or

49. 28 U.S.C. § 2072(a) (2006).

50. For a complete (and interesting) discussion of the rulemaking process, see Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103–19 (2002).

51. *See* Hanna v. Plumer, 380 U.S. 460, 471 (1964) ("[T]he court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.").

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

53. Sibbach v. Wilson & Co., 108 F.2d 415 (7th Cir. 1939); *Sibbach*, 312 U.S. at 6.

54. *Sibbach*, 312 U.S. at 6.

55. *Id.* At the time, Federal Rule 35 allowed a district court to order a physical examination in an action in which the mental or physical condition of a party is in controversy, but Federal Rule 37(b)(2)(iv) "exempt[ed] from punishment as for contempt the refusal to obey an order that a party submit to a physical or mental examination." *Id.* at 16. Despite this explicit exception, the district court had held Sibbach in contempt for refusing to submit to the ordered physical examination. *Id.* Although the Court rejected Sibbach's central argument that Rules 35 and 37 violated the Enabling Act, the Court reversed the contempt sanction. *Id.*

56. Ides, *supra* note 21, at 8 ("When Sibbach filed her suit, the Federal Rules of Civil Procedure had yet to go into effect.").

modify" limitation.[57] Importantly, under the most plausible reading,[58] Sibbach did *not* argue that a court order compelling a physical examination affected her substantive[59] rights (e.g., the right to be free from personal "invasion"[60]). Instead she argued that the Enabling Act's "abridge, enlarge or modify" limitation was meant to prevent the Rules from affecting "important" or "substantial" rights.[61] This convoluted argument—essentially that substantive meant something other than substantive—reflected the thorny procedural posture of the case.[62]

The Supreme Court rejected Sibbach's interpretation of "substantive." According to the Court, "substantial" and "important" were too difficult to define: "If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded."[63] Relevant here, the Court noted that the supposedly "substantial" and "important" right that Sibbach sought to protect was not universally recognized, noting that "state courts are divided as to the power in the absence of a statute to order a physical examination."[64]

Instead, the Court held that "the test" for whether a Federal Rule violates the Enabling Act "must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[65] Rule 35 was valid, the Court held, because it was procedural.[66] The Supreme Court did not

57. *Sibbach*, 312 U.S. at 9 ("The contention of [Sibbach], in final analysis, is that Rule[] 35 . . . [is] not within the mandate of Congress to this court.").

58. *See supra*, note 21.

59. *Sibbach*, 312 U.S. at 11 ("[Plaintiff] admits, and, we think, correctly, that Rules 35 and 37 are rules of procedure.").

60. *Id*. at 18 (Frankfurter, J., dissenting) ("I deem a requirement as to the invasion of the person to stand on a very different footing from questions pertaining to the discovery of documents, pre-trial procedure and other devises for the expeditious, economic and fair conduct of litigation.").

61. *Id*. at 11 (majority opinion).

62. Professor Allan Ides provides an excellent explanation of this procedural posture in his 2010 article on *Shady Grove*. Ides, *supra* note 21, at 7–10.

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

64. *Id.*

65. *Id.*

66. Untangled from the procedural posture of the case, Justice Frankfurter in dissent made a compelling argument that Rules 35 and 37 did in fact exceed the scope of the Supreme Court's authority

address whether application of the Rule 35 would affect Sibbach's substantive rights as Sibbach did not make this argument.[67]

2. *Hanna v. Plumer*

The Supreme Court's next important decision on the Enabling Act was *Hanna v. Plumer*.[68] There, the plaintiff, Eddie V. Hanna, was injured in automobile accident that occurred in South Carolina.[69] She alleged that Louise Plumer Osgood was liable for her injuries. Osgood had died after the automobile accident, but before Hanna filed her suit, so Hanna sued the executor of Osgood's estate, Edward M. Plumer.

Plumer was purportedly served with notice of the lawsuit when copies of the summons and the complaint were left at his home with his wife.[70] This method of service was proper under Federal Rule of Civil

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to promulgate rules of practice and procedure. *Id*. at 16–17 (Frankfurter, J., dissenting). Frankfurter argued that at stake was the "inviolability of a person." *Id.* Instead of focusing on the "abridge, enlarge or modify" limitation, Justice Frankfurter argued:

> So far as national law is concerned, a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy, ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts.

Id. at 18. Essentially, Justice Frankfurter argued that, regardless of the label attached to Rules 35 and 37, the Rules affected an important right. This is something akin to a separation-of-powers argument—Congress, rather than the Court, should be decided an issue this important. *Cf.* Indus. Union Dep't AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring) ("This uncertainty, I would suggest, is eminently justified, since I believe that this litigation presents the Court with what has to be one of the most difficult issues that could confront a decisionmaker: whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths. I would also suggest that the widely varying positions advanced in the briefs of the parties and in the opinions of Mr. Justice Stevens, the Chief Justice, Mr. Justice Powell, and Mr. Justice Marshall demonstrate, perhaps better than any other fact, that Congress, the governmental body best suited and most obligated to make the choice confronting us in this litigation, has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court.").

67. *Sibbach*, 312 U.S. at 14. Sibbach's admission that Rules 35 and 37 were procedural foreclosed any argument under this test: "[t]hat the rules in question are such is admitted." *Id.* Professor Ely later suggested that the Supreme Court's *Sibbach* analysis was driven by the "comparatively primitive state of the Court's thinking, *circa* 1941." Ely, *supra* note 11, at 735. "[B]y [the Court's] lights, either a Rule was procedural or it affected substantive rights." *Id.* at 719.

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

69. *Id.* at 461.

70. *Id.*

Procedure 4(d)(1).[71] But Massachusetts General Laws ch. 197, § 9 required a plaintiff to serve an executor or administrator "in hand."[72]

Arguing that the service was improper under Massachusetts law, Plumer moved to dismiss the lawsuit. The district court granted Plumer's motion to dismiss and the court of appeals affirmed, holding that "relatively recent amendments to [the state service of process statute] evince a clear legislative purpose to require personal notification."[73]

The Supreme Court, however, reversed and held that in-hand service was not required. The Court stated that Federal Rule 4(d)(1) "relate[d] to 'practice and procedure of the district courts'"[74] because it "[p]rescrib[ed] the manner in which a defendant is to be notified that a suit has been instituted against him."[75] The Court quoted the *Sibbach* language on the validity of a Federal Rule—"'whether a rule really regulates procedure'"[76]—and held that Federal Rule 4(d)(1) "clearly passe[d] muster."[77] The analysis in *Hanna* shed little light on the meaning of the Enabling Act.

The *Hanna* opinion is important, however, for making clear that the Enabling Act analysis is different than the *Erie* analysis and that the *Erie* analysis was not "the appropriate test of the validity and therefore the

71. *Id.*; *see also* FED. R. CIV. P. 4(d)(1) ("The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made 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 . . . .").

72. MASS. GEN. LAWS ANN., ch. 197, § 9 (West 1958) ("Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate.").

73. *Hanna*, 380 U.S. at 462.

74. *Id.* at 464.

75. *Id.*

76. *Id.* (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

77. *Id.*

applicability of a Federal Rule of Civil Procedure."[78] A Federal Rule was different than non-statutory federal law as expounded by federal judges, according to the *Hanna* Court, because the Advisory Committee, the Supreme Court, and Congress had all made a judgment on the validity of a Federal Rule before it would become effective.[79]

So after *Hanna*, it was clear that *Erie* did not govern a conflict between a state law and a Federal Rule. Less clear, however, was the meaning of the "abridge, enlarge or modify" limitation of the Enabling Act.

C. Avoiding a Potential Conflict Between State Law and a Federal Rule

One consequence of the Enabling Act's language is that the conflict between state law and a Federal Rule is resolved by classification of a law as substantive or procedural. This precludes a court from accounting for the fairness considerations that underlie *Erie*'s twin aims. To avoid the more rigid Enabling Act analysis, courts have at times interpreted the Federal Rule to avoid a conflict with state law.[80] If there is no Federal Rule covering the matter in dispute, then any conflict is governed by the more flexible *Erie* analysis. The Supreme Court has followed this approach in two important cases following *Hanna*.

1. *Walker v. Armco Steel Corp.*

In *Walker v. Armco Steel Corp.*, the Court analyzed whether a conflict

78. *Id*. at 469–70.

79. *Id*. at 471 ("[T]he question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.").

80. *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001). *But see* Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.9 (1980) ("This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law. The Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies."); Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 7 (1986) (finding a conflict, in part, because "[T]he purposes underlying the Rule are sufficiently coextensive with the asserted purposes of the Alabama statute to indicate that the Rule occupies the statute's field of operation so as to preclude its application in federal diversity actions.").

existed between a state law and a Federal Rule that both addressed when an action was "commenced."[81] This conflict was important because the relevant statute of limitations in *Walker* required a plaintiff to "commence[]" an action within two years of an injury.

In this case, Fred N. Walker injured his eye when pieces of a nail he had hammered flew up into his face. Walker alleged that the nail shattered because it was defectively manufactured by defendant, Armco Steel.[82] Under Oklahoma law, Walker's suit was "governed by a 2-year statute of limitations period."[83] Walker filed his complaint and a summons was issued within two years of the accident.[84] Importantly, however, merely filing an action did not satisfy the Oklahoma statute of limitations; rather, the statute of limitations was only satisfied after an action was "commenced."[85] Relevant here,[86] the Oklahoma law stated that an action was not deemed "commenced" for the purposes of the statute of limitations until the defendant was actually served: "'An action shall be deemed commenced, within the meaning of this article [the statute of limitations] . . . at the date of the summons which is served . . . .'"[87] Armco Steel was not served until more than two years after the accident.[88] Walker admitted that he had not timely commenced the action under Oklahoma law.[89]

Walker argued instead that the Federal Rules of Civil Procedure—and not Oklahoma law—should govern when an action is commenced.[90] Under Federal Rule of Civil Procedure 3, "'[a] civil action is commenced by filing a complaint with the court.'"[91] Walker had filed

81. *Walker*, 446 U.S. at 742–43.

82. *Id.* at 741.

83. *Id.* at 742 n.3.

84. *Id.* at 742.

85. *Id.* at 742–43.

86. The Oklahoma statute of limitations also provided an exception to this general rule that commencement only occurred upon service on the defendant. The action as deemed to have been commenced on the date of filing for the purposes of the statute of limitations if service was made on the defendant within sixty days of service. *Id.* at 743. *Walker*, however, did not comply with either the general rule or the exception. *See id.* at 742–43.

87. *Id.* at 743 n.4 (alteration in original) (quoting OKLA. STAT., tit. 12, § 97 (1971)).

88. *Id.* at 742.

89. *Id.* at 743.

90. *See id.*

91. *Id.* at 750 (alteration in original) (quoting FED. R. CIV. P. 3).

his action within two years of his injury, and if Federal Rule 3 governed when an action was "commenced," Walker would have satisfied the applicable Oklahoma statute of limitations.[92]

Although both rules seemed to govern when an action was "commenced," the Supreme Court held that Federal Rule 3 and the Oklahoma law were not in conflict.[93] The Court reasoned that Federal Rule 3 was not intended to have an effect on state statutes of limitations. Instead, Federal Rule 3 was intended to start the clock on various deadlines under the Federal Rules.[94] In contrast, the Oklahoma law was a "statement of a substantive decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations."[95]

Because Federal Rule 3 did not replace the policy determinations in the Oklahoma statute, the Court held that the two rules could "exist side by side[:] each controlling its own intended sphere of coverage without conflict."[96] The lack of a conflict dictated that case was governed by the *Erie* analysis. Acknowledging that application of Federal Rule 3 "might not create any problem of forum shopping," the Court nonetheless held that the Oklahoma rule should apply:

> There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants.[97]

Arguably, however, Federal Rule 3 should have controlled when the action was "commenced" for all purposes in federal court.[98] Federal

92. *See id.* at 742–43.

93. *Id.* at 750.

94. *Id.* at 750–51 (internal footnotes and citations omitted) ("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. In our view, in diversity actions Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations.").

95. *Id.* at 751.

96. *Id.* at 752.

97. *Id*. at 753.

98. Others have also noted that Federal Rule does address tolling in federal question cases. *See* Freer & Arthur, *supra* note 22, at 72 (citing West v. Conrail, 481 U.S. 35, 39 (1987)).

Rule 3 applies to "all civil actions and proceedings in the United States district courts."[99] In stating the test for determining whether a conflict existed, the Court seemed to put a thumb on the no-conflict side of the scale—"[t]he . . . question must . . . be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court."[100] In a footnote, however, the Court claimed that it was not "suggest[ing] that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law."[101]

2. *Gasperini v. Center for Humanities*

Following the *Walker* case, in *Gasperini v. Center for Humanities, Inc.*, the Supreme Court expressly recognized the practice of "interpret[ing] the federal rules to avoid conflict with important state regulatory policies."[102]

There, William Gasperini had taken photographs in Central America as a journalist, and had lent 300 of the original color transparencies of the photographs to the Center for Humanities.[103] The Center used the transparencies to make an educational video about conflict in Central America.[104] When Gasperini asked for the transparencies back, the Center for Humanities could not locate them.[105] Gasperini sued and was awarded $450,000 in compensatory damages, or $1,500 for each of the transparencies.[106]

The Center for Humanities argued that this verdict should be

99. *See* FED. R. CIV. P. 1.

100. *See Walker*, 446 U.S. at 749–50. Discussing the *Walker* case, Freer and Arthur observe that, "even though unwilling to own up to it, the court pretty clearly applied a substantive canon of construction: if possible, read Federal Rules narrowly to avoid trenching on state substantive interest and thus avoid raising serious issues under § 2072(b)." Freer & Arthur, *supra* note 22, at 72.

101. *Walker*, 446 U.S. at 750 n.9.

102. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 437 n.22 (1996) (citations and internal quotations marks omitted).

103. *Id.* at 419.

104. *Id.*

105. *Id.*

106. *Id.* at 420.

overturned because it was excessive.[107] Under a New York law, a judge had authority to overturn a jury verdict that "deviate[d] materially from what would be reasonable compensation."[108] Prior to the enactment of New York's "deviates materially" statute, federal courts had recognized a judge's power to overturn a jury's verdict under Federal Rule 59.[109] Under Federal Rule 59, a judge had authority to overturn a jury verdict when "it [wa]s quite clear that the jury ha[d] reached a seriously erroneous result [and] letting the verdict stand would result in a miscarriage of justice."[110]

The Court held that these two standards were not in conflict, stating that, "[w]hether damages are excessive for the claim-in-suit must be governed by *some* law [a]nd there is no candidate for that governance other than the law that gives rise to the claim for relief—here, the law of New York."[111] The Court supported this interpretation by citing to authority stating that the "Court 'ha[d] continued since [*Hanna*] to interpret the federal rules to avoid conflict with important state regulatory policies.'"[112]

Under the Court's interpretation, the deviates materially statute did not conflict with Federal Rule 59; instead, the statute conflicted with the non-statutory federal law standard for granting a new trial. The Court, therefore, applied the *Erie* analysis and concluded that the federal district court was required to use the New York State's "deviates materially" standard.[113]

To summarize, before *Shady Grove*, there were three relevant lines of cases on the conflict between non-statutory federal law and state law:

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107. *Id*.

108. *Id.* at 423–24. This statute was apparently motivated by runaway juries. *See* Bauer, *supra* note 4, at 26 ("There was considerable evidence that this statute had been adopted in response to perceived excessive verdicts by 'runaway' juries.").

109. FED. R. CIV. P. 59(a) ("The court may, on motion, grant a new trial on all or some of the issues . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court."); *see Gasperini*, 518 U.S. at 467–68 (Scalia, J., dissenting) (discussing federal practice under Federal Rule 59).

110. *See Gasperini*, 518 U.S. at 467–68 (Scalia, J., dissenting). *But see id*. at 437 n.22 (majority opinion).

111. *Id.* at 437 n.22 (majority opinion).

112. *Id.* (quoting R. FALLON, D. MELTZER, & D. SHAPIRO, HART AND WECHSLER'S, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 729–30 (4th ed. 1996)).

113. *Gasperini*, 518 U.S. at 439.

(1) *Erie* and its progeny, which required a court to resolve a conflict between federal common law and state law through consideration of *Erie*'s twin aims; (2) *Sibbach* and its progeny, which offered a really regulates procedure test—and almost nothing else—to resolve a conflict between a Federal Rule and a conflicting state law; and (3) *Walker* and *Gasperini*, which acknowledged the practice of interpreting a Federal Rule to avoid a conflict with important state policies.

III. *SHADY GROVE*

A. Background of Shady Grove

Coincidentally, like the important Enabling Act cases that preceded it, *Shady Grove* involved an automobile accident.[114] Sonia E. Galvez suffered injuries in that automobile accident and then received medical treatment from Shady Grove Orthopedic Associates.[115] Galvez had an insurance policy with the Allstate Insurance Co. to cover the care that Shady Grove provided.[116]

Under New York law, an insurance company like Allstate had 30 days from the treatment to pay Shady Grove.[117] If an insurance company missed this deadline, it was required to pay 2% interest per month on the late payments. Allstate did pay Shady Grove, but Allstate paid late and did not pay the 2% interest.[118]

Shady Grove brought suit in federal district court in New York to collect the statutory interest. In addition to the facts outlined above, Shady Grove also alleged that "Allstate routinely refuse[d] to pay interest on overdue benefits."[119] Shady Grove, therefore, sought to act as a class representative for all others that Allstate failed to pay the statutory interest to.[120]

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114. *Cf.* Sibbach v. Wilson & Co., 312 U.S. 1 (1941); Hanna v. Plumer, 380 U.S. 460 (1965).

115. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1436 (2010).

116. *Id.* As partial compensation for the medical treatment, Galvez gave her rights to insurance benefits under a policy she had with Allstate. *Id.*

117. *Id.* at 1436–37.

118. *Id.*

119. *Id.*

120. *Id.*

Allstate sought to dismiss Shady Grove's class action claim, arguing that New York Civil Practice Law § 901(b) prohibited class treatment.[121] Section 901(b) "prohibit[ed] class actions in suits seeking penalties or statutory minimum damages."[122] The interest on the unpaid insurance payments that Shady Grove sought to recover was a penalty or statutory minimum under § 901(b).[123] In a New York state court, then, § 901(b) would have precluded class treatment of Shady Grove's claim.[124]

Shady Grove, however, argued that § 901(b)'s limitation did not apply to its claim. Rather, because Shady Grove had sued in federal court, Federal Rule 23 governed whether it could maintain a class action. Unlike New York's § 901(b), Federal Rule 23 contained no limitation on class actions that sought a penalty or statutory interest.[125] Arguably, then, Federal Rule 23 allowed class treatment of Shady Grove's claim. Allstate responded that application of Federal Rule 23 instead of New York's § 901(b) would abridge, enlarge, or modify Allstate's substantive rights in violation of the Enabling Act.[126]

To resolve whether New York's § 901(b) or Federal Rule 23 governed, the Supreme Court had to decide (1) whether § 901(b) and Federal Rule 23 were in conflict; and, if so, (2) how the "abridge, enlarge or modify" limitation actually limited the Supreme Court's

121. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 549 F.3d 137, 139–40 (2d Cir. 2008). The procedural posture of the case requires a brief explanation. Shady Grove brought its claim in federal district court as a class action. Shady Grove's complaint raised no federal question and, on its own, Shady Grove's claim did not meet 28 U.S.C. § 1332's jurisdictional minimum of $75,000 in controversy. 28 U.S.C. § 1332(a) (2006). Instead, Shady Grove invoked jurisdiction under the Class Action Fairness Act: "[t]he district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A). If Allstate could show that Shady Grove's claim could not be brought as a class action, then the federal court would be required to dismiss the claim for lack of jurisdiction.

122. *Shady Grove*, 130 S. Ct. at 1436.

123. *See id.* at 1437.

124. *See id.* (noting that federal district court had "[c]onclud[ed] that statutory interest [wa]s a 'penalty' under New York law, [and] held that § 901(b) prohibited the proposed class action").

125. *See* FED. R. CIV. P. 23.

126. *Shady Grove*, 130 S. Ct. at 1443 (quoting Brief for Respondent at 31, Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010) (No. 08-1008)) (noting that Allstate argued that application of Rule 23 over § 901(b) was not "substantively neutral" and would abridge the "'substantive right . . . not to be subjected to aggregated class-action liability" in a single suit").

rulemaking authority.

B. The "Really Regulates Procedure" Approach

To answer whether Federal Rule 23 and § 901(b) were in conflict, Justice Scalia focused on the "question in dispute"[127]—"whether Shady Grove's suit may proceed as a class action."[128] Rule 23 answered that question: "By its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action."[129] Section 901(b) also answered "the same question."[130] The two, therefore, were in conflict,[131] and no reasonable interpretation of Federal Rule 23 could avoid the conflict.[132] This conflict required the court to "confront head-on whether Rule 23 f[ell] within [the Enabling Act's] statutory authorization."[133]

As stated above, the Enabling Act vested the Supreme Court with authority to promulgate rules of procedure (subject to congressional approval) "but with the limitation that those rules 'shall not abridge, enlarge or modify any substantive right.'"[134] Justice Scalia, following *Sibbach*, stated that "this limitation means that the Rule must 'really regulate[] 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.'"[135] The Federal Rule, Justice Scalia argued, must control if it "governs . . . 'the manner and the means' by which the litigants' rights are 'enforced.'"[136] Importantly, this approach did not leave any room for consideration of the displaced state law: the "substantive nature" or "substantive purpose" of the state rule that the Federal Rule will displace "*makes no*

127. *Id.* at 1437.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 1441 ("[E]ven artificial narrowing cannot render § 901(b) compatible with Rule 23.").
133. *Id.* at 1442.
134. *Id.* (quoting 28 U.S.C. § 2702(b) (2006)).
135. *Id.* (alteration in original) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).
136. *Id.* at 1442 (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 446 (1946)).

difference."[137]

Justice Scalia acknowledged that his approach was "hard to square with [the Enabling Act's] terms."[138] Said another way, he concluded that "it is hard to understand how it can be determined whether a Federal Rule 'abridges' or 'modifies' substantive rights without knowing what state-created rights would obtain if the Federal Rule did not exist."[139] Although, potentially inconsistent with the language of the Enabling Act, Justice Scalia argued that his approach was "driven by the very real concern that Federal Rules which vary from State to State would be chaos."[140]

C. The "Intertwined" Approach

Writing separately in a concurrence, Justice Stevens agreed with much of Justice Scalia's opinion. To start, he agreed with Justice Scalia that the conflict between § 901(b) and Federal Rule 23 was unavoidable.[141] Although he acknowledged that a court should avoid an unnecessary conflict between a Federal Rule and a state law, he argued that, "[s]imply because a rule should be read in light of federalism concerns, it does not follow that courts may rewrite the rule."[142]

Justice Stevens, however, disagreed with Justice Scalia's interpretation of the *Sibbach* case. Justice Stevens argued that Justice

137. *Id.* at 1444.

138. *Id.* at 1446.

139. *Id.* at 1445–46.

140. *Id.* at 1431, 1446 (citing *Sibbach*, 312 U.S. at 13–14). Justice Scalia also argued that his approach was required by *Sibbach*—i.e., *Sibbach*'s really regulates procedure test did not allow consideration of state law and the test "ha[d] been settled law . . . for nearly seven decades." *Id.* at 1446. Justice Stevens (and others) have made a compelling argument that Justice Scalia's broad interpretation of *Sibbach*'s really regulates procedure test is not required by *Sibbach* itself. *See* Ides, *supra* note 21. Professor Ides points out that, for a variety of reasons, Sibbach did not argue that the right to be free from a physical examination was substantive and made a only "facial" challenge to the validity of Federal Rule 35. *Id.* at 15. In light of these aspects of the *Sibbach* case, if one assumes that Justice Scalia's interpretation of the really regulates procedure test is correct, the test "provides at best a cryptic and elliptical way of announcing a rather bold and superfluous interpretation of § 2072(b)." *Id.* For this reason and others, Professor Ides has convincingly shown that the Sibbach really regulates procedure test does not compel the result that Justice Scalia reaches in *Shady Grove*. *Id.* at 16 ("Thus, if the question is one of statutory construction or *stare decisis*, Justice Stevens was plainly correct.").

141. *Shady Grove*, 130 S. Ct. at 1456 (Stevens, J., concurring).

142. *Id.*

Scalia's application of the really regulates procedure test "ignore[d] the [Enabling Act's] . . . limitation that such rules . . . 'not abridge, enlarge or modify *any* substantive right.'"[143] Where Justice Scalia argued that a Federal Rule was valid if it "really regulate[d] procedure," Justice Stevens argued that the procedural nature of a Federal Rule was only the first requirement for validity under the Enabling Act.

Justice Stevens criticized the really regulates procedure approach for valuing ease of application over fidelity to statutory text, stating that, "[a]lthough Justice Scalia may generally prefer easily administrable, bright-line rules, his preference does not give us license to adopt a second-best interpretation of the Rules Enabling Act"; Justice Stevens continued that "[c]ourts cannot ignore text and context in the service of simplicity."[144]

Justice Stevens read the Enabling Act to involve two requirements. First, to be valid under § 2072(a), a rule must be a "general rule[] of practice [or] procedure."[145] Second, to be valid under § 2072(b), the rule must not abridge, enlarge, or modify any substantive right.[146] Justice Stevens argued that the really regulates procedure approach only spoke to § 2072(a) "[b]ut it ignore[d] the second limitation that such rules also 'not abridge, enlarge or modify *any* substantive right.'"[147]

Giving meaning to the Enabling Act's abridge, modify, or enlarge limitation, Justice Stevens argued that a Federal Rule "cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right."[148] For brevity's sake, this Article will refer to this approach as the "intertwined" approach. Although noting that, "[i]t will be rare" that a state law will satisfy this intertwined approach,[149] Justice

143. *Id.* at 1452–53.

144. *Id.* at 1454.

145. 28 U.S.C. § 2072(a) (2006); *see Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring).

146. 28 U.S.C. § 2072(b); *see Shady Grove*, 130 S. Ct. at 1452–53 (Stevens, J., concurring).

147. *See Shady Grove*, 130 S. Ct. at 1452–53 (Stevens, J., concurring) (quoting 28 U.S.C. § 2072(b)).

148. *Id.* at 1452.

149. *Id.* at 1454 n.10; *id.* at 1455 ("Although most state rules bearing on the litigation process are adopted for some policy reason, few seemingly 'procedural' rules define the scope of a substantive right or remedy.").

Stevens provided little additional guidance of the meaning of his test.

Justice Scalia characterized Justice Stevens' intertwined approach as "inscrutable,"[150] arguing that Stevens' "approach will present hundreds of hard questions, forcing federal courts to assess the substantive or procedural character of countless state rules that may conflict with a single Federal Rule."[151] As support, Justice Scalia pointed to Justice Stevens' drawn out application of the intertwined approach in the *Shady Grove* opinion itself, which required an examination of the legislative history and context of § 901(b).[152] According to Justice Stevens, however, even if his approach was more difficult to apply, his "inquiry [wa]s what the Enabling Act requires."[153]

D. The "Deferential Interpretation" Approach

The disagreement between Justice Scalia and Justice Stevens turned on the meaning of the Enabling Act's "abridge, enlarge or modify" limitation and the relative importance of an easily administrable rule versus fidelity to statutory text. Justice Ginsburg, however, criticized both Justice Scalia and Justice Stevens for their answer to an antecedent question: "Is this conflict really necessary?"[154]

Justice Ginsburg, with the support of three other justices, argued that Justice Scalia and Justice Stevens were wrong in the interpretation of Rule 23. In essence, Justice Ginsburg disagreed with Justice Scalia and Justice Stevens on whether Rule 23 was ambiguous enough to allow state interests to affect its interpretation. According to Justice Ginsburg, the Court "read[] Rule 23 relentlessly to override New York's restriction on the availability of statutory damages."[155] Justice Ginsburg argued that the Court should interpret a Federal Rule with "'sensitivity to important state interests to avoid conflict with important state regulatory

150. *Id.* at 1447 n.14 (plurality opinion).

151. *Id.* at 1447.

152. *Id*. at 1447 n.15 (internal citation omitted) ("Walking through the concurrence's application of its test to § 901(b) gives little reason to hope that its approach will lighten the burden for lower courts.").

153. *Id.* at 1454 (Stevens, J., concurring).

154. *Id.* at 1460 (Ginsburg, J., dissenting) (citing Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959)).

155. *Id.*

policies.'"[156] For brevity's sake, this Article will refer to this as the "deferential interpretation" approach.

Disputes over whether to apply state law or non-statutory federal law only arise when application of one over the other would change the outcome in a case—i.e., some difference between state law and federal non-statutory law would cause a different result. (If the result were not different, parties would have no motivation to argue for the application of one over the other.) Resolution of these disputes depends on whether the federal non-statutory law is judge made or a Federal Rule. When a court limits the scope of a Federal Rule to avoid a conflict with a state law, the conflict will not be governed by the Enabling Act. But even with the Federal Rule thus limited, there is still an extant conflict between the state law and some non-statutory federal law that is causing a different outcome in federal court. This extant conflict must be governed by the *Erie* analysis.

The deferential interpretation approach, therefore, allows a court to resolve the conflict by reference to *Erie*'s twin aims. The more flexible *Erie* approach defers to the authority of state legislatures and values federalism.[157] According to Justice Ginsburg, the effect of a broad interpretation of Rule 23 in *Shady Grove* was to undercut "New York's legitimate interest in keeping certain monetary awards reasonably bounded."[158]

Both Justice Scalia and Justice Stevens argued that Justice Ginsburg's deferential interpretation approach would rewrite Federal Rule 23.[159] Justice Scalia argued that the deferential interpretation approach was actually counterproductive, stating that "[t]he dissent's concern for state prerogatives is frustrated rather than furthered by revising state laws when a potential conflict with a Federal Rule arises; the state-friendly approach would be to accept the law as written and test the validity of

156. *Id.* (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7, 438 n.22 (1996)).

157. *Id.* at 1464 ("Our decisions instruct over and over again that, in the adjudication of diversity cases, state interests—whether advanced in a statute, or a procedural rule—warrant our respectful consideration.") (internal citations omitted).

158. *Id.* at 1460.

159. *Id.* at 1442 (plurality opinion) ("We cannot contort [Rule 23's] text, even to avert a collision with state law that might render it invalid."); *id.* at 1456 (Stevens, J., concurring) ("Simply because a rule should be read in light of federalism concerns, it does not follow that courts may rewrite the rule.").

the Federal Rule."[160] Justice Stevens stated that, "[a]t bottom, the dissent's interpretation of Rule 23 seems to be that Rule 23 covers only those cases in which its application would create no *Erie* problem."[161]

The three proposed approaches reflect the relative weight that the justices assigned to the policy issues underlying the *Shady Grove* case: Justice Scalia favored an approach that would be easily administrable, Justice Stevens favored an approach that was most consistent with the text of the Enabling Act, and Justice Ginsburg favored an approach that was deferential to state legislatures.

E. After Shady Grove

As others have noted, *Shady Grove* solved almost nothing[162]: "*Shady Grove*'s fractured opinions suggest the need to reconsider the problem from the ground up."[163] No opinion in *Shady Grove* garnered a majority of five votes. Under the rule announced in *Marks v. United States*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[164]

Following *Shady Grove*, most commentators and courts have assumed that the "narrowest" grounds was Justice Stevens' intertwined approach.[165] The *Marks* doctrine, however, is not always easy to

160. *Id*. at 1440 (plurality opinion).

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

162. *See* Burbank & Wolff, *supra* note 5.

163. Tidmarsh, *supra* note 8, at 880.

164. Marks v. United States, 430 U.S. 188, 194 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

165. *See* Lyle Denniston, *Analysis: Sorting out an* Erie *sequel*, SCOTUSBLOG (Mar. 31, 2010, 1:16 PM), http://www.scotusblog.com/2010/03/analysis-sorting-out-an-erie-sequel/ ("Stevens' view on this general point becomes controlling through the practice of the Court, when its nine members are deeply divided, of treating the narrowest view supporting the outcome as the controlling interpretation, in a legal sense."); McKinney v. Bayer Corp., 744 F. Supp. 2d 733, 747 (N.D. Ohio 2010) ("Because Justice Stevens' concurring opinion would permit some state law provisions addressing class actions—whereas Justice Scalia's opinion in Part II-B (which only had the support of four Justices) would broadly prohibit any state law that conflicted with Rule 23—Justice Stevens' opinion is the narrowest and, thus, controlling opinion."); Estate of CA v. Grier, 752 F. Supp. 2d 763, 767 (S.D. Tex. 2010) ("Justice Stevens's opinion, as the narrower opinion, controls.").

apply[166] and it is not clear that Justice Stevens' approach is the narrowest, i.e., "fit[s] entirely within a broader circle drawn by" Justice Scalia.[167] Even if courts do all agree that Justice Stevens' approach is controlling, the meaning of Justice Stevens' approach is unclear. Justice Stevens indicated that it would be "rare" that "a state law . . . [wa]s procedural in the ordinary use of the term but [wa]s so intertwined with a state right or remedy that it function[ed] to define the scope of the state-created right."[168] But Justice Stevens gave no examples of state laws that would satisfy the intertwined approach.[169]

Further, although five members of the Court agreed that there was a conflict between § 901(b) and Federal Rule 23, the extent to which courts should shade the interpretation of a Federal Rule to avoid a conflict remains unclear. Justice Scalia argued that the Court "should read an ambiguous Federal Rule to avoid 'substantial variations [in outcomes] between state and federal litigation . . . because it is

166. *See* Nichols v. United States, 511 U.S. 738, 745–46 (1994) ("We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered [its application to Baldasar v. Illinois, 446 U.S. 222 (1980)].").

167. King v. Palmer, 950 F.2d 771, 782 (D.C. Cir. 1991). Courts have proposed several definitions of "narrowest." *See* Joseph M. Cacace, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *Doctrine After* Rapanos v. United States, 41 SUFFOLK U. L. REV. 97, 110–13 (2007) (describing several of the various definitions of "narrowest" that have been proposed). In *King*, the court has stated that the opinion is narrowest if it "represent[s] a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." *King*, 950 F.2d at 781. Further, the court noted that "[w]hen . . . one opinion supporting the judgment does not fit entirely within the broader circle drawn by the others, *Marks* is problematic." *Id.* at 782. Further, "[w]hen eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be." *Id.* Another court has argued that the opinion is narrowest that rests on the ground "that is most nearly confined to the precise fact situation before the Court, rather than to a ground that states more general rules." United States v. Martino, 664 F.2d 860, 872–73 (1981).

168. *Shady Grove*, 130 S. Ct. at 1452, 1454 n.10 (Stevens, J., concurring).

169. One possibility is that the "intertwined" approach requires something roughly equivalent to the "bitter with the sweet" approach of the 1974 Supreme Court case *Arnett v. Kennedy*. *Cf.* 416 U.S. 134, 153–54 (1974) ("[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedure which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet."). It should be noted that the "bitter with the sweet" approach was later rejected. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) ("In light of these holdings, it is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee."). For example, a procedural rule may be sufficiently "intertwined" with a substantive right to violate the Enabling Act when "the very section of the statute which granted" the substantive right "expressly provided also for the procedure by which" the right should be enforced. *Cf. Arnett*, 416 U.S. at 152.

reasonable to assume that 'Congress is just as concerned as we have been to avoid significant differences between state and federal courts in adjudicating claims.'"[170] Although Justice Stevens agreed with Justice Scalia that there was a conflict, he agreed with the dissent that a court should "avoid immoderate interpretations of the Federal Rules that would trench on state prerogatives."[171] The extent to which a court's interpretation of a Federal Rule should be affected by a conflicting state policy, therefore, is still very much unsettled.

Courts and litigants are left without guidance. This lack of guidance creates a real need for an approach that can accommodate the various policy interests that divided the Justices in *Shady Grove*. Below, this Article will describe a new approach, referred to as the "state-law transsubstantivity" approach. After describing the approach, this Article will demonstrate how the analysis would function in practice with example cases.

IV. "STATE-LAW TRANSSUBSTANTIVITY"

Briefly summarized, the "state-law transsubstantivity" approach is a new solution to test whether application of a Federal Rule instead of a conflicting state law would violate the Enabling Act's "abridge, enlarge or modify" limitation.[172] Once a court determines that a state law and a Federal Rule are in conflict, the court must examine the nature of the state law to determine whether the state law is substantive or procedural. This approach defines "procedural" as "transsubstantive" and defines "substantive" as "any law that lacks transsubstantivity." If a state law is not transsubstantive—i.e., if the state law only applies to a particular

170. *Shady Grove*, 130 S. Ct. at 1441 n.7. Justice Scalia states that "there is only one reasonable reading of Rule 23" and that is in conflict with § 901(b). *Id*. But Justice Ginsburg argued that the Court unnecessarily read into Rule 23 a conflict with § 901(b). *Id*. at 1460 (Ginsburg, J., dissenting) ("The Court reads Rule 23 relentlessly to override New York's restriction on the availability of statutory damages.").

171. *Id.* at 1456 (Stevens, J., concurring) (citations and internal quotations omitted).

172. This approach assumes that the federal rule in question will comply with § 2072(a)'s requirement that the federal rule is a "general rule[] of practice [or] procedure." 28 U.S.C. § 2072(a) (2006). This is the first and only step for testing the validity of a Federal Rule under Justice Scalia's really regulates procedure approach. *See Shady Grove*, 130 S. Ct. at 1446 (noting the "single hard question of whether a Federal Rule regulates substance or procedure").

type of claim—then the state law is presumed to create or define some substantive right, such that a failure to apply the state law would "abridge, enlarge or modify a[] substantive right."[173] Conversely, if a state law is transsubstantive—i.e., if a state law applies to all types of claims—then the state law is procedural and the court should apply the Federal Rule.

This approach would apply to *Shady Grove* as follows. Assuming that in *Shady Grove* there was a conflict between § 901(b) and Federal Rule 23, the Court should have proceeded to examine the nature of the § 901. Section 901(a) states that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all" if the class meets certain prerequisites.[174] Section 901(a) is transsubstantive and applies to all claims; stated another way, all claims that meet the prerequisites may be brought as a class action. Were the conflict in *Shady Grove* between § 901(a) and Federal Rule 23, Federal Rule 23 would govern as § 901(a) is transsubstantive and purely procedural—allowing a Federal Rule to trump a state procedural law is unproblematic under the Enabling Act.[175]

But § 901(b), in contrast, plucks a particular type of claim out from § 901(a)'s transsubstantive treatment and provides a special rule: "Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in 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."[176] Section 901(b), because it is not transsubstantive, is not purely procedural; therefore, it is presumed to create or define some substantive

173. *See* 28 U.S.C. § 2072(b).

174. N.Y. C.P.L.R. § 901(a) (McKinney 2006).

175. Not all possible statutes fall comfortably within the framework that I have proposed. Take, for example, the following statute: "Claims *that do not seek statutory damages* may proceed as a class action if the claim meets certain prerequisites." This hypothetical statute would be functionally identical to the actual 901(a) and (b). This hypothetical statute is difficult to place within the framework that I have proposed because it is essentially both transsubstantive (it creates a general rule applicable to all claims) and not transsubstantive (it singles out a particular type of claim for special treatment at the same time. In such a situation, it may be necessary to separate the part of a law that is transsubstantive from the part of a law that is not transsubstantive.

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

right.[177] Application of a Federal Rule that conflicts with § 901(b), will thus abridge, enlarge, or modify[178] a substantive right.

As argued above, the fractured result in *Shady Grove* was driven by three different policy considerations at stake: (1) ease of administration, (2) fidelity to the Enabling Act text, and (3) deference to important state interests. Below, this Article will explain how the state-law transsubstantivity approach better accommodates all three of these interests.

A. Ease of Administration

Justice Scalia's really regulates procedure approach involves only an examination of whether the Federal Rule regulates procedure.[179] This approach is easy to administer because a court avoids examination of "the idiosyncrasies of state law."[180]

Because the state-law transsubstantivity approach requires an examination of state law, it arguably lacks the administrative ease of Justice Scalia's really regulates procedure approach. However, determining whether a state law is transsubstantive—the only examination of a state law required under the state-law transsubstantivity approach—does not require an examination of "idiosyncrasies"[181] or, potentially even more taxing on courts, an examination of state legislative history.[182] Justice Scalia's rejection of an approach that examines the nature of the conflicting state law is

177. This point—that a law must be substantive if it is not purely procedural—is not an obvious one but will be further developed *infra* Part III.B.

178. 28 U.S.C. § 2072(b) (2006).

179. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (alterations in original) (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 446 (1946)) ("What matters is what the rule itself *regulates*: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not.")).

180. *Shady Grove*, 130 S. Ct. at 1445; *id*. at 1454 (Stevens, J., concurring) (criticizing the plurality opinion and noting that, "Although, Justice Scalia may generally prefer easily administrable, bright-line rules, his preference does not give us license to adopt a second-best interpretation of the Rules Enabling Act. Courts cannot ignore text and context in the service of simplicity.").

181. *Shady Grove*, 130 S. Ct. at 1445 (plurality opinion).

182. *Cf. id.* at 1441 (criticizing Justice Ginsburg's reliance on state legislative history to determine the purpose of a state law).

premised on the assumption that the examination will be taxing—i.e., determining the nature of a state law would present a "hard question[]."[183] If the examination of state law is simple, Justice Scalia's criticism of any approach that examines state law is unpersuasive.[184]

Transsubstantivity is readily apparent. A law is transsubstantive "if it applies equally to all cases regardless of substance."[185] When this is the only relevant information about a state law, determining the "nature" of the state law is as simple as reading the law. Accordingly, although the state-law transsubstantivity approach does require an examination of state law, the additional burden this examination imposes on courts or litigants is slight. The state-law transsubstantivity approach, therefore, is not materially more difficult to administer than the really regulates procedure approach.

B. Fidelity to the Enabling Act Text

Justice Stevens criticized Justice Scalia's really regulates procedure approach as a "second-best interpretation of the Rules Enabling Act."[186] Stevens argued that the really regulates procedure approach, by precluding examination of the conflicting state law, "ignore[d] the [Enabling Act's] limitation that [a Federal Rule] 'not abridge, enlarge or modify *any* substantive right.'"[187] As will be explained below, without sacrificing ease of administration, the state-law transsubstantivity approach is consistent with the language of the Enabling Act.

183. *See id.* at 1447 (criticizing Justice Stevens' "intertwined" approach as "present[ing] hundreds of hard questions, forcing federal courts to assess the substantive or procedural character of countless state rules that may conflict with a single Federal Rule").

184. There is a potential benefit from the uncertainty that this will cause—litigants will be limited to the extent that they are able to forum shop. If a litigant does not know how a court will decide a particular issue, a litigant cannot shop for that forum. But eliminating forum-shopping can be better achieved with appropriate deference to state legislative judgments.

185. Marcus, *supra* note 23, at 376.

186. *Shady Grove*, 130 S. Ct. at 1454 (Stevens, J., concurring).

187. *Id.* at 1452–53 (quoting 28 U.S.C. § 2072(b) (2006)) (emphasis removed).

1. The Language of the Enabling Act Requires Consideration of the Conflicting State Law

The phrase "abridge, enlarge or modify"[188] requires a comparison. It is not possible to know if a substantive right will be enlarged or modified by a Federal Rule without first knowing the scope of that substantive right. This language demands that a court examine the scope of the substantive right embodied in the to-be displaced state law to determine whether application of the Federal Rule will cause the right to be abridged, enlarged, or modified. Justice Scalia all but admits that this is the correct reading of the Enabling Act, acknowledging that "it is hard to understand how it can be determined whether a Federal Rule 'abridges' or 'modifies' substantive rights without knowing what state-created rights would obtain if the Federal Rule did not exist."[189]

Professor Allan Ides, however, has noted that, "if one reads the phrase 'really regulates procedure' in isolation, one can certainly construct an argument that *Sibbach* melded the two requirements of the [Enabling Act] into a single standard, one that focuses entirely on the procedural character of the Federal Rule."[190] The argument that Ides suggests would require the following assumption: a rule that is procedural can only actually conflict with other procedural rules. Under such an assumption, once a Federal Rule is found to really regulate procedure, any state law that conflicts with the Federal Rule must also be procedural. Therefore, because the conflicting law is procedural, allowing the Federal Rule to trump to the conflicting state law would not abridge, enlarge, or modify any substantive right.

Although this argument is tenable, an argument can be made that the structure of § 2072 indicates that Congress did not hold the critical assumption.[191] Specifically, if Congress believed that any state law must be procedural when it conflicts with a Federal Rule that is

188. *See* 28 U.S.C. § 2072(b).

189. *Shady Grove*, 130 S. Ct. at 1445–46.

190. Ides, *supra* note 21, at 14.

191. It must also be noted that Professor Stephen Burbank has persuasively argued the Congress did not intend the substance–procedure dichotomy to speak to a conflict between federal and state law. Rather, Professor Burbank has argued that "the procedure/substance dichotomy . . . was intended to allocate lawmaking power between the Supreme Court as rulemaker and Congress." Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106 (1982).

determined to be procedural, Congress would not have needed to include § 2072(b)'s "abridge, enlarge or modify any substantive right" language. The Enabling Act's text, then, suggests that the to-be displaced state law must be examined.

2. Defining Procedural as Transsubstantive

The required examination of the to-be displaced state law must determine whether the state law is substantive or procedural. The Enabling Act vests the Supreme Court with authority to promulgate general rules of practice and procedure but prohibits a Federal Rule from "abridge[ing], enlarge[ing] or modify[ing] any *substantive* right."[192] A Federal Rule that trumps a state procedural law is therefore unproblematic under the Enabling Act. Determining whether application of a Federal Rule over a conflicting state law is problematic under the Enabling Act requires a court to determine whether the conflicting state law is substantive or procedural.[193]

a. Previous Attempts to Distinguish Between Substance and Procedure

Courts and commentators have struggled to find a line that separates substance and procedure.[194] Justice Frankfurter, dissenting in *Sibbach*, even questioned whether substance and procedure "are mutually exclusive categories with easily ascertainable contents."[195] Although

192. *See* 28 U.S.C. § 2072(b) (emphasis added).

193. It should be noted, however, that some have questioned whether the Enabling Act actually requires defining a law as substantive or procedural. *See* Bauer, *supra* note 4, at 31 ("[T]here is something inherently problematic about having a result driven solely by a definitional label . . . rather than by also undertaking some analysis of the legislative purpose behind the [Enabling Act], including cabining the law-making role of the Supreme Court, and Congress' use of certain language to effect that purpose.").

194. Historically, substance and procedure were joined together. *See* Tidmarsh, *supra* note 8, at 882 ("For centuries the Anglo-American tradition thoroughly integrated and interwove rules of 'procedure' (understood to be the rules by which courts and other adjudicatory bodies resolve legal disputes) and rules of 'substance' (understood to be the rules to which citizens were supposed to conform their conduct outside of the courtroom).").

195. Sibbach v. Wilson & Co., 312 U.S. 1, 17 (1941) (Frankfurter, J., dissenting) (emphasis added).

this has proven to be a difficult task,[196] categorizing a law as a substantive or procedural is necessary because "they are the terms that Enabling Act uses."[197]

Past attempts at drawing the line between substance and procedure have proved unworkable. Concurring in the *Hanna* case, Justice Harlan suggested that a law was substantive if it "affect[ed] those primary decisions respecting human conduct."[198] Roughly, this definition suggests that a law is substantive if it affects matters outside of the court and it is procedural if it affects matters at the courthouse door or once inside.[199] For example, a law that considers an individual a trespasser (and therefore generally responsible for protecting his or her own safety) when walking next to a railroad track will cause that individual to be very careful on the path when a train approaches.[200] What an individual does when walking on a path by a railroad track is easily conceived of as "human conduct" and is, therefore, substantive.

This "human conduct" definition would not solve all conflicts between a state law and a Federal Rule. One example where the definition fails is in its application to the bond requirement in the 1949 Supreme Court case *Cohen v. Industrial Loan Corp.*[201] In *Cohen*, New

196. *See* Bauer, *supra* note 4, at 7–8 ("[E]ven after seventy-plus years, the Court has been unable to come up with definitions of 'procedural' and 'substantive' which predictably resolve that distinction.").

197. Ely, *supra* note 11, at 724. It should also be noted that "substance" and "procedure" do not have intrinsic definitions that apply in all situations:

> A particular issue may be classified as substantive or procedural in three contexts: when determining whether it is within the scope of a court's rulemaking power; when resolving questions of conflict of laws; or when determining whether to apply state law or federal law. These three contexts present three very different kinds of problems, and factors that are of decisive importance in making the substance-procedure classification for one context may be irrelevant in the other contexts. To use the same terminology for all three contexts is an invitation to a barren and misleading conceptualism, in which a decision classifying a particular issue as substantive in one of these contexts could be misinterpreted to classify the issue as substantive in another context even though an entirely different purpose is involved.

19 WRIGHT & MILLER, *supra* note 7, § 4508.

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

199. *See* Tidmarsh, *supra* note 8, at 882 (noting that procedure is "understood to be the rules by which courts . . . resolve legal disputes" and that substance is "understood to be the rules to which citizens were supposed to conform their conduct outside of the courtroom").

200. *Cf.* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 69–70 (1938).

201. *See* Ely, *supra* note 11, at 729 (discussing Cohen v. Beneficial Indus. Loan Corp., 337 U.S.

Jersey had enacted a statute requiring a plaintiff "to post a bond securing payment of defense costs" before instituting a shareholder derivative suit.[202] The *Cohen* Court held that this New Jersey statute did not conflict with the applicable Federal Rule and, therefore, resolved the conflict under the *Erie* framework.[203] Concurring in *Hanna*, Justice Harlan argued that even if there was a conflict, this New Jersey statute "could be expected to have a substantial impact on private primary activity" and "reflected policy considerations which, under *Erie*, would lie within the realm of state legislative authority."[204] Justice Harlan failed to identify how to determine when a law lies within the nebulous "realm of state legislative authority."[205] Notably, although stating that *Cohen* would have been the correct result even if the New Jersey law and the Federal Rule had conflicted, Justice Harlan did not characterize the New Jersey law as "substantive."[206]

Although the "human conduct" definition is conceptually helpful, it does not adequately solve the Enabling Act problem. Instead, the human conduct definition relies on the "realm of state legislative authority" to capture those results that the definition cannot.

Following the *Hanna* opinion, Professor Ely came closer to a workable definition of substance and procedure.[207] Professor Ely proffered that a right is substantive when it is granted "for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process."[208] This

541 (1949)).

202. *Hanna*, 380 U.S. at 477.

203. *See Cohen*, 337 U.S. at 556.

204. *See Hanna*, 380 U.S. at 478 (Harlan, J., concurring). Harlan first noted that the *Cohen* case was not decided under the Enabling Act analysis because the *Cohen* Court had interpreted Rule 23 to avoid a conflict with the New Jersey statute. *Id.* Harlan continued, noting that "even had even had the Federal Rules purported to do so, and in so doing provided a substantially less effective deterrent to strike suits, I think the state rule should still have prevailed." *Id.*

205. *See id.*

206. *Id*. at 477–78.

207. Ely, *supra* note 11.

208. Ely, *supra* note 11, at 725. Professor Ely also pointed out that "it is not at all unlikely that with respect to a given rule the legislature or other rulemaker will have had two (or more) goals in mind—one relating to the management of litigation and one relating to some other concern." *Id.* at 726; *see also* Freer & Arthur, *supra* note 22, at 64 ("No one doubts that procedures may be designed—for substantive policy reasons—to make it easier in a close case for one side to prevail."). It has long been

definition was able to accommodate the result in *Cohen*—even though the effect of the bond statute in *Cohen* was to halt litigation before it started, this was "done for a substantive purpose."[209]

This definition also adequately explained how to treat a statute of limitations. A statute of limitations is a "'door closing' rule[]"[210] and is limited to conduct that occurs at the courthouse door. Statutes of limitations seem primarily directed at influencing litigation conduct more than human conduct—i.e., it influences someone to file a suit by a particular time. Professor Ely has pointed out, however, that a statute of limitations also allows "potential defendants to breathe easy after the passage of the designated period" and that this "purpose[] . . . cannot be dismissed as procedural."[211]

So, Professor Ely's definition actually provided a line between substance and procedure because it included laws with substantive purposes within the substantive category.[212] Professor Ely, however, failed to provide a workable way to determine when a law had been enacted for a substantive purpose. According to Ely, the Supreme Court reached the correct result in *Hanna*, which allowed Federal Rule 4(d)(1) to trump a state law that required in-hand service for a case involving an executor of an estate. Ely argued that this was correct because "the state rule thus subordinated was one concerned with assuring actual notice

recognized that a procedural-looking law can be substantive: "The 1926 Senate Judiciary Committee noted that 'some of our most valued civil liberties have been obtained through the creation by legislative edict of mere remedial measures.'" Burbank & Wolff, *supra* note 5, at 47. "Congress has learned the power of procedure and knows how to pursue or mask substantive aims in procedural dress." *Id.* at 51. One commentator has suggested a definition that attempts to combine the principles expressed in Harlan's concurrence and expressed by Professor Ely: "a rule is substantive in this context—not subject to displacement by an Enabling Act rule—(a) if it has a nonprocedural purposes, or (b) even if its purposes are entirely procedural, if it is calculated to affect behavior at the planning as distinguished from the disputative stage of activity." Olin Guy Wellborn III, *The Federal Rules of Evidence and Application of State Law in Federal Courts*, 55 TEX. L. REV. 371, 404 (1977)

209. Ely, *supra* note 11, at 729.

210. *See id.* at 732.

211. *See id.* at 730–31.

212. A contrary rule would violate principles of federalism. *See, e.g.*, Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1450 (2010) (Stevens, J., concurring) ("In our federalist system, Congress has not mandated that federal courts dictate to state legislatures the form that their substantive law must take. And were federal courts to ignore those portions of substantive state law that operate as procedural devices, it would in many instances limit the ways that sovereign States may define their rights and remedies.").

and therefore a fair opportunity to appear and be heard."[213] But how does one know that the purpose of the displaced state law was only notice and a fair opportunity to be heard? The First Circuit, before the matter was appealed to the Supreme Court, had concluded that the service of process rule was "a substantive rather than a procedural matter."[214] As noted by the First Circuit, this Massachusetts service of process rule was a part of a "[s]pecial statute[] of limitations to effectuate the safe and 'speedy settlement of estates that the heirs might be quieted.'"[215] This stark disagreement demonstrates the difficulty in reliably determining whether a state law has a substantive purpose.

b. Finding the Purpose of the To-Be Displaced State Law

The concept of transsubstantivity can be used as a tool to reliably determine when a law has a substantive purpose. In the Enabling Act universe, a state law can be three things: (1) substantive, (2) procedural, or (3) both substantive and procedural.[216] The state-law transsubstantivity approach begins distinguishing between substance and procedure by identifying what is purely procedural—i.e., that which can be characterized as procedural and nothing else. A law that is transsubstantive speaks only to matters of procedure; the law does not

213. Ely, *supra* note 11, at 732. Even Professor Ely recognized that Massachusetts' service-of-process rule could be thought of as a substantive in the same way that a statute of limitations was substantive: "There is, of course, a sense in which one will 'breathe easier' simply by virtue of the assurance that the state is making a special effort to ensure that notice of suit will not get lost." *Id.* at 732.

214. Hanna v. Plumer, 331 F.2d 157, 159 (1st Cir. 1964).

215. *Id.* (quoting Brown v. Anderson, 13 Mass. 201, 202 (1816)).

216. Following *Shady Grove*, Professor Tidmarsh published a fascinating article suggesting a complete reformulation of *Erie* and the Enabling Act. *See* Tidmarsh, *supra* note 8, at 880. The author reads Professor Tidmarsh to confront the Enabling Act problem from the opposite direction—i.e., Professor Tidmarsh tries to distill a law down to its substantive essence. *Id.* He explains his approach as follows:

> In brief, if we assume a world in which processing a state-law claim from filing through settlement or judgment is costless and outcome-neutral, the claim has an expected value at the time of its hypothetical filing in a state court. This value is a product of the probability of recovery and the amount of the remedy if liability is found. What a federal court *cannot* do—whether its choice involves a Federal Rule or a common-law procedural rule—is to choose a rule that affects this expected value.

Id. at 880–81.

speak to any substantive matter. This is not to say that a transsubstantive law is value-neutral.[217] But a transsubstantive rule is concerned only with matters of "mak[ing] the process of litigation a fair and efficient mechanism for the resolution of disputes."[218] There can be no substantive purpose in a law that does not address any particular type of substantive claim. A law that is transsubstantive, therefore, is purely procedural. A law that is purely procedural and can reliably be placed within the procedural category. A court's application of a Federal Rule to trump such a law is therefore unproblematic under the Enabling Act.

The state-law transsubstantivity approach then presumes that, of the three types of laws in the Enabling Act universe (substantive, procedural, or substantive and procedural), only transsubstantive laws can fall within the procedural type. Any law that lacks transsubstantivity must create or define some substantive right. The foundation for this approach is the assumption that when a state legislature is not speaking purely about procedure, it is speaking about substance. And when a state legislature is speaking about substance, the legislature has at least some substantive purpose for enacting the law.

This presumption is not inexorable—i.e., this presumption does not inevitably flow from the idea that a transsubstantive law is purely procedural.[219] Specifically, it is possible that a legislature may enact a state law that lacks transsubstantivity for purely procedural reasons. For example, in *Shady Grove*, Justice Stevens suggests that § 901(b) can be read as a "procedural calibration of making it easier to litigate claims in

217. Marcus, *supra* note 23, at 379–80.

218. Ely, *supra* note 11, at 724.

219. Certainly the Constitution does not require adopting this definition of substance and procedure. It seems likely that Congress has the authority to declare the rule announced by Justice Scalia—i.e., a Federal Rule will govern in federal courts regardless of the state law that it trumps. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1435 (2010) ("[I]t is not the substantive or procedural nature of the affected state law that matters, but that of the Federal Rule."); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring) (internal citations omitted) ("The line between procedural and substantive law is hazy but no one doubts federal power over procedure. The [Article Three] and the "necessary and proper" clause of Article One may fully authorize legislation, such as this section of the Judiciary Act."); Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.").

New York courts (under any source of law) only when it is necessary to do so, and not making it *too* easy when the class tool is not required."[220] It is therefore possible to imagine a law that lacks transsubstantivity as having only a procedural purpose.[221]

Justice Stevens, in fact, in his intertwined approach, essentially proposes his own presumption. For Justice Stevens, when a state law and a Federal Rule are in conflict, application of the Federal Rule is unproblematic (i.e., the state law is procedural) unless there is "little doubt" that state law is substantive.[222]

Both the state-law transsubstantivity approach and Justice Stevens' approach, then, rely on presumptions. The presumption underlying the

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

221. It is also possible to imagine a transsubstantive law that has a substantive purpose. For example, imagine a state that has enacted a transsubstantive statute of limitations as State Law § 1: "All claims must be commenced within two years of the cause of action's accrual." (It is hard to imagine this happening and the author is not aware of any state that has done this. Statutes of limitations generally fix a time limit because of the facts that typically come up in that type of cause of action. So, for example, a personal injury statute of limitations may be shorter than a contract statute of limitations.) Then, the Supreme Court promulgated a hypothetical Federal Rule 87: "All claims must be commenced within one year of the cause of action's accrual." These two statutes conflict, and allowing the Federal Rule 87 to trump State Law § 1 would seem to abridge, enlarge, or modify a substantive right. The state-law transsubstantivity approach would require application of the Federal Rule 87 over State Law § 1 because State Law § 1 is transsubstantive. Importantly, however, the state-law transsubstantivity approach is designed only to solve the Enabling Act problem in *Shady Grove*—i.e., how does a court distinguish between substantive and procedural for the purposes of the Enabling Act's abridge, enlarge, or modify limitation on the Supreme Court's rulemaking authority? In the hypothetical conflict between Federal Rule 87 and State Law § 1, the abridge, enlarge, or modify may never come up. This is because the Enabling Act, in § 2072(a), grants the Supreme Court with authority only to promulgate "general rules of practice and procedure"—a federal statute of limitations may not be a rule of practice or procedure but instead a definition of substantive rights. The workable distinction between "substantive" and "procedural" proposed here is only meant to apply to the language in § 2072(b). The notion that § 2072(a) should handle this hypothetical conflict in some ways just avoids a hard question—when does a law that appears transsubstantive actually have a substantive purpose? But it seems that this question would only rarely arise and its difficulty does not wholly undercut the administrative simplicity of the state-law transsubstantivity approach.

222. *Shady Grove*, 130 S. Ct. at 1457 (Stevens, J., concurring). Justice Stevens states that it will be "rare" that a conflicting state law will satisfy this test. *Id.* at 1454 n.10 (citations omitted) ("It will be rare that a federal rule that is facially valid under 28 U.S.C. § 2072 will displace a State's definition of its own substantive rights."). He also states that "the bar for finding an Enabling Act problem is a high one." *Id.* at 1457. Justice Stevens also assumes that when a state law conflicts when a Federal Rule, the state law will typically look procedural. *See 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 the scope of state-created rights and remedies.").

state-law transsubstantivity approach (that a state law that lacks transsubstantivity must create or define some substantive right) is preferable for two reasons.

First, there is nothing in the Enabling Act that compels or even suggests Justice Stevens' "little doubt" approach. Instead, the Enabling Act categorically prohibits "abridg[ing], enlarg[ing] or modify[ing] *any* substantive right."[223] The Enabling Act's "any substantive right" language should mean "any substantive right," regardless of how a state legislature has chosen to grant that substantive right.[224] Justice Stevens acknowledged that it was "plausible" that New York adopted § 901(b) because the state "wished to create a 'limitation' on New York's 'statutory damages,'"[225] which would be a substantive purpose. Even so, Justice Stevens concludes that § 901(b) should be treated as procedural because "there are costs involved in attempting to discover the true nature of a state procedural rule."[226]

Second, the Enabling Act is the result of Congress's judgment about when it is proper to delegate authority to another coequal branch of the federal government, the Supreme Court, and the boundaries of that delegation. The Supreme Court's jurisprudence on congressional limits imposed on subject-matter jurisdiction can be instructive here. Subject-matter jurisdiction "concerns the fundamental constitutional question of the allocation of judicial power between the federal and state governments."[227] The Supreme Court has cautioned that federal courts must assiduously observe congressional limits on jurisdiction.[228]

223. *See* 28 U.S.C. § 2072(b) (2006) (emphasis added).

224. *See Shady Grove*, 130 S. Ct. at 1450 (Stevens, J., concurring) ("[W]ere federal courts to ignore those portions of substantive state law that operate as procedural devices, it could in many instances limit the ways that sovereign States may define their rights and remedies.").

225. *Id.* at 1457. Justice Stevens, in his analysis of § 901(b) under the "intertwined" approach stated that "there [we]re two plausible competing narratives" about the purpose of § 901(b). *Id.* at 1459.

226. *Id.* at 1457 ("And for the purposes of operating a federal court system, there are costs involved in attempting to discover the true nature of a state procedural rule and allowing such a rule to operate alongside a federal rule that appears to govern the same question. The mere possibility that a federal rule would alter a state-created right is not sufficient. There must be little doubt.").

227. 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3522 (3d ed. 2008).

228. *See* Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain

Similarly, the Enabling Act is a limitation imposed by Congress on the authority of the Supreme Court. The Enabling Act limitation on the Supreme Court's authority should, therefore, similarly be assiduously observed. In other words, Justice Stevens permits room for error on the wrong side of the issue.

The language in the Enabling Act, in light of the Supreme Court's traditional observance of congressional limitations on the Supreme Court's power, supports the state-law transsubstantivity presumption. Unless a court can conclude that a law is procedural within the Enabling Act universe, the law is either substantive or ostensibly procedural with a substantive purpose.[229] The argument here is not that this is the only conceivable way to apply the Enabling Act's "abridge, enlarge or modify" limitation; rather, the argument here is only that this presumption better carries out the Enabling Act.

C. Deference to Important State Interests

Justice Ginsburg, in her dissent, argued that the Court "relentlessly" read Federal Rule 23 to override important state interests.[230] According to Justice Ginsburg, the majority "approve[d] Shady Grove's attempt to transform a $500 case into a $5,000,000 award, although the State

legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, California v. LaRue, 409 U.S. 109 (1972), principles of estoppel do not apply, Am. Fire & Casualty Co. v. Finn, 341 U.S. 6, 17–18 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.").

229. Whether this presumption should be rebuttable is a question that should be saved for a state law that presents such an issue. *Cf.* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536 (1958). In *Byrd*, the Court faced the question whether the South Carolina practice of having a judge (rather than a jury) determine factual issues associated with the workers-compensation bar to tort suits was "a rule intended to be bound up with the definition of the rights and obligations of the parties." *Id.* The Court concluded that it was not, stating, "[the practice] is grounded in the practical consideration that the question had therefore come before the South Carolina courts from the Industrial Commission and the courts had become accustomed to deciding the factual issue of immunity without the aid of juries." *Id. Byrd* is arguably different because the non-transsubstantive practice established in that case was established by courts and not the legislature. This is not to say that rule pronounced by a state court do not qualify as state law, but only to suggest that the process for adopting a common law practice in a state court may be so different than legislation that the presumption does not hold up.

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

creating the right to recover has proscribed this alchemy."[231]

Unlike Justice Scalia's and Justice Stevens' approaches, the state-law transsubstantivity approach would defer to state policy judgments directed at anything other than the simple efficiency of courts.[232] When a state legislature selects a particular substantive claim for special treatment, a federal court sitting in diversity would be required to give that particular substantive claim the same special treatment afforded in state court.[233] This approach, therefore, accommodates Justice Ginsburg's concern for deference to important state interests.

In its deference to state legislatures, the state-law transsubstantivity approach should have the added benefit of helping to resolve the disagreement in *Shady Grove* (the Court split five to four) on whether § 901(b) and Federal Rule 23 were in conflict. Justice Scalia argued that, to determine whether a conflict exists, a court must determine whether the state law and the Federal Rule both supply an answer to the "question in dispute."[234] According to Justice Scalia, under the only reasonable interpretation, Federal Rule 23 conflicted with New York's § 901(b).[235] Justice Ginsburg called Justice Scalia's interpretation

231. *Id.*

232. *Cf.* 19 WRIGHT & MILLER, *supra* note 7, § 4504 (summarizing the *Hanna* opinion's really regulates procedure test and raising the question, "But has the pendulum swung too far?"); *id.* § 4509 (noting that the *Sibbach* test "is no test at all—in a sense, it is little more than the statement that a matter is procedural if, by revelation, it is procedural").

233. There are hypothetical state statutes that would seem to test the notion that federal courts should defer to state legislatures when a particular claim is singled out for special treatment. Take, for example, a state statute that required that different colored covers be used for filings in different kinds of cases (e.g., red for contract/tort cases; blue for civil rights cases; etc.). Such a statute would be nontransubstantive, but it would seem like statute that is really directed at the efficient prosecution of claims, rather than substantive rights. Under the state-law transsubstantivity approach however, a federal court would be required to follow such a state law. Such a result seems problematic; after all, the color of a cover sheet for a civil case seems fairly trivial. But one of the points of the state-law transsubstantivity is to avoid normative judgments about the triviality or importance of a conflicting state law. However, to the extent that a state statute would impose unduly taxing administrative burdens on federal courts, it may be necessary to include some sort of constitutional backstop on the power of a state legislature to impose the applicable of procedures in federal courts. *See infra* note 246 and accompanying text.

234. *Shady Grove*, 130 S. Ct. at 1441 ("We must first determine whether Rule 23 answers the question in dispute . . . . The question in dispute is whether Shady Grove's suit may proceed as a class action. Rule 23 provides an answer. . . . [Section] 901(b) attempts to answer the same question . . . . [Rule 23 and § 901(b)] flatly contradict each other.").

235. *Id.* at 1441 n.7 ("[T]here is only one reasonable reading of Rule 23.").

"relentless[]" and "mechanical."[236]

The disagreement between Justice Scalia and Justice Ginsburg on this issue was driven by a disagreement on how much the policies underlying *Erie* should influence the interpretation of the scope of a Federal Rule.[237] Justice Scalia argued that the Court "should read an ambiguous Federal Rule to avoid 'substantial variations [in outcomes] between state and federal litigation.'"[238] Justice Ginsburg, on the other hand, stated that a Federal Rule should be interpreted "'with sensitivity to important state interests' and a will 'to avoid conflict with important state regulatory policies.'"[239] Justice Ginsburg seemed to put a heavier thumb on the no-conflict side of the scale when interpreting a Federal Rule.[240] Although defining conflict is not the function of the state-law transsubstantivity approach, divorcing the consideration of important state policy considerations from the interpretation of the Federal Rules may help to bring more consistency to the interpretation of the Rules.[241]

Despite these benefits, an argument can be made that the state-law transsubstantivity approach is too deferential to state interests. In rejecting Justice Stevens' intertwined approach, Justice Scalia argued that Justice Stevens' approach could allow states too much influence on procedure in federal courts. Too much deference would "allow States to force a wide array of parochial procedures on federal courts."[242] The state-law transsubstantivity approach is, arguably, even more susceptible

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

237. *See supra* notes 170–171 and accompanying text.

238. *Shady Grove*, 130 S. Ct. at 1441 n.7. Justice Scalia states that "there is only one reasonable reading of Rule 23" and that is in conflict with § 901(b). *Id.* Justice Ginsburg, on the other hand, argued that the Court unnecessarily read into Rule 23 a conflict with § 901(b). *Id*. at 1460 (Ginsburg, J., dissenting) ("The Court reads Rule 23 relentlessly to override New York's restriction on the availability of statutory damages.").

239. *Shady Grove*, 130 S. Ct. at 1463 (citations omitted).

240. This strong disagreement is unsurprising given the Supreme Court's inconsistent interpretation of the Federal Rules in Enabling Act cases. *See* Freer & Arthur, *supra* note 22, at 70 ("Through the years, the Court has been anything but consistent in its approach to the important funneling function of assessing the breadth of a Federal Rule.").

241. In addressing examples of the application of the state-law transsubstantivity approach, this Article will apply Justice Scalia's question in dispute approach.

242. *Shady Grove*, 130 S. Ct. at 1446 n.11. *Cf.* 19 WRIGHT & MILLER, *supra* note 7, § 4504 (noting that the outcome-determinative test of *York* was criticized because "[a]pplied literally, very little would have remained of the Federal Rules of Civil Procedure in diversity cases").

to this criticism than Justice Stevens' intertwined approach.[243]

Addressing this criticism is best done with an example. Imagine that a state passed the hypothetical State Law § 2: "No claim for injuries caused by negligent operation of a motor vehicle can be dismissed before a full trial on the merits." This law lacks transsubstantivity and, therefore, would be categorized as an ostensibly procedural law with a substantive purpose. Assuming that this law would conflict with the several Federal Rules that allow for dismissal of an action before trial (Federal Rules 12(b)(6) and 56), a federal court sitting in diversity would be required to apply State Law § 2.

Application of State Law § 2 would require a federal court to forego two of the traditional tools for efficiently screening out unmeritorious claims before trial. An approach that allows a state legislature this much control over federal courts seems problematic.[244] But why?[245] If a state

243. The comparison with the "deferential interpretation" approach is somewhat more complicated. The "deferential interpretation" approach would only apply a state procedural law when the failure to apply the state procedural law would be problematic under *Erie*'s twin aims. Some cases reasonably involving a conflict between a federal rule and a state law that is not transsubstantive may nonetheless apply the federal rule because the state law does not pose any problem under the traditional *Erie* analysis. In this narrow class of cases, however, the state rule would apply under the "state-law transsubstantivity" approach. The "state-law transsubstantivity" approach would also, potentially, apply the federal rule in some cases when the "deferential interpretation" approach would apply the state rule. If, for example, the failure to apply a conflicting and transsubstantive state rule would cause an *Erie* problem, the "deferential interpretation" approach would apply the state law and the "state-law transsubstantivity" approach would apply the federal rule.

244. There certainly are federal interests at stake. 19 WRIGHT & MILLER, *supra* note 7, § 4501 (noting the difficulty in "reconciling the tension between *Erie*'s command that federal courts must honor state substantive law when it is applicable[] and the integrity of the federal courts as an independent judicial system"). Once the federal judicial system affords a federal forum to certain kinds of litigation, including cases based on the diversity of citizenship of the parties, the federal courts have an interest in uniformity of the procedure used in every federal court for the various stages of the litigation, because uniformity helps the parties, attorneys and judges know what the rules are. *See* Bauer, *supra* note 4, at 22–23. Uniformity in turn also leads to greater ease of administration of the judicial process; federal courts will have to look to fewer sources for resolving controverted issues, and they will be sources with which the courts are more familiar. *Id*. Differing state procedural requirements also might compel federal courts to create unique mechanisms to accommodate them. Federal courts also have an interest in docket control, including deciding which cases will continue, and in what form, and what actions should be terminated, and when, and under what standards. Finally, in diversity cases, federal courts have an interest in providing a forum that is, or is perceived to be, less biased against out-of-state litigants.

245. *Cf.* Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945) ("[T]he intent [of *Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of

has made a judgment to require that all claims for negligent operation of a motor vehicle go to trial for the substantive purpose of guaranteeing its citizens the right to drive in a safe environment, is it up to a federal district court to decide that the state legislature is incorrect? A refusal to apply State Law § 2 in federal courts would implicate *Erie*'s twin aims, which, at bottom, are focused on fairness.

At some point, an unduly burdensome state law might run up against "the Constitution's grant of power over federal procedure"[246] to the federal government, but this is not a reason to reject the state-law transsubstantivity approach. That a state would pass such a burdensome law seems unlikely. States generally face the same pressures of overworked and overburdened courts that the federal government faces. Even if there exists some possibility that a future case would be problematic, this remote possibility does not make untenable the state-law transsubstantivity approach.

V. APPLICATION OF THE STATE-LAW TRANSSUBSTANTIVITY APPROACH IN PRACTICE

Several example cases will help demonstrate how the state-law transsubstantivity approach would work in practice.

A. Service of Process

As discussed above, in *Hanna*, the Court was faced with the decision between a Massachusetts General Law ch. 197 § 9 (which required in-hand service for a case involving an executor)[247] and Federal Rule

citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.").

246. *Cf.* Hanna v. Plumer, 380 U.S. 460, 474 (1965) ("To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act. Rule 4(d)(1) is valid and controls the instant case.").

247. MASS. GEN. LAWS ANN. ch. 197, § 9 (West 1958) ("Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the

4(d)(1) (which allowed service of process at a defendant's house).[248] In the *Hanna* case, service of process was purportedly made when Plumer's wife received the complaint and summons at Plumer's house.[249]

Plumer later moved for summary judgment, arguing that Hanna could not maintain her case because Plumer had not been served in-hand as required by Massachusetts.[250] The question in dispute in *Hanna* was whether Plumer had been properly served. Because both the Massachusetts law and the Federal Rule 4(d)(1) answered the same question in dispute, there was a conflict.[251]

The First Circuit Court of Appeals, hearing the *Hanna* case before the Supreme Court, had stated that the law was actually designed to ensure that heirs would be quieted:

> [I]n addition to service sufficient to satisfy due process requirements for in personam jurisdiction, the executor, a creature of the Massachusetts court charged with the administration and disposition of the estate sought to be reached, was by law entitled to receive specific notification of the action within the year. Special statutes of limitations to effectuate the safe and speedy settlement of estates that the heirs might be quieted have been operative in the Commonwealth for over 150 years. Relatively recent amendments evince a clear legislative purpose to require personal notification within the year, ascertainable of record. This matter is quite apart from the question of what is adequate service of process in the procedural sense. Actual, record notice would appear fully as substantive a state requirement binding in the federal court as is a requirement that in certain actions a bond must be furnished for costs.[252]

The Supreme Court, with almost no analysis, reversed this judgment of the First Circuit and held that "Rule 4(d)(1) is valid and controls the

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amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate . . . .").

248. *Hanna*, 380 U.S. at 461 ("[S]ervice was made by leaving copies of the summons and the complaint with respondent's wife at his residence, concededly in compliance with Rule 4(d)(1).").

249. *Id.* at 461.

250. *Id.* at 462–63.

251. *Cf. id.* at 470 (noting that the conflict in *Hanna* was "unavoidable" and distinguishing other cases where the purportedly conflicting Federal Rule did not "cover[] the point in dispute").

252. Hanna v. Plumer, 331 F.2d 157, 159 (1st Cir. 1964) (internal citations and quotations omitted).

instant case."[253] The Court reasoned that "[t]o hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act."[254]

Under the state-law transsubstantivity approach, after finding a conflict, the court should have whether the state law was purely procedural—i.e., transsubstantive—to determine if application of the Federal Rule would violate the Enabling Act.

The Massachusetts law was not transsubstantive. The law only applied to a claim by a creditor against an executor or administrator.[255] It was not purely procedural and, therefore, would have been presumed to have at least some substantive purpose. The state law, therefore, embodied a protection on a creditor and the heirs of an estate.

This conclusion makes sense, too. Hanna had sued Plumer for injuries that Plumer did not cause. Plumer was the executor of the estate of the person that injured Hanna. An executor is "a creature of the Massachusetts court charged with the administration and disposition of the estate sought to be reached."[256] Massachusetts, by creating this institution should be able to control exactly what it should and should not be entitled to receive because the purpose of this institution was to ensure a "safe and 'speedy settlement of estates that the heirs might be quieted.'"[257] Massachusetts was apparently concerned that heirs be able to breathe easy and know the disposition of an estate after one year was final. It is not the place for the Supreme Court to second guess this decision.[258]

253. *Hanna*, 380 U.S. at 474.

254. *Id.* at 473–74.

255. *Id.* at 461–62.

256. *Hanna*, 331 F.2d at 159.

257. *Id.* at 159 (quoting Brown v. Anderson, 13 Mass. 201, 202 (1816)).

258. *Cf. Hanna*, 380 U.S. at 469 ("Moreover, it is difficult to argue that permitting service of defendant's wife to take the place of in-hand service of defendant himself alters the mode of enforcement of state-created rights in a fashion sufficiently 'substantial' to raise the sort of equal protection problems to which the Erie opinion alluded.").

B. Pleading Standards

There has been much debate about how much (and even whether) the *Twombly* and *Iqbal* cases changed pleading standards in federal court.[259] Assuming, however, that the cases have heightened pleading standards a perceptible amount, and that this change will make a difference in some cases, it can be argued that Federal Rule 12(b)(6) is in conflict with a state rule 12(b)(6) that has not adopted the *Twombly* and *Iqbal* gloss.

For example, in 2010, the Supreme Court of Washington expressly "decline[d]" to adopt the *Twombly* and *Iqbal* gloss on the motion to dismiss because it had not been presented with "the type of facts and figures (specific to the Washington trial courts) that were presented to, and persuaded, the United States Supreme Court to alter its interpretation" of the motion to dismiss.[260]

For a case brought in a federal district court that sits in Washington State, there is an argument (on the above assumptions) that the federal court should apply Washington's rule on the motion to dismiss. Both rules would answer the same question—whether the plaintiff had stated a claim. To determine how to resolve that conflict, a court would examine the nature of the conflicting state law.

Washington Civil Rule 12(b)(6) states that:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be

259. *See* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010); Edward A. Hartnett, *Taming* Twombly *Even After* Iqbal, 158 U. PA. L. REV. 473 (2010). The *Twombly* and *Iqbal* cases, however, only explicitly apply to Federal Rule of Civil Procedure 12(b)(6) and do not govern any state rule on a motion to dismiss. In *Conley v. Gibson*, a seminal case on pleading standards in federal court, the Supreme Court had stated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45 (1957). In *Twombly*, the Supreme Court stated that this "no set of facts" language "ha[d] earned its retirement." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 (2007). Restating the test for a motion to dismiss, the *Twombly* Court stated that a plaintiff must plead "enough facts to state a claim to relief that is plausible on its fact." *Id.* at 570.

260. McCurry v. Chevy Chase Bank, 233 P.3d 861, 863–64 (Wash. 2010); *see also* Roger Michael Michalski, *Tremors of Things To Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109 (2010), http://yalelawjournal.org/2010/10/27/michalski.html.

granted . . . .[261]

This rule applies to "a claim for relief in any pleading" and is therefore transsubstantive.[262] Because this rule is transsubstantive, Federal Rule 12(b)(6) (and the *Twombly* and *Iqbal* gloss) would govern a motion to dismiss in a federal district court sitting in Washington state under the "state-law transsubstantivity" approach.[263]

A rule on a motion to dismiss applicable to all cases does not reflect how a substantive right is protected. Instead it governs *purely* how it is enforced in a court. This hypothetical case demonstrates that, under the state-law transsubstantivity approach, the Federal Rules are not "disembowel[ed]," [264] but will trump conflicting state laws that are purely procedural.

VI. CONCLUSION

In summary, under the state-law transsubstantivity approach, when a Federal Rule conflicts with a state law, a court should examine the nature of the state law to determine whether the state law is transsubstantive. If the state law is not transsubstantive, the court should presume that the state law protects some substantive right. Application of the Federal Rule over the conflicting state law that is not transubstantive, therefore, would abridge, enlarge, or modify a substantive right in violation of the Enabling Act.[265] Because application of the Federal Rule would violate the Enabling Act, the Federal Rule must yield to the conflicting state law.

The state-law transsubstantivity approach outlined here provides a rule that will accommodate the various policy interests that divided the Justices in *Shady Grove*: the approach is easily administrable and will

261. WASH. R. CIV. P. 12(b)(6).

262. If the Washington Supreme Court interpreted this transsubstantive Civil Rule 12(b)(6) to require heightened pleading in employment discrimination cases, the Washington Supreme Court gloss would be substantive under this state-law transsubstantivity approach. This is because such gloss would not be gloss at all but instead a common law substantive rule that is applicable to a particular type of claim that a federal court would be required to follow.

263. *But see* Adam N. Steinman, *What is the* Erie *Doctrine (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245 (2008).

264. *Cf.* Hanna v. Plumer, 380 U.S. 460, 473–74 (1965).

265. 28 U.S.C. § 2072(b) (2006).

not require federal courts to delve into state legislative history,[266] the approach does not write language out of the Enabling Act,[267] and the approach gives deference to judgments made by state legislatures about substantive rights.[268]

266. *Cf.* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1441 (2010). (criticizing the "deferential interpretation" approach for requiring federal judges to "por[e] through state legislative history"); *id.* at 1447 n.14 (criticizing the "intertwined" approach as "inscrutable" and as "forcing federal courts to assess the substantive or procedural character of countless state rules that may conflict with a single Federal Rule").

267. *Cf. id*. at 1454 (Stevens, J., concurring) (criticizing the really regulates procedure approach for "ignor[ing] text and context in the service of simplicity").

268. *Cf. id*. at 1464 (Ginsburg, J., dissenting) (criticizing the Court for a "mechanical reading of Federal Rules [that was] insensitive to state interests and productive of discord").