2011

Shedding Light on Shady Grove: Further Reflections on the Erie Doctrine from a Conflicts Perspective

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SHEDDING LIGHT ON *SHADY GROVE*: FURTHER REFLECTIONS ON THE *ERIE* DOCTRINE FROM A CONFLICTS PERSPECTIVE

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As is well known, the "*Erie*[1] doctrine" broadly involves questions of *vertical* choice of law: what law should be applied in a federal court when the underlying claim arises under state law?[2] In an article that

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

2 A short-hand formulation of the situations in which *Erie* issues might be raised are cases which are being heard in a federal court because of its diversity jurisdiction, granted by 28 U.S.C. § 1332 (2006). Indeed, the Court has repeatedly noted that "federal courts *sitting in diversity* apply state substantive law and federal procedural law." Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996) (emphasis added), *quoted in* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1460 (2010) (Ginsburg, J., dissenting).

But, *Erie* issues also may arise when the court has jurisdiction because the plaintiff asserts a federal question and the court exercises supplemental jurisdiction over the plaintiff's state-created claims, and in a variety of other possible settings, including state-law-created counterclaims, cross-claims, and impleaders in actions asserting a federal question. *See generally* Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980) (discussing how the *Erie* doctrine applies to federal question jurisdiction in addition to diversity jurisdiction).

appeared in this journal twelve years ago,[3] I argued that many of the goals embodied in that doctrine would be advanced if learning from the field of *horizontal* conflicts of law—determining which of the conflicting rules of two or more states or countries should govern—were applied to *Erie* analysis.[4]

In this Article, I propose to reexamine some of those issues in light of intervening case law, academic criticism, and, in particular, the Supreme Court's recently decided case, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[5] For the most part, the suggestions in that 1999 article are consistent with the dissent's conclusions in *Shady Grove.* Interestingly, however, some other aspects of conflicts-of-law doctrine, and in particular case law surrounding the imperatives and limitations imposed on state courts by the Due Process and Full Faith and Credit Clauses, would have provided useful insights for the plurality and concurring decisions.

In Part I of this Article, I begin with a brief review of the basic methodology for resolving "*Erie* cases," and of some of the ways that horizontal choice-of-law jurisprudence might be imported into the *Erie* realm. In Part II, I then offer a brief summary of the facts, and Justice Scalia's plurality,[6] Justice Stevens's concurring, and Justice Ginsburg's dissenting[7] opinions in *Shady Grove.* In Part III, I analyze and criticize those opinions. In Part IV, I conclude with some observations about issues that remain unresolved after *Shady Grove.*

I.

It is familiar learning that when a federal court serves as the forum for the adjudication of claims arising under state law, it may be required to apply state "rules of decision" to resolve many of the legal issues in dispute. At a minimum, this requirement is imposed by sec-

3 Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis,* 74 NOTRE DAME L. REV. 1235 (1999).

4 *See id.* at 1264–99. For a recent contribution to the *Erie*/choice-of-law interface, see Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 Nw. U.L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/so13/papers.cfm?abstract_id=1665092.

5 130 S. Ct. 1431 (2010).

6 The "plurality" opinion, written by Justice Scalia, was in fact joined in full by only two other members of the Court—Chief Justice Roberts and Justice Thomas. *See id.* As discussed more fully below, *see infra* notes 68–70 and accompanying text, Justices Stevens and Sotomayor joined in some portions of this opinion. Those portions of the decision in which both of these latter Justices joined are referred to as the "majority."

7 Justices Alito, Breyer, and Kennedy joined in the single dissenting opinion.

tion 34 of the Judiciary Act of 1789[8]—the so-called Rules of Decision Act.[9] And, without identifying specific provisions, *Erie* itself suggested that appropriate deference to state law was constitutionally mandated.[10]

But when? This question has vexed courts and commentators for the nearly three-quarters of a century since the *Erie* decision. So, let me first offer an abbreviated version of Erie *for Dummies*.

A.

The starting point is the identification of the legal issue in question. For example, what is the duty of care owed by a railroad to someone walking parallel to its right of way?[11] What steps suffice to satisfy the state statute of limitations' requirements for "commencing" an action?[12] What should be the standard of review applied by a trial court of a jury verdict, and by an appellate court of the trial court's ruling thereon?[13] May a particular claim be asserted as a class action?[14]

At this stage, the court must identify the nature and scope of the state and federal "rules"[15] that would deal with that question. Do both of those rules in fact address and cover that question? Do they truly

8 Ch. 20, § 34, 1 Stat. 92 (1789) (current version at 28 U.S.C. § 1652 (2006)).

9 *See id.* ("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.").

10 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 67, 78–80 (1938).

11 *See id.* at 70.

12 *See* Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980) ("In our view, in diversity actions Rule 3 governs the date from which various timing requirements of the Federal Rules begin to the run, but does not affect state statutes of limitations." (footnote omitted)); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533 (1949) ("[T]he Federal Rules of Civil Procedure determine the manner in which an action is commenced in the federal courts—a matter of procedure which the principle of *Erie R. Co. v. Tompkins* does not control.").

13 *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 419 (1996) ("New York's law controlling compensation awards for excessiveness or adequacy can be given effect, without detriment to the Seventh Amendment, if the review standard set out in [the New York law] is applied by the federal trial court judge, with appellate control of the trial court's ruling limited to review for 'abuse of discretion.'").

14 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1439 (2010) ("Rule 23 permits all class actions that meet its requirements, and a State cannot limit that permission . . . .").

15 I use the term "rules" to include both positive law and judge-made law. At the state level, I use it the same way as that term is interpreted under the Rules of Decision Act. *See infra* notes 23–25 and accompanying text. At the federal level, the term

"conflict," or might they coexist, in part perhaps because the federal rule should be given a less expansive reading? If they can be harmonized—if they do not in fact clash—then the *Erie* problem largely disappears. If the state law is the only "rule" that is on point with respect to that issue,[16] then the federal court will of course apply it.

In my earlier article, I drew on horizontal choice-of-law jurisprudence to advocate for more robust attempts to give the federal rule a more limited reach, as a means of reducing or solving *Erie* problems. This approach would be consistent both with some of the primary goals of a conflicts regime, including enhanced comity, uniformity of outcome, and a reduction of "forum shopping," and with a fundamental underpinning of *Erie*—respect for the law-making and law-enforcement role of the states, based on the federal nature of the Republic.[17]

Unfortunately, the Supreme Court has spoken with at least two voices with respect to its willingness to give a more restrained reading to federal statutes and the Federal Rules of Civil Procedure (FRCP).[18] On the one hand, the Court has on multiple occasions given the Fed-

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"rules" of course includes, but is broader than, one of the Federal Rules enacted pursuant to 28 U.S.C. §§ 2071–2072 (2006).

16 These situations are not limited to instances in which there is literally "no" federal rule. It may be, as just indicated, that the federal law can be interpreted less expansively. Or, the federal rule might only apply to federal question actions. Or, while this might be an area where the courts could have created a rule by the common law process, they have chosen not to adopt one.

17 Justice Ginsburg's dissent drew on authority from the conflicts realm in support of her position for a more restrained reading of the Federal Rules. *See Shady Grove*, 130 S. Ct. at 1460 (Ginsburg, J., dissenting) (citing Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 658 (1959)); *id.* at 1470 (citing Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 231 (1958)). This is not completely surprising, since in her earlier life, Justice Ginsburg both taught conflicts—at Rutgers-Newark and Columbia Law Schools, *see* Herma Hill Kay, *Ruth Bader Ginsburg: Professor of Law*, 104 COLUM. L. REV. 2, 11–16 (2004)—and authored several law review articles on the subject, *see, e.g.*, Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798 (1969).

18 The level of deference to be afforded to state law in an *Erie* setting and the appropriate canons for guiding that deference are closely related to the broader issue of preemption of state law by federal statute or regulation—a topic beyond the scope of this Article. Supreme Court Justices have offered contrasting canons regarding preemption. *Compare* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 518 (1992) ("[W]e must construe these provisions [in the state law] in light of the presumption against the pre-emption of state police power regulations."), *with id.* at 544 (Scalia, J., concurring in the judgment in part and dissenting in part) (describing that presumption as "an extraordinary and unprecedented principle of federal statutory construction" and asserting that "there is no merit to this newly crafted doctrine of narrow construction").

eral Rule a more limited reach, thus avoiding a clash with state law.[19] Indeed, the Court has noted that in assessing their reach, "[f]ederal courts have interpreted the Federal Rules with . . . sensitivity to important state interests and regulatory policies."[20] However, the Court has also stated that the Rules should be given their "plain meaning," even if that will result in a "direct collision."[21]

As discussed more fully below,[22] in my view, a principal objection to the plurality's opinion in *Shady Grove* is its payment of lip-service to the merits of this more restrained approach, but then the rejection in fact of that alternative.

B.

The second step of *Erie* analysis takes place after the court determines that both the state and federal rules govern the disputed legal

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19 *See, e.g.*, Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980) (holding that the provision in Rule 3 providing that an "action is commenced by filing a complaint with the court," FED. R. CIV. P. 3, did not apply to the service of process provisions of the state statute of limitations and that, in absence of clash, the Rule and the state statute "can exist side by side, therefore, each controlling its own intended sphere of coverage without conflict"); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533 (1949) ("[T]he Federal Rules of Civil Procedure determine the manner in which an action is commenced in the federal courts—a matter of procedure which the principle of *Erie R. Co. v. Tompkins* does not control."); Palmer v. Hoffman, 318 U.S. 109, 117 (1943) (interpreting Rule 8(c)'s enumeration of affirmative defenses to apply only to burden of pleading, with state law governing burden of proof).

20 Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996). The majority also noted with approval the observation by scholars of the Court's predilection "'to interpret the federal rules to avoid conflict with important state regulatory policies.'" *Id.* at 438 n.22 (quoting RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 729 (4th ed. 1996)).

In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Court declined to give an expansive reading to Rule 23, noting that "this limiting construction . . . minimizes potential conflict with the Rules Enabling Act, and avoids serious constitutional concerns." *Id.* at 842. *Ortiz* was cited with approval in *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001). *See also* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 37–38 (1988) (Scalia, J., dissenting) ("[I]n deciding whether a federal procedural statute or Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits.").

21 *Walker*, 446 U.S. at 750 n.9 ("This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law. The Federal Rules should be given their plain meaning."). Perhaps these two canons may be harmonized in part by preferring the first, calling for heightened deference to state interests, when the Rule is susceptible to several interpretations, while preferring the second when the Rule is deemed less ambiguous.

22 *See infra* Part III.A.

issue, but in different ways, i.e., that they "clash" and cannot be harmonized. The court then looks to the source of the federal rule.[23] On a descending hierarchy of primacy, these could be the U.S. Constitution, federal statutes,[24] one of the Federal Rules promulgated pursuant to the Rules Enabling Act (REA),[25] or federal judge-made law.

1. Because the U.S. Constitution provides that it is the "supreme Law of the Land,"[26] it will always prevail in any clash between it and a conflicting state law. To date, only two *Erie* cases at the Supreme Court level have raised this potential conflict.[27] However, in both cases, the Court found that the constitutional provision at issue—the Seventh Amendment—only "influenced" the result, and did not reach so far to create an actual clash.[28] Therefore, the Court proceeded to employ alternate methodologies to resolve the *Erie* issue.

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23 The source of the state law is irrelevant. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), had interpreted section 34 of the Rules of Decision Act, mandating that the "laws of the several states . . . be regarded as rules of decision," to require that the federal courts accord deference to the state's positive law, but not to state common law of a "general" nature. *Id.* at 8 (quoting Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92); *see id.* at 18. In rejecting this distinction, *Erie* recognized that the federal courts cannot second guess the state's determination of how its "law" should be "made." *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). State constitutional provisions, statutes, and judge-made rules are all treated as the "*laws* of the several states." *See id.* (emphasis added).

24 This would include not only the typical statute found in the U.S. Code, but also the Federal Rules of Evidence (FRE). The Rules Enabling Act authorizes the Supreme Court to prescribe "rules of evidence for cases in the United States district courts." 28 U.S.C. § 2072 (2006); *see infra* notes 32–34 and accompanying text. In fact, however, with a few exceptions (for example, portions of Rules 101, 409, and 610), the bulk of the FRE is the product of statute. *See* Pub. L. No. 93-595, 88 Stat. 1926, 1926–48 (1975).

25 This would include virtually all of the FRCP and the Federal Rules of Appellate Procedure (FRAP), and to a far lesser extent, some of the FRE. Some isolated portions of the FRCP are the result of legislation. The principal example was the legislative rewriting of Rule 4 in 1983, *see* Pub. L. No. 97-462, § 2, 96 Stat. 2527 (1983), although that Rule has since been modified under the REA process. *See* Pub. L. No. 102-198, § 11, 105 Stat. 1623 (1991) (amending then-Rule 15(c)(3)); Pub. L. No. 100-690, Title VII, § 7047(b), 102 Stat. 4401 (1988) (amending part of Rule 35); Pub. L. No. 96-481, Title II, § 205(a), 94 Stat. 2330 (1981) (amending part of Rule 37).

26 U.S. CONST. art. VI, cl.2.

27 *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 426 (1996) (noting the potential friction between the two without deciding that the Seventh Amendment's influence was dispositive); Byrd v. Blue Ridge Rural Electric Coop., Inc., 356 U.S. 525, 537–38 (1958).

28 At issue in *Byrd* was whether a federal court had to defer to a state's assignment of decisionmaking responsibility to a judge, rather than a jury, with respect to a specific disputed issue, in a situation in which the federal practice was to have all such issues decided by a jury. The Court declined to decide whether the Seventh Amend-

2. and 3. Clashes between a state rule, and either a federal procedural statute or one of the Federal Rules, are dealt with in similar fashion, although the former entails only a single step, while the analysis for the latter comprises two steps. In both cases, after that analysis, the federal standard will be applied unless the federal rule was not "validly" adopted. As a historical matter, once the Supreme Court has concluded that the statute or Rule is on point and that it governs the issue in dispute, it has never sustained a challenge seeking to invoke *Erie* principles and has rejected contentions that, as applied, the federal statute or a Federal Rule was "invalid"—including in *Shady Grove.*

The resolution of a clash between a state rule and a federal procedural statute is relatively straight forward. In *Stewart Organization, Inc. v. Ricoh Corp.*,[29] the Court held that "a district court sitting in diversity *must apply* a federal statute that controls the issue before the court and that represents a valid exercise of Congress's constitutional powers."[30] Once these two determinations have been made, the federal court no longer has occasion to undertake any *Erie*-based analysis—even if arguably the application of federal law would be inconsistent with some of policies underlying the *Erie* doctrine.[31]

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ment spoke to this question, merely noting that the federal practice was done "under the influence—if not the command—of the Seventh Amendment." *Byrd*, 356 U.S. at 537 (footnote omitted).

Gasperini involved the Re-Examination Clause portion of the Seventh Amendment, which provides that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. At issue was whether a federal court had to defer to a New York statute and interpretative case law, which would have required greater supervision by state trial court judges of jury verdicts and by state appellate courts of trial court rulings, than would have occurred under prevailing federal standards. See *infra* notes 148–57 and accompanying text for a more detailed discussion of *Gasperini.* Here it is sufficient to note that Justice Ginsburg's opinion concluded that the Seventh Amendment did not reach far enough to dictate the result of the *Erie* analysis. *See Gasperini*, 518 U.S. at 436.

29 487 U.S. 22 (1988).

30 *Id.* at 27 (emphasis added). The Court stated:

> [T]he constitutional provision for a federal court system . . . 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.

Id. at 32 (second alteration in original) (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965)). The source of that power is Article III, as augmented by the Necessary and Proper Clause. *See id.*

31 *See id.* at 32 n.11 ("Because a validly enacted Act of Congress controls the issue in dispute, we have no occasion to evaluate the impact of application of federal judge-made law on the 'twin aims' that animate the *Erie* doctrine.").

Because of limitations on the statutory authority for the promulgation of the Federal Rules, the resolution of a clash between one of those Rules and a state rule is more involved. In 1934, Congress passed the Rules Enabling Act (REA),[32] authorizing the Supreme Court to prescribe "general rules of *practice and procedure* and rules of evidence for cases in the United States district courts . . . and courts of appeals."[33] As a counterpart to the emphasized language, the Act also provided that "[s]uch rules shall not abridge, enlarge or modify any substantive right."[34]

Thus, after a court undertaking an *Erie* analysis has determined that there indeed is a clash between a state rule and one of the Federal Rules, it will use the standards of the REA to determine if the Rule is "valid." Once again, as with a federal statute, the federal court *must* apply a "valid" Rule in the face of the conflicting state rule.[35]

The Supreme Court has undertaken analyses of whether a particular Rule was "valid" in a host of cases—from *Sibbach v. Wilson*[36] in 1941, to *Shady Grove* earlier this year.[37] The "test" seeks to address the REA's contrast between valid "rules of . . . procedure"[38] and prohib-

32 Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–2077 (2006)).

33 28 U.S.C. § 2072(a) (emphasis added).

34 *Id.* § 2072(b).

35 *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996) ("[I]f the Rule in point is consonant with the Rules Enabling Act and the Constitution, the Federal Rule applies regardless of contrary state law." (citation omitted)); Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987) ("The initial step is to determine whether, when fairly construed, the scope of Federal Rule 38 is 'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law. The Rule must then be applied if it represents a valid exercise of Congress' rulemaking authority, which originates in the Constitution and has been bestowed on this Court by the Rules Enabling Act." (citation omitted)).

36 312 U.S. 1 (1941) (upholding validity of Rule 35, which permits physical examinations of parties as part of pretrial discovery, notwithstanding state law which would have barred those examinations).

37 There are other examples. *See Burlington*, 480 U.S. at 3 (upholding validity of FRAP 38, which confers discretion on appellate court to enter sanctions against unsuccessful appellant, in contrast to state statute which mandated automatic entry of penalty against defendant who unsuccessfully contested on appeal entry of adverse money judgment); Hanna v. Plumer, 380 U.S. 460, 464 (1965) (upholding validity of service of process provisions of Rule 4, in face of state statute which provided other means for service of process and which would not have permitted means used by plaintiff); Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946) (upholding validity of Rule 4(f), which expanded possibilities for service of process beyond that permitted by state venue provisions).

38 28 U.S.C. § 2072(a); *see supra* text accompanying notes 32–34.

ited rules which would "abridge, enlarge or modify any substantive right."[39] However, even after seventy-plus years, the Court has been unable to come up with definitions of "procedural" and "substantive" which predictably resolve that distinction. Rather, in *Shady Grove*, the plurality fell back on the "test" first stated in *Sibbach*: "We have long held . . . that the Rule must 'really regulat[e] procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.' "[40]

It is obvious that this proffered "test" is vague and imprecise. In Part III below, I will discuss why the heavy reliance on it by the *Shady Grove* plurality was a thoroughly inadequate basis for resolving the *Erie* issue.

4. The appropriate analysis for resolving clashes between state law and federal judge-made law is considerably less well-defined than with the prior three clashes. Over the years, the Court has identified four different, but overlapping, approaches. Because *Shady Grove* nominally involved a clash involving one of the Federal Rules, I will not discuss these four approaches in detail;[41] instead, I will confine myself to identifying those aspects of these approaches which are relevant to *Shady Grove* and to the invocation of conflicts-of-law jurisprudence to resolving *Erie* disputes.

The first approach is the one most frequently invoked by first year Civil Procedure students: federal courts must apply state substantive law; federal courts apply federal procedural rules.[42] The first part of this statement is certainly true. *Erie* itself involved the question of the appropriate standard of care in a negligence action, and the Supreme Court left no doubt that the federal courts could not create their own "federal general common law" of negligence to resolve that question. However, the second part of the syllogism is less clear. Federal courts will on occasion also have to defer to state rules of procedure, because of the concerns animating one of the other three approaches.

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39 *Id.* § 2072(b); *see supra* text accompanying notes 32–34.

40 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (plurality opinion) (alteration in original) (quoting *Sibbach*, 312 U.S. at 14).

41 I have canvassed these approaches in Bauer, *supra* note 3, at 1254–63.

42 As I will indicate, this statement is incomplete; indeed, it may be misleading. Nonetheless, those students have good authority for the proposition. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.").

But, another difficulty with this syllogism—and the aspect that has implications for *Shady Grove* and its application of this distinction for testing the validity of a Federal Rule under the Rules Enabling Act—is that the boundary between substance and procedure is both imprecise and varying depending on the context in which the question is posed.[43]

A second approach was suggested by the Court in *Guaranty Trust Co. v. York*.[44] Irrespective of whether a judge-made rule[45] is characterized as procedural or substantive, the federal court must defer to state law if failure to do so would substantially affect the outcome of the case.[46]

A third, related approach was best described in dictum in *Hanna v. Plumer*.[47] There, the Supreme Court said that a federal court's determination of whether it could apply federal judge-made law or whether it had to apply state law must take account of the "twin aims" of *Erie*—"discouragement of forum shopping and avoidance of inequitable administration of the [state's] laws."[48] In particular, the first of those two goals is consistent with the basic themes underlying *Erie* that the availability of a federal forum in diversity cases is designed to afford the litigants a more neutral, less biased, forum, but it is not intended to reward the diversity litigant with a different, and better,

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43 *See infra* notes 161–77 & 188–90 and accompanying text.

44 326 U.S. 99 (1945).

45 At issue in *Guaranty Trust* was whether a federal court hearing a historically equitable action arising under state law had to apply the state's statute of limitations—which would have barred the action—or whether it could apply a federal laches rule, which might have permitted the action to proceed. *See id.* at 100–01.

46 *See id.* at 109 ("[I]n all cases where a federal court is exercising jurisdiction solely because of the diversity of 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.").

Two quick points. First, any difference between the state and federal rules could, at the margin, affect the outcome of the case. *See infra* notes 137–41 and accompanying text (noting concession by plurality that all rules of procedure can affect the rights of the parties). Thus, *Guaranty Trust* talked in terms of a substantial effect. But, what is "substantial"?

Second, once the lawsuit is underway, any difference between the two rules could have an effect, trivial or otherwise. If the federal courts give a defendant twenty-one days to file an answer and the state gives twenty-eight days, a defendant who follows the state procedure could suffer consequences. Thus, the principal focus is on ex ante behavior and decisions. *See generally* Jay Tidmarsh, *Procedure, Substance, and* Erie, 64 VAND. L. REV. 877 (2011) (stressing difference between ex ante and ex post effects of procedural rules).

47 380 U.S. 460, 468 (1965).

48 *Id.*

legal rule.[49] And, this goal also has resonance in extending horizontal choice-of-law jurisprudence to *Erie* analysis. A frequently invoked reason for a state to apply another state's rule to a dispute, rather than its own, is to protect defendants from the perceived unfairness of plaintiffs' ability to search for, and opt for, the forum with the most favorable law. Similar concerns animate *Erie.*

Although the plurality in *Shady Grove* recognized that their holding might encourage forum shopping, they shrugged their collective shoulders at this fact.[50] As discussed more fully below,[51] this indifference is another objection to the reasoning, and the outcome, of that opinion.

The fourth alternative for resolving *Erie* disputes requires the court to assess and balance the goals of and interests behind the conflicting state and federal rules.[52] In my 1999 article, I made a number of observations. First, this approach has analogies to the balancing undertaken in the horizontal context by several modern choice-of-law methodologies, including interest analysis and the identification and weighing of state policies called for under the *Restatement (Second) of Conflicts.*[53] Second, this approach can be undertaken at two stages of the *Erie* analysis—first in deciding whether there really is a "clash" between the state and federal rules, and then, even if the answer is in the affirmative, in counseling deference to the state rule.[54] Third, greater use of this approach would reduce the number of *Erie* disputes.[55] Finally, as a practical matter, by making it more likely that the state rule would be applied, this approach would advance an important precept underlying the *Erie* doctrine, of promoting the values of federalism.[56] The *Shady Grove* majority's failure to give adequate regard to the state's interests is another deficiency in their opinion.

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49 *See, e.g., Guar. Trust,* 326 U.S. at 111–12.

50 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1447–48 (2010) (plurality opinion).

51 *See infra* notes 105, 118–49 and accompanying text.

52 The Court has applied this approach in two previous decisions. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 450 (1996); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958).

53 RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971); *see* Bauer, *supra* note 3, at 1262–64; *infra* note 118.

54 Bauer, *supra* note 3, at 1264–66.

55 *See id.* at 1266–71.

56 *See id.* at 1271–81.

II.

New York's insurance law requires an insurance company either to pay a claim or to deny it within thirty days of submission.[57] That law also imposes a statutory penalty—two percent per month—on noncompliant insurance companies.[58]

New York's Civil Practice Law and Rules contain detailed requirements for the maintenance and certification of a suit as a class action.[59] In addition, an adjacent provision in the same statutory section[60]—section 901(b)—expressly states that certain actions, including actions for statutory damages, "may not be maintained as a class action."[61]

Shady Grove provided medical services to an individual insured by Allstate Insurance Company. Although Allstate eventually paid the claim, it failed to do so within thirty days; it then refused to pay the statutory penalty on the balance that had accrued.

Shady Grove brought an action in federal district court in New York for that amount, based on diversity of citizenship between it and Allstate. Shady Grove's individual claim was for about $500. However, asserting that Allstate routinely failed to comply either with the thirty day requirement or with the obligation to pay the penalty on overdue benefits, Shady Grove sought to maintain this action as a class action, on behalf of all similarly situated providers.

The district court dismissed the action for lack of subject matter jurisdiction.[62] The court concluded that New York's prohibition in section 901(b), barring the maintenance of claims for statutory damages as class actions, controlled in federal court. Because the plaintiff's individual action was for much less than the statutory $75,000 amount-in-controversy requirement, this claim could not be heard in federal court.[63]

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57 *See* N.Y. INS. LAW § 5106(a) (McKinney 2009).

58 *See id.*

59 *See* N.Y. C.P.L.R. 901(a) (McKinney 2010).

60 *Id.* 901(b).

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

62 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 466 F. Supp. 2d 467, 475–76 (E.D.N.Y. 2006).

63 However, had the action been properly certified as a class, the amount-in-controversy requirement of 28 U.S.C. § 1332(a) (2006) would have been satisfied under the provisions of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

The Second Circuit affirmed,[64] based on two related conclusions. First, it determined that the New York statute and Rule 23 of the Federal Rules of Civil Procedure[65]—which governs the certification of class actions in federal courts—addressed different issues, and so there was no conflict for *Erie* purposes.[66] Second, it held that the state statute was "substantive" under *Erie*, and thus it controlled in a diversity action in federal court.[67]

By a 5-4 vote, the Supreme Court reversed. Justice Scalia authored the plurality opinion.[68] Justice Stevens's concurrence provided the key fifth vote. Justice Ginsburg and three other members of the Court dissented.[69] The Court's judgment was that Rule 23 controlled, notwithstanding the fact that the same action could not have been maintained as a class action in a state court in New York.[70]

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64 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 549 F.3d 137, 141 (2d Cir. 2008).

65 FED. R. CIV. P. 23.

66 *See Shady Grove*, 549 F.3d at 143 (concluding that section 901(b) addresses questions of "which substantive causes of action may be brought as class actions or which remedies may be sought by class action plaintiffs," neither of which is controlled by Rule 23).

67 *See id.* ("CPLR 901(b) . . . is a substantive rule that eliminates statutory penalties under New York law as a remedy for class action plaintiffs.").

68 *See supra* note 6 and accompanying text.

69 *See supra* note 7 and accompanying text.

70 A few observations about the positions taken by various members of the Court, which were quite different from the "usual lineup" in recent 5-4 decisions.

First, this was not a "liberal-conservative" split. As just noted, Justice Stevens, probably the most liberal member of the Court, joined with three of the more conservative members of the Court and Justice Sotomayor to provide the majority. One of the more conservative members of the Court, Justice Alito, joined with the more liberal dissenters.

Second, the all too easy characterization is that the "conservative" wing of the Court tends to support larger corporations and defendants, while the "liberals" are more likely to vote for the plaintiff's position. Yet here, Justice Scalia's opinion supported the plaintiff, while Justice Ginsburg championed the position of the defendant, a large insurance company.

Third, on questions raising federalism concerns, one might expect that "conservatives" would be more likely to support views which defer to state interests, while "liberals" might be thought more likely to support the interests of the national government. Yet, here, the Chief Justice and Justices Scalia and Thomas voted in favor of application of federal law, preempting a state rule, while the dissenters would have subordinated federal interests to the stronger state interests. *See generally* David L. Franklin, *Justice Ginsburg's Common-Law Federalism*, 43 NEW ENG. L. REV. 751, 754 (2009) (collecting voting patterns in cases from 1993–2009 involving preemption issues, but excluding *Erie* cases from data-set, and finding that "conservatives," with the exception of Justice Thomas, tend to favor preemption, while "liberals" and "moderates" tend to vote more in favor of preservation of state law).

In reaching its conclusion, the majority followed the framework outlined above.[71] It first asked whether there was a "clash" between state law and the Federal Rule.[72] If the answer was in the affirmative, and if Rule 23 was on point, it controlled the outcome, unless it was invalid.[73]

So, was there a "clash"? Two alternatives were offered, in an attempt to find that the New York statute and Rule 23 could coexist, each dealing with distinct issues. Allstate sought to disaggregate the class certification process. It argued that section 901(b) dealt only with a predicate question for the maintenance of a class action: could this particular type of claim (here, one for statutory damages) be maintained, i.e., the "eligibility" determination. Allstate asserted that the proper (and more limited) role for Rule 23 was to determine, after this question was resolved in the affirmative, whether the specific case before the court satisfied the criteria for maintenance as a class, i.e., the "certifiability" determination.[74]

The dissent offered another way of eliminating the clash. Justice Ginsburg contended that section 901(b) was directed at limiting the remedies available for violation of state law, while Rule 23 governs only the procedural aspects of class litigation, including considerations for class certification.[75] And, the dissent asserted that this latter analysis is taken off the table in situations such as this, where the state has decided to bar certain class actions, because of the state's goal of limiting the amount of monetary relief for certain kinds of claims.

The majority repeated the maxims that "we should read the Federal Rules 'with sensitivity to important state interests' and 'to avoid a conflict with important state regulatory policies.'"[76] However, then brushing aside any uncertainties, Justice Scalia asserted that both of

71 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010) ("The framework for our decision is familiar.").

72 *See id.* ("We must first determine whether Rule 23 answers the question in dispute.").

73 *See id.* ("If it does, it governs—New York's law notwithstanding—unless it exceeds statutory authorization or Congress's rulemaking power. We do not wade into *Erie*'s murky waters unless the federal rule is inapplicable or invalid." (citation omitted)).

74 Brief for Respondent at 12–39, *Shady Grove*, 130 S. Ct. 1431 (No. 08-1008).

75 *See Shady Grove*, 130 S. Ct. at 1465–66 (Ginsburg, J., dissenting). The Second Circuit had used similar reasoning to find an absence of a clash. *See supra* notes 64–67 and accompanying text.

76 *Shady Grove*, 130 S. Ct. at 1441 n.7 (quoting *id.* at 1463 (Ginsburg, J., dissenting)); *see also id.* at 1468 (Ginsburg, J., dissenting) ("[O]ur *Erie* jurisprudence . . . counsels us to read Federal Rules moderately and cautions against stretching a rule to cover every situation it could conceivably reach.").

the proffered attempts to avoid the state law/Rule 23 clash were untenable.[77] In the majority's view, "there is only one reasonable reading of Rule 23,"[78] and under that "unambiguous"[79] interpretation, the state statute "undeniably answer[s] the same question as Rule 23: whether a class action may proceed for a given suit."[80] Thus, at the end of the day, Justice Scalia was unwilling to "contort its text, even to avert a collision with state law that might render it invalid."[81]

Under the Court's "familiar framework," the only question left was whether Rule 23 was "valid" under the Rules Enabling Act. As noted above,[82] this involved consideration of two, reciprocal requirements—that the REA only confers authority on the Court to promulgate "rules of practice and procedure,"[83] and that those Rules shall not "abridge, enlarge or modify any substantive right."[84] With respect to the first of these requirements, the plurality's response to the challenge to the validity of Rule 23, as applied here, can only charitably be described as unhelpful; its response to the second was genuinely problematic.

Is Rule 23, which specifies the requirements for class certification, a "rule of practice and procedure"? Harkening back to the Court's first attempt to define that phrase almost seventy years earlier in *Sibbach*, the plurality restated that the test must be whether a rule "really regulates procedure."[85] Embellishing a bit on this "test" by quoting from another case from the 1940s, the plurality asserted that "[w]hat matters is what the rule 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."[86] That isn't much of a "test."[87] Future district courts

77 Justice Stevens joined in this portion of the opinion.

78 *Shady Grove*, 130 S. Ct. at 1441 n.7.

79 *Id.* at 1442 ("Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met.").

80 *Id.* at 1439.

81 *Id.* at 1442.

82 *See supra* text accompanying notes 33–34, 38–39.

83 28 U.S.C. § 2072(a) (2006).

84 *Id.* § 2072(b).

85 *Shady Grove*, 130 S. Ct. at 1442 (plurality opinion) (quoting Sibbach v. Wilson, 312 U.S. 1, 14 (1941)); *see supra* note 40 and accompanying text.

86 *Shady Grove*, 130 S. Ct. at 1442 (alterations in original) (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 446 (1946)).

87 *Id.* at 1454 n.10 (Stevens, J., concurring) ("The plurality's 'test' is no test at all—in a sense, it is little more than the statement that a matter is procedural if, by revelation, it is procedural.'" (quoting 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4509 (2d ed. 1996))).

and courts of appeals, facing this definitional problem, can well be forgiven if they have difficulty applying it to other Federal Rules.

The Court identified a number of previous cases in which it had upheld other Federal Rules in the face of a REA challenge[88] because there, each of those Rules "undeniably regulated only the process for enforcing those rights; none altered the rights themselves."[89] Here, Justice Scalia concluded that Rule 23, as with other Rules permitting joinder of claims, equally met that standard.

Allstate had also argued that Rule 23's authorization for class certification of a class that could not be maintained in that form in state court "abridged . . . substantive rights" that had been created by the New York statute. That was because class status transformed a claim that in all likelihood would not have been brought individually, into a proceeding that was worth asserting collectively,[90] and that section 901(b) conferred the right not to be subject to aggregated liability; and also because section 901(b) was enacted for substantive reasons.[91]

But, remarkably, the plurality asserted that these claims were irrelevant. Neither the nature of the state statute, nor the state's purpose in its enactment, made any difference.[92] All that mattered was the *federal* characterization of the Rule.[93]

In contrast, Justice Stevens would have focused not on whether the Federal Rule was procedural, but on whether the *state law* being displaced was procedural. He argued that this in turn should involve an examination of whether the state law, even if nominally "procedural," was "sufficiently intertwined with,"[94] "interwoven with,"[95] or "so

88 *See, e.g.*, Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 552–53 (1991); Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 7–8 (1987); Hanna v. Plumer, 380 U.S. 460, 472 (1965); Schlagenhauf v. Holder, 379 U.S. 104, 114 (1964); *Miss. Publ'g Corp.*, 326 U.S. at 445; *Sibbach*, 312 U.S. at 15–16.

89 *Shady Grove*, 130 S. Ct. at 1443 (plurality opinion).

90 Thus, quoting Allstate's rhetorical language, class certification "'transform[s] [the] dispute over a five *hundred* dollar penalty into a dispute over a five *million* dollar penalty.'" *Id.* at 1443 (alteration in original) (quoting Brief for Respondent, *supra* note 74, at 1); *see also id.* at 1460 (Ginsburg, J., dissenting) (employing similar language).

91 The dissent agreed with this characterization. *See id.* at 1465 ("New York's decision . . . therefore makes scant sense, except as a means to a manifestly substantive end . . . .").

92 *See id.* at 1444 (plurality opinion) ("[T]he substantive nature of New York's law, or its substantive purpose, *makes no difference.*").

93 *See id.* ("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.*" (emphasis added)).

94 *Id.* at 1452, 1455 (Stevens, J., concurring).

95 *Id.* at 1456.

bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy."[96] This was because, as he noted, states are free to choose the method for defining the scope of substantive rights and remedies, including embodying them in "procedural" vehicles. And, the federal courts must respect that choice.[97]

Justice Stevens, providing the decisive fifth vote, concluded that here, Rule 23 controlled, because section 901(b) was not "substantive."[98] Although he acknowledged that there was considerable evidence of the substantive nature of, and purposes behind, the enactment of section 901(b), there was conflicting, contrary evidence. And, "[t]he mere possibility that a federal rule would alter a state-created right is not sufficient. There must be little doubt."[99]

The plurality rejected Justice Stevens's approach, of a focus on the state's characterization of its own rule, as unworkable. Justice Scalia's opinion contended that it would have involved countless, individualized inquiries into the purpose and effect of varying clashes between one Federal Rule and numerous state laws.[100] The plurality also maintained that this alternative was foreclosed by the approach taken in *Sibbach*.[101]

The objections to the plurality's approach are discussed in more detail in the next Part of this Article.[102] But, here it is sufficient to point out that the respect given by *Erie*, and many subsequent decisions, to the states' rule-making roles, in areas where the states are the sources of the underlying legal rights and remedies, was dismissed with the back of Justice Scalia's hand by his singular adoption of a federal standard to characterize the state law.

As noted above,[103] under the *Hanna* framework, once this two-step analysis of the validity of the Rule is finished, the opportunity to consider whether this result clashes with the "twin aims" of *Erie* is fore-

96 *Id.* at 1450.

97 *See id.*

98 Justice Stevens's ultimate conclusion—that section 901(b) was not "substantive"—appears inconsistent with the description he gave of "procedural" rules which should be treated as "substantive" because that standard seems to describe section 901(b) perfectly: "[S]eemingly procedural rules that make it significantly more difficult to bring or to prove a claim, thus serving to limit the scope of that claim." *Id.*; *cf. id.* at 1465 (Ginsburg, J., dissenting) (characterizing section 901(b) as a "means to a manifestly substantive end").

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

100 *See id.* at 1444–47 (plurality opinion). Justice Sotomayor did not participate in this portion of the opinion.

101 *See id.*

102 *See infra* Part III.C.

103 *See supra* notes 47–51 and accompanying text.

closed. Since all nine Justices agreed with that framework, it is probably a fool's errand to suggest that greater attention should have been paid to the extent to which disregard for state law might have significant forum shopping effects.[104] Nonetheless, it is troubling to note that although the plurality candidly admitted that its decision might well be a significant factor in the plaintiff's choice of a federal court in order to avoid an unpalatable rule in state court, it still felt compelled to throw up its collective hands at this result, asserting that this was the product of congressional choice for the alternative forum of a federal court to hear diversity cases.[105] In fact, the development of the "traditional framework," and filling in that skeleton, are the product of Supreme Court case law rather than congressional edict. And, in any event, these "twin aims" could still have been given a role, by taking them into account in performing the analysis under the Rules of Decision Act branch of the *Erie* doctrine.

In sum, *Shady Grove* is not a trail-blazing decision. It reiterated and expanded on existing *Erie* doctrine, instead of articulating new principles or standards. But, even to the extent *Shady Grove* merely explicates that doctrine, it does so based on faulty premises. Not surprisingly, the Court thus reached an ill-advised, incorrect result.

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104 *See* Bauer, *supra* note 3, at 1251, 1254 (describing the deleterious forum shopping effects flowing from unquestioning preemption of state law by "valid" federal statutes and Rules).

105 According to the Court:

> [D]ivergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure. Congress itself has created the possibility that the same case may follow a difference course if filed in federal instead of state court. The short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping.

Shady Grove, 130 S. Ct. at 1448 (plurality opinion) (citation omitted).

By concluding that the result was dictated by statute, the plurality in *Shady Grove* pleaded that the forum-shopping effects of its decision were beyond the Court's ability to affect or control. By contrast, in *Ferens v. John Deere Co.*, 494 U.S. 516 (1989), which involved the application of another statute—28 U.S.C. § 1404(a) (2006), permitting transfers of an action from one federal district to another—Justice Scalia noted that "[t]he goal of *Erie* . . . was to prevent 'forum shopping,' as between state and federal systems." *Ferens*, 494 U.S. at 534 (Scalia, J., dissenting). He argued that the majority had improperly extended *Van Dusen v. Barrack*, 376 U.S. 612 (1964), to plaintiff-initiated transfers because such an extension gave the plaintiff an alternative not available to him in state court. *See Ferens*, 494 U.S. at 534; *see also infra* notes 210–11 and accompanying text (discussing *Van Dusen*).

III.

In my earlier article, I made several suggestions for enhanced importation of horizontal jurisprudence into the *Erie* analysis.[106] Here, I will consider the extent to which the Court in *Shady Grove* employed that approach, and the missed opportunities in their not having taken further advantage of that rich literature. In fact, a fuller adoption of different aspects of this jurisprudence would have lent support to both the plurality and the dissent. However, at the end of the day, appropriate incorporation of the values and jurisprudence drawn from horizontal choice-of-law analysis indicates that the dissenters' view in *Shady Grove* was correct.

To be sure, there are some significant differences between horizontal and vertical choice-of-law considerations that counsel against full application of the jurisprudence from the former to the latter.[107] But, these two choice-of-law regimes also share many common goals and values, including predictability, uniformity, and comity. Therefore, the ample case law, the *Restatements of Conflicts*, scholarly analysis, and the multiple other sources which are used for making horizontal choice-of-law determinations can be very instructive in resolving choice of law in the federal vs. state law setting.

A.

Initially, it is necessary to examine in somewhat more detail the majority's conclusion that there was an irreconcilable clash between section 901(b) and Rule 23. This inquiry can play out at either of two stages—both to determine whether to go further and then whether the operative inquiry should take place pursuant to the standards of the Rules of Decision Act or of the Rules Enabling Act,[108] and, in either case, to determine what deference should be accorded to the state's interests and goals in its adoption of the "conflicting" rule.[109]

106 *See* Bauer, *supra* note 3, at 1264–65, 1281–99 (suggesting that the greatest benefits from horizontal analysis would occur in determining whether there is a clash between the state rule and federal law and in weighing federal versus state interests in applying (or declining to apply) the federal or state rule).

107 *See id.* at 1266–71 (noting that the application of horizontal methodologies is least likely to be beneficial when invoking substance vs. procedure and outcome-determination tests).

108 *See supra* notes 32–34 and accompanying text.

109 *See Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring) ("[T]he second step of the inquiry [under the REA] may well bleed back into the first [determining whether there is a clash]. When a federal rule appears to abridge, enlarge or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result.").

As noted above, two alternatives were proffered for finding an absence of a clash.[110] Allstate argued that the issues before a district court weighing the certification of a class action could be divided into two separate questions—whether certain kinds of claims (here, one for statutory damages) could ever be maintained as a class action, which Allstate denominated the "eligibility" determination, and which would be governed by state law; and then the separate, subsequent question, to be addressed only if that first one were answered in the affirmative, whether this specific case, in light of the parties and the facts, satisfied the general criteria for maintenance as a class action, which Allstate denominated the "certifiability" determination, and which it asserted was the proper, and more limited, domain for control by Rule 23.[111]

The dissent offered a different alternative.[112] Justice Ginsburg contended that the New York statute modified the *remedy* available for violations of the insurance law.[113] While the state's insurance law provided that certain conduct would be subject to statutory damages, another New York statute (the CPLR) categorically prohibited class action treatment for that kind of remedy.[114] The dissent asserted that Rule 23 should be read to apply only to the *procedural* aspects of class litigation; this might include whether class certification was appropriate, again in light of the parties and the facts.[115]

Five Justices[116] rejected both of these attempted accommodations of the state statute and the Federal Rule. Although mindful of precedents and maxims which would have counseled a more limited reading of the Rule in order to avert a clash, the majority concluded that the text of Rule 23 was "unambiguous," and that it clearly covered all aspects of the class certification process, making the clash unavoidable.[117]

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110 *See supra* note 74 and accompanying text.

111 To the extent one wants to engage in labeling, while the latter determination appears "procedural," the former—which deals with the questions of what claims can be maintained and what remedies are available for statutory violations—would appropriately be characterized as "substantive."

112 *See supra* note 77 and accompanying text.

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

114 *See id.* at 1464–65.

115 *See id.* at 1466.

116 Justice Stevens joined the plurality in this portion of the opinion. *See supra* notes 6, 68–70.

117 *See Shady Grove*, 130 S. Ct. at 1442. Justice Scalia's inability to avoid a clash here stands in stark contrast to the opinion he authored for the Court in *Semtek*. At issue was the meaning of the term "adjudication upon the merits," FED. R. CIV. P. 41(b), and specifically whether that Rule governed the claim-preclusion effect to be given to

In my earlier article, I analogized this stage of the *Erie* process to that stage of "interest analysis" or other modern choice-of-law methodologies[118] where, after identifying the nature of the conflicting rules governing the issue in question, and then identifying the purposes or goals of each of the jurisdictions in adapting those rules, the court determines whether it is presented with a "true conflict"—each jurisdiction has an interest in seeing its rule applied to the dispute—or only a "false conflict," in which one of the jurisdictions would be relatively indifferent if its rule were not applied.[119] If the situation indeed presents a false conflict, the choice-of-law decision becomes relatively easy—choose the law of the interested jurisdiction. And, because of this resolution of the law applicable to the disputed issue, Professor Currie famously urged that, if plausible, courts should seek to characterize conflicts as "false."[120]

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a dismissal of an action by a federal district court sitting in diversity. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 501–03 (2001). The Court concluded that the Rule did not govern that issue; instead, it should be decided as a matter of federal common law. *See id.* at 508. Counseling for a "more reasonable interpretation of the meaning of . . . Rule 41(b)," *id.* at 505, was the Court's concern that a more expansive reading "would in many cases violate the federalism principle of *Erie R. Co. v. Tompkins* by engendering '"substantial" variations [in outcome] between state and federal litigation' which would '[l]ikely . . . influence the choice of a forum.'" *Id.* at 504 (alterations in original) (citation omitted) (quoting Hanna v. Plumer, 380 U.S. 460, 467–68 (1965)). The Court also noted that this more modest approach would allow it to avoid the "arguable violation of the [Rules Enabling] Act that would ensue from interpreting Rule 41(b) as a rule of claim preclusion." *Id.* at 506 n.2.

118 The approach I describe is exemplified by classic interest analysis. In the past several decades, many states have abandoned that approach for alternatives, including the analysis called for by the *Second Restatement*, which now is the choice-of-law methodology used in the majority of states. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227, 231–32 (2010) (finding that only two states continue to use interest analysis, while twenty-eight jurisdictions use the *Second Restatement* and ten jurisdictions use a "combined modern" approach).

These numbers are somewhat misleading, however, because the *Second Restatement* incorporates the basic considerations from interest analysis by identifying the "factors relevant to the choice of the applicable law [to] include . . . (b) the relevant policies of the forum, [and] (c) the relevant policies of the other interested states and the relative interests of those states in the determination of the particular issue." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971).

119 *See* Bauer, *supra* note 3, at 1282–99.

120 *See* Brainerd Currie, *Comments on* Babcock v. Jackson, 63 COLUM. L. REV. 1233, 1242 (1963) ("If the court finds an apparent conflict between the interests of the two states, it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict.").

I previously suggested that a federal court undertaking an *Erie* analysis should go through a comparable process.[121] The court would identify the interests of both the state and federal systems in having their rule apply to the particular issue in dispute—in *Shady Grove*, it was whether the action should receive class certification. If that analysis demonstrated a strong state interest in having its rule applied, and if there were only modest federal interests at stake, then, analogously to the analysis in the horizontal setting, this choice-of-law decision would become relatively easy—go with state law.

And, one of the maxims cited by the majority—that "we should read the Federal Rules 'with sensitivity to important state interests' and 'to avoid a conflict with important state regulatory policies' "[122]—is fully consistent with that approach.[123] So, where did the majority go astray? By failing properly to identify and consider those state interests, as well as by *overstating* the federal interests at stake.[124]

The dissent, by contrast, invoked these maxims to zero in on the key question: "Is this conflict really necessary?"[125] The recognition of "New York's legitimate interest in keeping certain monetary awards reasonably bounded,"[126] coupled with a more restrained reading of the Federal Rules,[127] would have avoided that conflict.[128]

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121 *See* Bauer, *supra* note 3, at 1288.

122 *See Shady Grove*, 130 S. Ct. at 1441 n.7 (quoting *id.* at 1463 (Ginsburg, J., dissenting)).

123 In almost any case, primary interests of the state include the regulation of conduct within its borders and the enforcement of rights and obligations of persons subject to its control. Sensitivity by the federal courts to those interests is consistent with the second of the "twin aims" of *Erie*—"avoidance of the inequitable administration of the [state's] laws." Hanna v. Plumer, 380 U.S. 460, 468 (1965).

124 An initial misstep by the plurality, contributing to its giving short shrift to those state interests, was its exclusive focus on the federal characterization of Rule 23 with no concern for the nature of the state statute or New York's purpose in its enactment. *See Shady Grove*, 130 S. Ct. at 1444 (plurality opinion); *supra* note 92–93 and accompanying text.

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

126 *Id.*

127 This was described as the Court's historic willingness "to interpret [the] Federal Rules with awareness of, and sensitivity to, important state regulatory policies." *Id.*; *see also supra* note 17 (discussing Justice Ginsburg's reliance on authority from the conflicts realm in support of her positions).

128 A Seventh Circuit decision provides a useful illustration of a restrained reading of the Rules, to avoid a clash with state law. *See* S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305 (7th Cir. 1995), *cited with approval in* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996). Wisconsin had a statute permitting *plaintiffs* to make an offer of settlement; if the defendant rejected the offer and the plaintiff obtained a judgment for a sum larger than the offer, it was entitled to twice its taxable costs and interest at a stated rate. *See id.* at 307. Rule 68 contains an analo-

What were the state interests? The majority asserted that it was difficult to tell. In his concurring opinion, Justice Stevens referred to "two plausible competing narratives,"[129] one suggesting that section 901(b) was implemented for "classically procedural" reasons,[130] and the other suggesting that this provision was enacted to achieve "substantive" goals.

But, that characterization, while essential for the analysis required under the Rules Enabling Act—more on that issue in the next portion of this Article[131]—is irrelevant for assessing New York's interests. There is really little doubt about New York's basic goal in adopting a statute barring class actions seeking statutory damages. Regardless of the vehicle that it used to accomplish that goal—and that was a choice for the state legislature, not the federal courts—it is clear that New York sought to reduce the number of actions for statutory damages, and thus to limit the amount of exposure that insurance companies would face.[132] Why else would section 901(b) have been enacted? While the provision in the insurance law permitting statutory damages was designed to affect the primary conduct of insur-

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gous provision, allowing *defendants* to make similar offers, and awarding the defendant costs incurred if the judgment obtained is less than the amount offered. *See* FED. R. CIV. P. 68(a), (c). The Federal Rule is silent on offers by a *plaintiff*. *See id.* At issue was whether the statute and the Rule clashed, and if so, whether the Rule preempted the statute. *See Healy*, 60 F.3d at 307–08.

The Seventh Circuit answered the first question in the negative. The Rule was "limited to offers by defendants," and the court found unpersuasive any suggestion that "by subjecting defendants in diversity cases to Wisconsin's highly pro-plaintiff settlement rule, [it] would be disturbing a delicate but deliberate balance between plaintiffs and defendants that is struck in the federal rules, and hence undermining the integrity of those rules." *Id.* at 310–12.

The court noted that the Wisconsin statute "does not have substantive goals in any obvious sense." *Id.* at 310. Nonetheless, it concluded that a failure by the federal court to apply the state statute would inappropriately alter the incentives for the defendant to remove the case, and would interfere with the state's judgment about balancing the interests of the plaintiff and defendant. "The decision whether to give successful plaintiffs this additional relief involves considerations of adequacy and proportionality of remedies," *id.* at 312, which the drafters of the Rule might well decide are best left to other bodies—such as the state legislature—to weigh.

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

130 *Id.* ("The legislative history of § 901 thus reveals a classically procedural calibration . . . .").

131 *See infra* notes 169–70, 178–91 and accompanying text.

132 *See also* Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1216 & n.141 (2011) (offering evidence of purposes for enactment of section 901(b) and demonstrating why the Court in *Shady Grove* should have deferred to interpretation of that provision by New York courts).

ance companies—requiring them to act upon and pay claims within a reasonable time period—the counterpart prohibition in the CPLR, precluding enforcement of those obligations by a class action, was designed to shield insurance companies from perceived overkill.[133] As the source of the underlying state claim, New York had an interest in defining the scope of that right and the remedies for its violation.

Both parties and the entire Court in *Shady Grove* conceded that there would be far fewer claims brought for these statutory damages, if they could not be pursued as class actions, and that this particular claim would not have been brought as an individual action. Therefore, it may be curious that New York appeared to be creating a cause of action with one hand, but with the other, seriously limiting plaintiffs' ability to assert those claims. But, curious or not, that was New York's decision, as it sought to balance, according to its own lights, the conflicting interests of insurers, insureds, and providers of services to insureds.[134] And that decision deserved considerable respect, in deciding whether there was a clash between section 901(b) and Rule 23.[135]

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133 *See Shady Grove*, 130 S. Ct. at 1458–59 (Stevens, J., concurring) (noting that supporters of section 901(b) were animated by "fear of excessive recoveries" and held view that broad class action device was unnecessary).

134 One possible explanation is that section 901(b) was passed several years after the enactment of § 5106(a), and intervening experiences, different political pressures, and so forth were the impetus for this substantial limitation on the right to seek statutory damages.

135 *Structural Concrete Products, LLC v. Clarendon American Insurance Co.*, 244 F.R.D. 317 (E.D. Va. 2007), offers another healthy contrast to *Shady Grove*—a court successfully avoiding a conflict with state law by giving a Federal Rule a more limited reading. A Virginia statute required that before an insurance company that was not licensed in the state could file a "pleading," it either had to post cash or securities with the court, post a bond, or procure a certificate of authority. *Structural Concrete Prods.*, 244 F.R.D. at 324. In a suit in federal court, the defendant, which was an out-of-state, unlicensed insurance company, filed an answer and motion to dismiss without having complied with the statutory requirements. *Id.* at 320–21. The court held that the Virginia statute controlled with respect to the motion as well as the answer. *Id.* at 323–24.

Resolving the applicability of the statute to the answer was comparatively easy. Under Rule 7(a), an "answer" is clearly a pleading. *See* FED. R. CIV. P. 7(a). Even though the Rule is silent on prerequisites to filing an answer, the defendant did not face any irresolvable inconsistency in federal court by being required to follow the state's additional statutory prerequisite. *Structural Concrete Prods.*, 244 F.R.D. at 324.

Application of the statute to the motion to dismiss was less straightforward. A "motion" is not identified as a "pleading" in Rule 7(a); rather, "motions" are described in Rule 7(b). *See* FED. R. CIV. P. 7(b). Thus, as a matter of federal law, motions under Rule 12(b)(6) are *not* "pleadings." *See id.* By contrast, Rule 3:8(a) of the Virginia Supreme Court expressly deems a motion to dismiss to be a "pleading." *Structural Concrete Prods.*, 244 F.R.D. at 323 (quoting VA. SUP. CT. R. 3:8(a) (1992)).

What about the federal interests? The usual litany. 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. 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. 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.[136]

In addition, all procedural rules will have some effect—sometimes more limited, sometimes greater—on the substantive outcome of the case.[137] Here, permitting a class action for statutory damages

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Yet the district court concluded that there was no irreconcilable "clash" because the Rule was not "directly on point" to the state law. *Id.* at 325–26. Equally important, they served different, completely unrelated purposes. While the Federal Rule was purely procedural, the Virginia statute had substantive purposes—"assisting an insured to bring suit and secure judgment against an out–of–state insurance company." *Id.* at 326.

Having found no clash, the court proceeded to a "twin aims" analysis, and properly concluded on both counts that Virginia law should apply. *Id.* Disregarding the state's prerequisites would have improperly given such defendants the incentive to remove the action and would have "permitt[ed] a defendant in federal court a means to defend itself which would be expressly disallowed to a defendant similarly situated in state court." *Id.* at 327.

136 However, federal courts do not have an interest in providing a different set of rules or outcome of the proceedings. *See* Guar. Trust Co. v. York, 326 U.S. 99, 111–12 (1945) ("Diversity jurisdiction is founded on an assurance to nonresident litigants of courts free from susceptibility to potential local bias. . . . And so Congress afforded out-of-state litigants another tribunal, not another body of law.").

137 The plurality acknowledged this fact by stating that the test under the REA for determining the validity of a Rule "is not whether the rule affects a litigant's substantive rights; most procedural rules do." *Shady Grove*, 130 S. Ct. at 1442 (plurality opinion). Rather, the "validity of a Federal Rule depends entirely upon whether it regulates procedure. If it does, it . . . is valid in all jurisdictions, with respect to all claims, *regardless of its incidental effect upon state-created rights.*" *Id.* at 1444 (emphasis added) (citations omitted). *See also* Jay Tidmarsh, *supra* note 46, at 21 ("[A]cting on, and changing, the substance of legal claims is procedure's very nature, not simply one of its unavoidable and unfortunate side effects.").

benefitted plaintiffs, by making it more likely that the action would be brought.[138] Other rules will disadvantage plaintiffs.[139] Still other procedural rules might alternately benefit either plaintiffs or defendants.[140] Thus, the adoption of a particular procedural rule often may reflect substantive preferences.[141]

But, no one argues that these federal interests—whether in rules that would be thought of as more narrowly "procedural"[142] or those with a greater "substantive component"—are themselves sufficient to justify application of a federal rule (or one of the Federal Rules) to every issue in every lawsuit, including those based on diversity jurisdiction.[143] The important point about all of these rules is that although they may be motivated in part by substantive concerns, those are not

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138 *See supra* notes 90–91 and accompanying text.

139 A principal motivation behind the Class Action Fairness Act, which allows the assertion of certain claims as class actions in federal court (or allows for their removal from state court) even if they would otherwise not satisfy the complete diversity or amount-in-controversy requirements of § 1332(a), *see* Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.), was the perception that state courts were more likely to certify a class action, and that higher judgments were more likely if the action proceeded in state court. *See Shady Grove*, 130 S. Ct. at 1473 (Ginsburg, J., dissenting).

Similarly, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Court noted that the enormous burden on defendants—including litigation expenses, disruption of business activities, and increased pressure to settle—supported imposing greater pleading burdens on those class action plaintiffs before they could proceed to discovery. *See id.* at 558–59.

140 The decision to certify a class action could have adverse effects on defendants, leading to increased pressure to settle. The decision to decline to certify a class action could have adverse effects on plaintiffs because proceeding individually is significantly more expensive. But, until final judgment, neither decision is appealable. In response, Rule 23(f) was added in 1998, allowing, under certain circumstances, the immediate appeal of both of these kinds of rulings. FED. R. CIV. P. 23(f).

141 As the Court noted in *Shady Grove*, "[p]leading standards, for example, often embody policy preferences about the types of claims that should succeed—as do rules governing summary judgment, pretrial discovery, and the admissibility of certain evidence." *Shady Grove*, 130 S. Ct. at 1441. Presumably, so too with Rule 23.

142 Examples might include the method of service of process or the time period for the defendant to answer.

143 In *Semtek*, the Court rejected arguments that concerns about uniformity required the adoption of a single federal standard for determining the claim preclusion effect of the disposition of diversity actions. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508–09 (2001). The Court adopted a rule that, as a matter of federal common law, the federal court would look to the law of the state in which the action had been brought, stating:

> Since state, rather than federal, substantive law is at issue there is no need for a uniform federal rule. And indeed, nation-wide uniformity in the substance of the matter is better served by having the same claim-preclusive rule

relevant "federal interests" to be put in the balance for purposes of an *Erie* analysis.

So, were the relevant federal interests powerful enough in *Shady Grove* to justify disregarding New York's strong interests in the application of the New York rule?

The plurality painted a doomsday scenario, warning of dire consequences if a court were to have to undertake the analysis outlined by the dissent. Justice Scalia lamented the prospect that federal courts might be forced to deal with clashes between a Federal Rule and countless different state rules,[144] and asserted that the Court's refusal to engage in a broader inquiry was premised on "the very real concern that Federal Rules which vary from State to State would be chaos."[145]

It is true that the adoption of the Federal Rules was in large measure a response to the variation in rules in the federal courts under the previous regime prevailing under the Conformity Act, which required each court to adopt the procedural rules of the state in which it was sitting.[146] However, as a general proposition, the assertion that federal courts would encounter chaos in an absence of complete uniformity of procedural rules seems overwrought. And, here in particular, these concerns were seriously misplaced. It is undoubtedly true that a provision in a state law dealing with class actions would be preempted if it was inconsistent with the particulars for Rule 23 certifi-

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(the state rule) apply whether the dismissal has been ordered by a state or federal court.

Id.

144 That concern is consistent with Justice Scalia's expressed preference for clear, bright-line rules and his aversion to multi-part tests or balancing approaches. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 640 (1987) (Scalia, J., dissenting) (urging overrule of the three-part test in Lemon v. Kurtzman, 403 U.S. 602 (1971), and asserting "I think it time that we sacrifice some 'flexibility' for 'clarity and predictability'"); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (indicating preference as an appellate judge to have "committed myself to the governing principle," rather "than to announce that, 'on balance,' we think the law was violated here").

145 *Shady Grove*, 130 S. Ct. at 1446 (plurality opinion) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 13–14 (1941)); *see also id.* at 1448 ("To hold otherwise would be to 'disembowel either the Constitution's grant of power over federal procedure' or Congress's exercise of it." (quoting Hanna v. Plumer, 380 U.S. 460, 473–74 (1965))).

146 Contemporaneously with the enactment of the Judiciary Act of 1789, Congress passed a statute requiring that the procedure in each federal court should be the same as "are now used or allowed in the supreme courts of the same." *See* Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93. This requirement was formalized in greater detail three years later. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276. That Act, as amended on several occasions, was replaced by the Conformity Act of 1872, ch. 255, 17 Stat. 197.

cation. Thus, a federal court applying Rule 23 could properly disregard requirements in a state rule specifying a numerical minimum class size, or requiring particular experience by the class representative or counsel, or stating that common questions of law or fact had to "predominate," before a class action could be certified. That would make class certification both inordinately more difficult, and impermissibly more variant, in federal court than under the present practice. And, Allstate conceded as much.[147]

But, application of the limitations in a statute such as section 901(b) would not have imposed any comparable burden on, or interference with, federal interests. To the contrary, all that would have been added here was a single, and simple, step. Once the federal court determined that under controlling state law, this kind of action—one seeking statutory damages—was ineligible for class certification, the federal proceedings would stop.[148] No further interpretation of either federal or state law would have been required. Surely federal judges are capable of doing that analysis without a descent into chaos. The difference in the analysis required with respect to the kinds of class actions that could be brought in New York, and those in states not having this limitation, would be modest at best, hardly affecting federal interests in uniformity or ease of administration.[149] Indeed, ironically, here the effect on the federal court's docket of application of the New York statute would have been salutary—there would have been one fewer case with which to deal.

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147 *See* Brief for Respondent, *supra* note 74, at 12–21.

148 That is precisely what happened here. The district court refused to certify the class, concluding that it now lacked subject matter jurisdiction over the claim for $500, and dismissed the action. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co, 466 F. Supp. 2d 467, 471–73 (E.D.N.Y. 2006).

149 By contrast, there might well have been far greater disuniformity among federal courts in different states and far greater interference with the administration of litigation in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See infra* notes 195–201 and accompanying text. There, the Court concluded that the federal court had to follow a New Jersey statute requiring the posting of a bond in certain kinds of actions, where the Federal Rules—ironically, an earlier version of Rule 23—contained no similar requirement, and there was no indication in the decision that any other state imposed this requirement. By contrast to *Shady Grove*, the *Cohen* Court concluded that "[n]one [of the provisions in Rule 23] conflict with the statute in question and all may be observed by a federal court." *Cohen*, 337 U.S. at 556.

One can imagine that as a result, the federal court in New Jersey (but in no other state) would have had to set up an additional system, including perhaps creating special bank accounts, giving its employees additional testing and training, and so forth, only to deal with that particular state statute. Although the Court did not discuss a balance of interests, one can conclude that New Jersey's strong interests in deterrence and compensation outweighed any of these potential burdens on the federal courts.

The majority's unwillingness to defer to New York's interests stands in stark contrast to *Gasperini v. Center for Humanities, Inc.*[150]—a case that, like *Shady Grove*, involved a provision in, and then judicial interpretation of, New York's CPLR.[151] *Gasperini* involved a statutory provision which spoke to the standard that a New York state appellate court would apply in reviewing the trial court's ruling on a motion challenging the size of a jury verdict, and subsequent case law applying that same standard to the trial court's review of the verdict.

At issue in *Gasperini* was whether a federal court sitting in diversity would have to apply the state's "materially deviates" standard,[152] or whether it could apply a different federal standard—whether the verdict "shocked the conscience of the court." There was considerable evidence that this statute had been adopted in response to perceived excessive verdicts by "runaway" juries. By requiring state trial court judges to reduce the amount of awards deemed excessive under New York's articulated criteria,[153] application of that standard of review resulted in a change of the remedy that some plaintiffs would obtain in state court proceedings. Holding that the federal *district court* must follow the state rule, the Supreme Court recognized that this statute, even if "procedural," was enacted for "substantive" reasons and had "substantive" effects.[154] The decision of the legislature to place that particular form of a cap on damages in the CPLR, rather than in the portions of the New York statute dealing with the underlying claims, was irrelevant for *Erie* purposes.[155] So too in *Shady Grove*, it should not

150 518 U.S. 415 (1996).

151 Instead of confronting *Gasperini*, the plurality virtually ignored it, citing it only a single time, and only then to note that the dissenting opinion had quoted *Gasperini*. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1441 n.7 (2010). By contrast, that case was cited nine times by Justice Stevens and twenty times in Justice Ginsburg's dissent. This should not come as any great surprise, since Justice Ginsburg authored the opinion for the majority in *Gasperini*, while Justice Scalia wrote a dissenting opinion.

152 The statute required that the verdict be set aside when it "deviates materially from what would be reasonable compensation." N.Y. C.P.L.R. 5501(c) (McKinney 2010).

153 Presumably, although far less frequently, this statute would be used to increase an award that a court found grossly deficient.

154 *Gasperini*, 518 U.S. at 425 ("The 'deviates materially' standard, however, in design and operation, influences outcomes by tightening the range of tolerable awards.").

155 *Erie* itself made it clear that a state's choice of the way law was made—statutory or judge-made—was irrelevant in determining the deference owed to state law by a federal court sitting in diversity. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77 (1938). It should be even less relevant how, and where, a state chooses to codify its laws.

have mattered that New York's ban on class actions for statutory damages was not placed in the portion of the insurance law creating that right.[156]

Gasperini held that federal *courts of appeals* did not have to mirror the practice in the state appellate courts, but instead could follow federal standards for review of the rulings of the federal district court.[157] But, respect for New York's interest in controlling the size of certain verdicts required that the federal *district court* could not apply its own, less demanding standard at the trial court level. Thus, the Court engaged in the very balancing of interests that I have urged as a means of avoiding a clash between state and federal law, but which it failed to follow in *Shady Grove.*

In *Gasperini,* contrasting its earlier opinion in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.,*[158] where the Court was faced with an either/or choice—of following the state rule (use the judge to decide a particular disputed question) or the federal rule (afford that role to the jury)—the Court stated that "a choice of that order is not required, for the principal state and federal interests can be accommodated."[159] And, how was that done? By recognizing "New York's dominant interest" in controlling the recovery available in an action arising under state law.[160]

While, as in *Byrd,* the federal court need not always defer to the state interest, at a minimum those two cases counseled the wiser alternative. A federal court performing an *Erie* analysis should identify,

156 *See infra* note 220 and accompanying text (reflecting on whether there might be different result under REA analysis if limitation on class actions were placed in substantive portion of state's statutes).

157 *See Gasperini,* 518 U.S. at 419.

158 356 U.S. 525, 537–38 (1958) ("[T]he inquiry . . . is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.").

159 *Gasperini,* 518 U.S. at 436–37.

160 *See id.* at 437 ("New York's dominant interest can be respected, *without disrupting the federal system,* once it is recognized that the federal district court is capable of performing the checking function, *i.e.,* that court can apply the State's 'deviates materially' standard in line with New York case law . . . ." (first emphasis added)).

The emphasized language stands in interesting contrast to the plurality's concern in *Shady Grove* for "chaos" if the federal court were to consider the state's purposes in adopting a particular procedural rule. *See supra* notes 144–45 and accompanying text. In reality, it would have been considerably *more difficult* for the federal district court in *Gasperini* to apply the state's standard for review of a jury verdict, which differed from the court's experience and practice in other cases, than for a federal court to determine whether the class plaintiff was bringing an action for statutory damages and then refuse to certify such a case.

weigh, and, when appropriate, defer to, the purposes and intended effects of even state "procedural" rules, in an effort to avoid needless clashes between state and federal law. Such an approach is supported by the philosophies under both horizontal and vertical choice-of-law regimes, and by the Court's own rhetoric. The error of the majority in *Shady Grove* was its failure to follow through with that teaching.

B.

One element of the *Erie* analysis which could benefit from greater incorporation of conflict-of-laws jurisprudence is perhaps the most obvious distinction—that between "substance" and "procedure." Under the familiar *Hanna* "framework," once a court has concluded that there is a clash between state law and one of the Federal Rules (and thus the analysis will not take place under the Rules of Decision Act), it then will, as required by the Rules Enabling Act, undertake an analysis of the "procedural" characteristic of the Rule. Thus, in *Shady Grove*, having found a clash between section 901(b) and Rule 23, the Court looked to the "substantive or procedural nature" of Rule 23 to determine its validity. What lessons does conflicts jurisprudence offer in addressing this inquiry?

Initially, it is noteworthy that "procedural" and "substantive" do not carry an identical meaning under the RDA and the REA.[161] As the Court noted in *Hanna*: "It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law, but from that it need not follow that the tests are identical."[162] However, because of the strong presumption of validity given to the Federal Rules, it becomes more likely that a Federal Rule will fall on the "procedural" side of the fence, than will occur with respect to a federal rule subject to the "relatively unguided" *Erie* analysis.[163] And, of course, this comparatively

161 Indeed, even when undertaking an analysis under the Rules of Decision Act branch of the framework—when there is no relevant Federal Rule on point—"substance" and "procedure" may have different meanings in different contexts. *See, e.g.*, Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945) (concluding that "statutes of limitations" might be "procedural" for certain purposes, yet are "substantive" under an outcome-determination test).

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

163 *See id.* ("When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.").

more expansive definition of "procedure" under the REA will make it more likely that a state law will be preempted by a Federal Rule.[164]

In my previous article, I suggested that there would be relatively little benefit in the *Erie* setting from importation of the learning in the horizontal setting.[165] But, perhaps I was too hasty in dismissing those possibilities. Because this distinction does have such great, and varying, importance for *Erie* purposes, I set out here some suggestions on how this aspect of horizontal choice-of-law jurisprudence can offer a better and more predictable resolution of this inquiry.

The characterization of a rule as "substantive" or "procedural" arises in a number of well-known contexts, using varying tests and approaches, and often yielding different conclusions.[166] Four in particular deserve attention. One is the "basic" *Erie* rule—although as suggested above,[167] the formulation of that rule is certainly misleading. As stated by the Court in *Gasperini*: "Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law."[168] This requirement carries out the mandate of the RDA branch of *Erie*.

A second significance to this distinction arises in the subset of *Erie* cases which, like *Shady Grove*, involve clashes between state law and one of the Federal Rules. Here the distinction involves the application of the Rules Enabling Act, which authorizes the Supreme Court to promulgate "rules of . . . *procedure*,"[169] but also provides that those Rules may not "abridge, enlarge or modify any *substantive* right."[170]

The third, broad area where this distinction is relevant includes a broad array of issues arising in a horizontal conflict of law setting. Among these are the basic doctrine that in making a choice-of-law

164 This concern, that a state's regulation of "substantive" matters is more likely to be preempted by a Federal Rule found "valid" under this approach, was highlighted by Justice Harlan's famous observation in *Hanna*: "So long as a reasonable man could characterize any duly adopted federal rule as 'procedural,' the Court . . . would have it apply no matter how seriously it frustrated a State's substantive regulation of the primary conduct and affairs of its citizens." *Id.* at 476 (Harlan, J., concurring).

165 *See* Bauer, *supra* note 3, at 1239.

166 For example, while a statute of limitations was treated as "substantive" for purposes of the outcome-determination test in *Guaranty Trust v. York*, 326 U.S. 99, 110–11 (1945), it was treated as "procedural" in *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). *See infra* notes 176–77 and accompanying text (discussing *Sun Oil* further); *see also* Sampson v. Channell, 110 F.2d 754, 758–60 (1st Cir. 1940) (treating burden of proof as "substantive" for *Erie* purposes, but as "procedural" for horizontal choice of law).

167 *See supra* note 42 and accompanying text.

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

169 28 U.S.C. § 2072(a) (2006) (emphasis added).

170 *Id.* § 2072(b) (emphasis added).

determination, a court will almost always apply its own rules of procedure, although it may choose to defer to the substantive laws of another state.[171] Thus, while the characterization of a disputed issue as "substantive" will then give rise to extensive application of various choice-of-law approaches, its characterization as "procedural" will pretermit further analysis.

The fourth area of significance for this distinction principally involves horizontal determinations, but it also raises federal constitutional considerations. In most situations, courts are free to apply the law of more than one jurisdiction to a dispute—either the law of the nonforum state, which may have the bulk of the contacts with the parties and the events giving rise to the dispute, *or* the law of the considerably less well-connected forum state.[172] As a limiting principle,[173] the forum state must have some minimum contacts[174] with the parties and the dispute, to be able to apply its law.[175] However, there is a further limit on this rule, drawn from *Sun Oil Co. v. Wortman*:[176] while that level of contacts is required for a state to apply its *substantive* law to a dispute, no such requirement applies to matters of *procedure*. The

171 In those rare cases where the forum lacks significant contacts with the parties and the dispute, it will be required to apply the laws of another jurisdiction. *See infra* notes 173–75 and accompanying text.

172 *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 307–08 (1981) ("[A] set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction. As a result, the forum State may have to select one law from among the laws of several jurisdictions having some contact with the controversy." (citations omitted)); *see also* Sun Oil Co. v. Wortman, 486 U.S. 717, 727 (1988) ("[I]t is frequently the case . . . that a court can lawfully apply either the law of one State or the contrary law of another.").

173 The source of this limitation is found in the Due Process Clause, U.S. CONST. amend. XIV, and the Full Faith and Credit Clause, U.S. CONST. art. IV, §1.

174 This is different from the familiar "minimum contacts" analysis that is used to determine whether a state can exercise personal jurisdiction over a nonresident defendant. *See Allstate*, 449 U.S. at 320 n.3 (Stevens J., concurring) ("Although the choice-of-law concerns—respect for another sovereign and fairness to the litigants—are similar to the two functions performed by the jurisdictional inquiry, they are not identical.").

175 *See id.* at 312–13 (plurality opinion) ("[F]or a State's *substantive* law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." (emphasis added)); *see also* Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 818 (1985) (discussing with approval the above principle from *Allstate*).

176 486 U.S. 717, 723 (1988).

mere fact that a court is the forum suffices for it to have the constitutional authority to apply its *procedural* rules.[177]

Now, how did these four varying contexts of the substantive/procedural divide play out in *Shady Grove*? Because in both the plurality's and Justice Stevens's view the case involved a direct clash between state law and one of the Federal Rules, their analyses did not look at all at the RDA context for the procedural/substantive distinction. Instead, their opinions launched immediately into the determination of whether Rule 23 was a rule of "procedure" as that term is used in the Rules Enabling Act, or whether it abridged, enlarged, or modified a "substantive right."[178]

First, there is something inherently problematic about having a result driven solely by a definitional label—is this Rule "procedural"?—rather than by also undertaking some analysis of the legislative purpose behind the REA, including cabining the law-making role of the Supreme Court and Congress's use of certain language to effectuate that purpose.[179] Indeed, as Judge Posner acknowledged, "at least for the purpose of marking out the scope of the *Erie* decision, the terms 'substance' and 'procedure' are conclusions rather than algorithms."[180] In *Shady Grove*, however, that labeling approach allowed the plurality to act with indifference to the practical consequences of its decision, i.e., the increased likelihood that plaintiffs would flock to federal courts to obtain the relief that was unavailable in state court.[181]

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177 *See id.* at 722 ("This Court has long and repeatedly held that the Constitution does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different state.").

178 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010). Interestingly, the REA does not ask whether the Rule itself is "substantive." Instead, § 2072(b) requires an examination of its effect on other rights, by foreclosing the adoption of Rules which have a prohibited effect on "substantive" rights. *See* 28 U.S.C. § 2072(b) (2006).

179 Here I will avoid further discussion of whether a court should look solely to legislative text (here, of the REA) or beyond that text to discern what the legislature sought to accomplish. That's another article, and many have already been written. *See, e.g.*, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992) ("[L]egislative history helps appellate courts reach interpretations that tend to make law itself more coherent, workable, or fair . . . ."); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 673 (1997) ("[I]nterpretive reliance on legislative history creates an opportunity for legislative self-delegation . . . .").

180 S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 311 (7th Cir. 1995).

181 *See supra* notes 48, 105 and accompanying text.

The plurality asserted that this "basic [definitional] difficulty is unavoidable,"[182] because it was commanded by the REA's "substance-procedure distinction."[183] Even accepting the necessity to make the distinction, one still may properly inquire both whether the statutory text is by itself sufficient to comprehend the distinction, and, in individual cases, what the practical effect will be of applying a particular definition to a particular Rule and a particular set of facts.

A particularly problematic aspect of the definitional approach—and which, as noted above,[184] was a key difference between the plurality and Justice Stevens—was the perspective to be used in characterizing the Rule as "procedural," and then in determining whether it had abridged or enlarged a substantive right. Should a court look to the state's characterization of the "right" affected, or solely, as suggested by the plurality, at the procedural nature of the Federal Rule?[185] Asked another way, are the terms "procedure" and "substance" really binary, so that even if a Rule is characterized as "procedural" under § 2071(a), it follows that it cannot be viewed as "substantive" within the meaning of § 2072(b)?[186] Do we need a definition of "substan-

182 *Shady Grove*, 130 S. Ct. at 1447 (plurality opinion).

183 *Id.*

184 *See supra* notes 92–102 and accompanying text.

185 As noted, the plurality stated that the analysis should focus solely on the procedural versus substantive nature of the Federal Rule, regardless of the state's views. *See Shady Grove*, 130 S. Ct. at 1444 (plurality opinion); *see supra* notes 92–93 and accompanying text. However, in a portion of the decision joined by Justice Stevens, the Court also discussed, but then dismissed, the evidence pointed to by the dissent to support the substantive objectives behind section 901(b), instead concluding that the "evidence of the New York Legislature's purpose is pretty sparse." *Shady Grove*, 130 S. Ct. at 1440.

That approach is decidedly inhospitable to the federalism values of *Erie*. It is misguided to impose some sort of "burden of proof" on the state to show that its laws have substantive goals before the federal courts will decline to preempt them by Federal Rules. This inattention to state interests is magnified because the state itself will not be a party to the litigation in typical diversity litigation. In order to protect those interests, the presumption should be the opposite—that state laws, which plausibly appear to have substantive objectives, cannot be preempted by Federal Rules.

186 Too often the focus of this concern is primarily on the plaintiff's rights—would the use of the Federal Rule instead of the state rule increase or diminish its rights? In support for its conclusion that this Rule was procedural, the plurality noted that even absent class certification, the plaintiff still could have brought the very same action for the same relief. *See Shady Grove*, 130 S. Ct. at 1443 (plurality opinion). Perhaps true, although all conceded as a practical matter, that lawsuit would probably not have been brought.

But, this concern should extend equally to the defendant. Here, New York state law protected defendants from exposure to class proceedings and class liability—by severely reducing both the costs and inconveniences of litigation and the possible

tive," which is something more than "not procedural"? Is it accurate to say that a Federal Rule which frustrates a state's substantive objectives, even if the state has chosen to embody them in a procedural rule, is not an abridgement of a "substantive right"?[187]

Second, even if on occasion this formalistic method of decision making might be acceptable, here the plurality's "test" of "procedure" was so imprecise that it reminds one of Justice Stewart's definition of obscenity—"I know it when I see it."[188] *Sibbach*'s standard—that a rule is "procedural" under the REA when it "really regulates procedure"[189]—provides virtually no predictability or uniformity, which of course are among the primary goals of a choice-of-law regime. Indeed, the plurality conceded that under this supposed test, "[u]ndoubtedly some hard cases will arise,"[190] but it took comfort in the fact that the Court had "managed to *muddle through* well enough in the 69 years since *Sibbach* was decided."[191]

Whether in fact the Court has successfully muddled through this definitional challenge is put in doubt by the multitude of times in which it has had to readdress these issues over those seven decades, including the case that I previously noted as particularly problematic for the plurality—*Gasperini*. As was also true in *Gasperini*, here, section 901(b) represented an attempt by New York to limit the amount of damages for which a defendant might be liable. In both instances, New York admittedly used a procedural vehicle, the CPLR, to implement that goal—there by more expansive judicial review of jury verdicts, and here, by prohibitions on class actions for certain types of claims. But, equally in both cases, "the State's objective [was] *manifestly substantive*."[192] Indeed, if we are seeking to assign labels, it seems

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adverse results. That change in outcome is of equal importance in determining whether there was an abridgement of "substantive rights."

187 In *Palmer v. Hoffman*, 318 U.S. 109 (1943), the Court held that the enumeration of affirmative defenses in Rule 8(c) applied only to the burden of pleading. State law governing the burden of proof—which makes it more or less likely that one of the parties will prevail at trial, and therefore could also affect the parties' primary conduct even before any litigation arises—continued to apply in a diversity action. *See id.* at 116–20. Similarly, statutes of limitations are arguably procedural; however, by cutting off even potentially meritorious claims, they also reflect "substantive" concerns and must be followed in federal diversity actions. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 748–50 (1980); Guar. Trust Co. v. York, 326 U.S. 99, 109–11 (1945).

188 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

189 *See supra* note 87 and accompanying text.

190 *Shady Grove*, 130 S. Ct. at 1447 (plurality opinion).

191 *Id.* (emphasis added).

192 Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 429 (1996) (emphasis added).

reasonable to conclude that any statute that limits or alters the *remedy* available is inherently "substantive."[193] Thus, even if it is true that both the state law and the Federal Rule are rules of "procedure," it does not follow that the right allegedly abridged or modified is not "substantive" under § 2072(b).[194]

Cohen v. Beneficial Industrial Loan Corp.[195] is another case in which the Court held that the federal courts had to defer to a state statute which used a procedural vehicle to achieve substantive goals.[196] And, like *Shady Grove*, it involved a clash with Rule 23.[197] Concerned about the proliferation of shareholder derivative lawsuits, New Jersey passed a statute requiring certain plaintiffs to post a bond, for the expenses of the defense of the suit, as a prerequisite to the maintenance of the action.[198] Even though the relevant Federal Rule was silent as to such a requirement, the Supreme Court held that the federal court had to follow the statutory requirement.[199] Although New Jersey had not altered the standards for proving the underlying claim, it had adopted a procedural device to advance other substantive objectives—deterring these kinds of suits and providing compensation for corporate defendants.[200] And, if the federal court had not also required the posting of a similar bond, the resultant circumvention of the state's

193 As noted above, *see supra* note 186, the New York statute conferred certain rights on defendants by reducing their exposure to class action litigation. Even if one concedes that the state used a "procedural" vehicle to achieve that result, it surely was done with a "substantive" objective.

194 *Cf.* Douglas v. NCNB Tex. Nat'l Bank, 979 F.2d 1128 (5th Cir. 1992). In *Douglas*, the Fifth Circuit declined to apply Rule 13(a), which normally would preclude assertion of a compulsory counterclaim that had not been brought in earlier action in federal court, in the face of Texas law, which allowed the defendant-lender to choose nonjudicial foreclosure as an alternative to judicial foreclosure by way of counterclaim. *See id.* at 1130. The "purpose of this [state] rule is to prevent a borrower from depriving its lender of a choice of remedies" and failure to follow that law would impermissibly abridge or modify the lender's substantive rights. *Id.*

195 337 U.S. 541 (1949).

196 *See id.* at 543–44.

197 That Rule has subsequently been amended. *See* FED. R. CIV. P. 23.1 (setting out the requirements for a shareholder's derivative suit).

198 *See Cohen*, 337 U.S. at 548–50. New Jersey's concern about proliferation included the legislative perception that many of these suits were so-called "strike suits" brought solely to extract a settlement from defendants. *See id.* at 548.

199 *See id.* at 556.

200 *See id.* at 555–56. These were not dissimilar to New York's motivations for adoption of section 901(b), which sought indirectly to curb the number of suits seeking statutory damages and to reduce the potential exposure to liability by certain defendants.

requirement would have undermined its ability to achieve those objectives.[201]

So, what does the learning from horizontal choice-of-law analysis add? In many ways, the case law there is equally unhelpful. Because the terms substance and procedure are used by state courts in a variety of contexts, and because they have been interpreted in at least fifty different jurisdictions, there is even less uniformity, consistency, and predictability in their definitions. Many of those state court decisions fall prey to the same decision making-by-labeling approach I decried in the *Erie* analysis. As in the federal courts, there too, characterization of an issue as "procedural" can become the all-too-easy vehicle for applying forum law, without the necessity of undertaking more detailed analysis. In short, both regimes have relied too heavily on this flawed approach. Therefore, it may be that the most candid con-

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201 Lower courts have applied a similar analysis to other state statutes, which used arguably "procedural" vehicles to achieve "substantive" goals and had "substantive" effects, holding that the diversity court was required to follow state law. For example, the Indiana Medical Malpractice Act, IND. CODE § 34-18-8-4 (2010), requires a potential plaintiff first to file a claim with a medical review panel and obtain the panel's opinion on the claim prior to instituting a court action. In *Hines v. Elkhart General Hospital*, 603 F.2d 646 (7th Cir. 1979), the court held that a federal court must impose the same prerequisites on a diversity plaintiff, concluding that "[t]his procedure is clearly not a mere form or mode for enforcing rights and obligations, but rather the procedure is bound up with those rights and obligations." *Id.* at 648.

Similarly, a number of states have enacted so-called anti-SLAPP statutes, which are intended to provide remedies, including the award of attorney's fees and costs, to private citizens who contemplate or bring lawsuits to exercise their political or legal rights:

> The hallmark of a SLAPP suit is that it lacks merit, and is brought with the goals of obtaining an economic advantage over a citizen party by increasing the costs of litigation to the point that the citizen party's case will be weakened or abandoned, and of deterring future litigation.

United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 970–71 (9th Cir. 1999).

Numerous courts have held that the federal courts must afford similar remedies to diversity claimants. For example, in *Newsham*, the Ninth Circuit found no "direct collision" between California's statute and the Federal Rules, and that "California has articulated the important, substantive state interests further by the Anti-SLAPP statute." *Id.* at 973. Further, the application of the statute was supported by the "twin aims" of *Erie*, including the fact that "if the anti-SLAPP provisions are held not to apply in federal court, a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum." *Id.*; *see also* Henry v. Lake Charles Am. Press, L.L.C., 566 F.3d 164, 169–70 (5th Cir. 2009) (asserting that Louisiana's "nominally-procedural" anti-SLAPP law governed in diversity action); Buckley v. DIRECTV, Inc., 276 F. Supp. 2d 1271, 1275 n.5 (N.D. Ga. 2003) (dismissing contention that Georgia's anti-SLAPP statute did not apply in federal court as "without merit").

clusion is that each system could profit from considering the shortcomings endemic to the methodology used by it and by the other.

C.

Conflicts jurisprudence would also have helped to inform the *Shady Grove* decision in another way, by drawing from doctrines which may arise in another horizontal choice-of-law context—those involving limitations and imperatives derived from the Constitution and certain federal statutes. And, so that I can take a stab at being "fair and balanced," it may be noteworthy that these considerations would have supported the majority's result.

Assume that in an attempt to circumvent the limitations in section 901(b), Shady Grove had brought its attempted class action not as it did in a federal court in Brooklyn, but across the Hudson River in New Jersey.[202] One scenario is that the action would have been brought in a *state* court. Then, obviously there would be no *Erie* issues. This attempt at circumvention might have proven unsuccessful for several reasons. The New Jersey court might have declined to hear the action because it was "penal," pursuant to the doctrine of *forum non conveniens*, or under other theories.[203] Or, that court might have characterized section 901(b) as "substantive," and then, applying its choice-of-law methodology, it might have decided to apply New York's prohibition on certifying claims for statutory damages as class actions. Indeed, if New Jersey had only minimal connections with the parties and the controversy, it would have been precluded from applying its

202 The only limitation is that the court must be able to exercise personal jurisdiction over the out-of-state defendant, which is not likely to be difficult for large, national corporations like Allstate. The Supreme Court has been hostile to attempts by states to localize an action by trying to permit their assertion only in the jurisdiction where the claim arose. *See, e.g.*, Crider v. Zurich Ins. Co., 380 U.S. 39, 41–43 (1965) (stating that, consistent with constitutional requirements, a forum state may "supplement" or "displace" the remedy of the other state); Tenn. Coal, Iron & R.R. Co. v. George, 233 U.S. 354, 359–61 (1914) (permitting a Georgia court to provide relief on an Alabama-created statutory cause of action which Alabama had tried to restrict for use in Alabama courts only).

203 However, with these handful of exceptions, a state is prohibited by the Full Faith and Credit Clause from closing its courts via procedural vehicles to actions arising under the laws of other states. *See, e.g.*, Broderick v. Rosner, 294 U.S. 629 (1935) (requiring New Jersey to entertain an action for obligations of New Jersey shareholders for debts of an insolvent New York bank despite a New Jersey statute limiting remedies in a way that effectively prohibited maintenance of such out-of-state claims in its courts).

own substantive law to the dispute.[204] However, New York apparently had not sought to give extraterritorial effect to section 901(b).[205] Therefore, this end-run probably would have worked. The court in New Jersey would have been likely to view the New York statute as "procedural." If it did hear the case, it would be likely to apply its own rules for class certification, including the absence of a bar like that in section 901(b), regardless of New York's attempted prohibition. And, under *Sun Oil Co. v. Wortman*, there are no constitutional limitations on New Jersey's choice to apply its procedural rules to a claim to which it has no other connections.[206]

The second scenario is that the action either might have been brought originally in a federal court in New Jersey, or it might have been removed from state court. Would that federal court in New Jersey have had to defer to New York's limitations on class actions? The answer is easiest if New Jersey viewed section 901(b) as procedural, and would have applied its own rules permitting certification. Complications could arise if the federal court in New Jersey would have viewed the statute as "substantive" and thus would have applied New York law, since *Klaxon Co. v. Stentor Electric Manufacturing Co.*[207] instructs that the federal court has to apply the same horizontal

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204 *See* Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 814–23 (1985) (stating that a forum state must have significant contacts with all claims in order to apply its own law to ensure that the application of its own law to a given claim is not arbitrary or unfair); Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) ("In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair, the Court has invalidated the choice of law of a State which had no significant contact or significant aggregation of contacts . . . with the parties and the occurrence or transaction" (citation omitted)); *see also* notes 173–175 and accompanying text (noting constitutional limitations).

205 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1458 n.16 (2010) (Stevens, J., concurring) ("Section 901(b) . . . is, by its own terms, not extraterritorial insofar as it states that it governs *New York* courts."). However, if its legislature had addressed the question, it is likely that they would have preferred that result. *See id.* at 1470 (Ginsburg, J., dissenting) (absence of language limiting section 901(b) to actions arising under New York law is explained by fact that "New York legislators make law with New York plaintiffs and defendants in mind").

206 *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) ("[The] Court has long and repeatedly held that the Constitution does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different State."). However, as noted above, *see supra* note 203, New Jersey could not use procedural vehicles to close its courts to actions arising in New York.

The fact that section 901(b) might be characterized as "procedural" for these purposes does not mean that it must have the same characterization for purposes of the Rules Enabling Act. *See supra* notes 166–70 and accompanying text.

207 313 U.S. 487 (1941).

choice-of-law rules as the state court would have applied.[208] However, even in this situation, the likely response is that if there is a controlling Federal Rule on point, the federal court would not be bound by the state limitation—especially if New York did not intend section 901(b) to apply to actions outside the state.

Finally, there is a third scenario that brings the action closest to the actual facts in *Shady Grove*. Assume that the action was commenced in a federal court in New Jersey but was transferred to a federal court in New York pursuant to § 1404(a).[209] Under *Van Dusen v. Barrack*[210] and *Ferens v. John Deere Co.*,[211] the transferee court would apply the same legal rules as would have been applied by the transferor court. If, as just indicated, the federal court in New Jersey likely would have disregarded the New York statute in making its class certification decision, it follows that even absent *Shady Grove*, a plaintiff seeking certification can wind up, indirectly, in a federal court in New York, without being bound by the restrictive provisions in section 901(b).

So, what lessons might the majority have drawn from these lines of cases? That there is consistency to the conclusion that regardless of New York's desires, its procedural statutes simply cannot reach beyond its own state courts. Objections that the rule in *Shady Grove* enhances the possibility of forum shopping would be undercut, since plaintiffs already have the courts in other states (both state and federal) as alternatives for bringing class actions.[212] Thus, it is arguable that the addition of one additional forum in which to seek certification of the class action—the federal court in New York—does not significantly change the landscape.

I argued above that New York has a strong interest in enforcing its prohibition on class actions for statutory damages, regardless of whether that claim is brought in a state court in New York or elsewhere. But these cases indicate that under present law, New York may be powerless to extend its rule beyond its own courts.

At the end of the day, this analysis, as well as the actual decision in *Shady Grove*, demonstrates that New York is between the proverbial rock and a hard place. It can create, as it has done, a claim for statutory damages for violations of section 5106(a) of its insurance law.

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208 *See id.* at 496.

209 *See* 28 U.S.C. § 1404(a) (2006).

210 376 U.S. 612 (1964) (considering a motion to transfer by defendants).

211 494 U.S. 516 (1989) (applying *Van Dusen* to motions by plaintiff).

212 The plaintiff would still be engaged in a form of forum shopping—choosing a court in New Jersey rather than a court in New York. But, the *Erie* doctrine is silent in addressing the plaintiff's motivations behind *horizontal* choice of forum.

But New York will be unable to preclude class certification for such relief, either in the courts of the other forty-nine states or in any federal court.[213] If it wants to bar such class actions because of concerns about over-enforcement, its only choice would be the repeal of section 5106(a), thus withdrawing that remedy in actions by individual plaintiffs as well as class claimants. Or, if the failure to make timely payments is conduct which New York wants to deter by imposing statutory damages, it will have to tolerate class actions as well as individual suits in non–New York state courts.

Is there any way out of this conundrum? Perhaps not, although that result has unfortunate implications both for federalism values and recognition of the interests of each state by its sister states. Or, perhaps what is called for is a greater invocation of a core principle of this Article—heightened deference to the interests of the states in the application of their rules, regardless of their characterization as procedural or substantive. Not only is that deference appropriately exercised by federal courts for *Erie* purposes, but greater deference by other states to these interests will allow states, like New York in this situation, to further their objectives to govern certain behavior, when their only other alternative would be to deny recovery to all claimants.

IV.

In his opinion for the plurality, Justice Scalia sought to minimize concerns about the imprecision of the test used to differentiate rules of "procedure" from substantive rights by asserting that the Court has managed to "muddle through" under that test for nearly seventy years.[214] I have already criticized numerous aspects of the reasoning leading to the Court's result. But, I'm afraid that we are also in for continued muddling.

In *Shady Grove*, the Court declined to express an opinion on "whether a state law that limits the remedies available in an existing class action,"[215] or "whether state laws that set a ceiling on damages

213 The Court discussed the possibility that a different statute, drafted more specifically to deal with the remedy available for violations of state law, might overcome the majority's objections to the application of section 901(b), but the plurality declined to resolve that question. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1443–48 (2010) (plurality opinion); *infra* notes 218–20 and accompanying text. Here I assume that a future court would decline even to follow that state statute.

214 *See Shady Grove*, 130 S. Ct. at 1447 (plurality opinion).

215 *See id.* at 1439 (majority opinion).

recoverable in a single suit,"[216] would clash with Rule 23 and thus would also be preempted.[217] What would happen if New York enacted such a statute?[218]

What if New York revised section 901(b), adding a preambular portion, which recited the substantive goals of the statute? What if New York sought to make its objectives clearer, by providing that the limitation on class actions only applied to claims arising under New York state law?[219] Would it have made a difference if the remedial bar or ceiling were codified as part of the substantive portion of the statute, rather than with the state's "procedural" laws?[220]

Just as I have suggested that it should not make any difference whether state law is the product of statutes or court-promulgated rules or common law, so also it should not matter where the limitation on class actions is codified. That's the state's call, and the federal courts must respect that choice. But, at least for Justice Stevens—who did look at the state's characterization of section 901(b), but then found the evidence of its substantive nature to be ambiguous[221]—that placement might have tipped the scales,[222] and so it might further the state's substantive interests by making them as clear as possible.

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216 *Id.* at 1439 n.4. The Court distinguished those hypothetical statutes, asserting that "§ 901(b) does conflict because it addresses not the remedy, but the procedural right to maintain a class action." *Id.*

217 The dissent compared these provisions to a "State, wishing to cap damages in class actions at $1,000,000, [which] enacted a statute providing that 'a suit to recover more than $1,000,000 may not be maintained as a class action.'" *Id.* at 1466 (Ginsburg, J., dissenting). The dissent concluded that the majority would have held that statute preempted by Rule 23, while leaving open a different result for these hypothetical alternatives. But, as the dissent noted, "[t]here is no real difference in the purpose and intended effect of these two hypothetical statutes." *Id.* at 1467.

Or, if the majority's interpretative focus was on whether such a class action could be "maintained," what about a state statute that provided that such an action may not be "brought"?

218 In his contribution to this symposium, Professor Clermont concludes that the Federal Rules would preempt even that kind of statute. *See* Kevin M. Clermont, *The Repressible Myth of* Shady Grove, 86 NOTRE DAME L. REV. 987, 1029–31 (2011).

219 *Cf. Shady Grove*, 130 S. Ct. at 1443 (plurality opinion) ("Nothing in the text of § 901(b) (which is to be found in New York's procedural code) confines it to claims under New York law . . . .").

220 As mentioned above, the plurality noted that the text of section 901(b) could be found in New York's procedural code. *See id.*

221 *See id.* at 1450 (Stevens, J., concurring); *supra* notes 98–99 and accompanying text.

222 Because the plurality looked solely at the *federal* characterization of the nature and effect of the Rule, presumably that change would not have made a difference for them. *See Shady Grove*, 130 S. Ct. at 1444 (plurality opinion); *supra* notes 92–93 and accompanying text.

Allstate's brief identified dozens of different state laws that raise parallel problems to the clash between section 901(b) and Rule 23, including statutes that limit the remedy available in class actions or that prohibited class actions for various kinds of claims.[223] What will happen with them?[224]

What about a state that barred class actions generally, rather than, as did New York via section 901(b) and those other states by those other statutes, only for specific claims?[225] Would it make a make a difference if the state merely failed to provide for class actions in its courts, or if the state affirmatively prohibited those kinds of lawsuits?[226]

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223 *See* Brief for Respondent, *supra* note 74, app. A (identifying representative state statutes limiting remedy available in a class action); *id.* app. B (identifying representative state statutes prohibiting class actions for particular claims); *see also Shady Grove*, 130 S. Ct. at 1468 n. 11 (Ginsburg, J., dissenting) ("States have adopted a variety of formulations to limit the use of class actions to gain certain remedies or to pursue certain claims.").

224 *See* Clermont, *supra* note 218, at 1030–31 (predicting that these statutes would not be followed in federal court). *But cf. In re* Whirlpool Corp. Front-Loading Washer Prods. Liability Litig., No. 1:08-WP-650000, 2010 WL 2756947, at *3 (N.D. Ohio July 12, 2010) (refusing to grant class certification, because the "class action restriction in [the state statute] is intimately interwoven with the substantive remedies available under [that statute]"); Cole v. Chevron USA, Inc., 554 F. Supp. 2d 655, 668–71 (S.D. Miss. 2007) (refusing to certify claim under state consumer protection act, because class actions for those kinds of claims were expressly precluded by statute, whereas under the approach of Justice Stevens (the crucial fifth vote in *Shady Grove*), application of Rule 23 would be "ultra vires," because it would "abridge, enlarge or modify" the rights and remedies afforded by state law); *id.* at 670 ("Where, as here, the state rule at issue is limited to a particular substantive area of law, the case is especially strong for applying the state rule.").

225 Class actions are severely limited or completely foreclosed in two states. Mississippi has never adopted a version of Rule 23 as part of its state rule. Its Supreme Court has concluded that in the absence of such a rule, no class actions—seeking either legal or equitable relief—can be maintained in a state court. *See* USF&G Ins. Co. of Miss. v. Walls, 911 So. 2d 463, 467 (Miss. 2005).

"There [also] is no class action under state law in Virginia," although "[t]here is an argument that, under established common law precedent, plaintiffs in equity may represent others who are similarly situated." *Survey of State Class Action*, 2009 A.B.A. SEC. LITIG. 527–28.

226 A mere failure to provide for class actions would appear more motivated by procedural concerns, including the added burden on the courts from those proceedings, or perhaps the perception that judges or juries will be less able to handle them, or a lack of experience with such actions. Mississippi's failure to create class action relief appears to be based on such concerns. *See* Am. Bankers Ins. Co. of Fla. v. Booth, 830 So. 2d 1205, 1214 (Miss. 2002). "'Few procedural devices have been the subject of more widespread criticism and more sustained attack—and equally spirited defense—than practice under Federal Rule 23 and its state counterparts. . . . [N]o

A week after *Shady Grove* was decided, the Supreme Court granted certiorari in another case raising *Erie* issues, *Holster v. Gatco, Inc.*,[227] and remanded for further consideration by the Second Circuit.[228] The Telephone Consumer Protection Act (TCPA)[229] sets out an unusual structure. It makes it unlawful under federal law to send unauthorized fax messages.[230] It provides for a private right of action by recipients of those messages, including specified damages.[231] But, those actions are to be brought in state court, and then only if the action is "otherwise permitted by the laws or rules of court of [the] state."[232] In *Holster*, the plaintiff brought a class action in federal court, seeking relief on behalf of more than 10,000 recipients of those messages.[233] As will be recalled from *Shady Grove*, section 901(b) prohibits class actions for statutory damages; a number of New York state decisions have dismissed attempted class actions under the TCPA

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meaningful reforms have as yet been developed [in this state] to render class action practice a more manageable tool.'" *Id.* at 1212 (first alteration in original) (quoting MISS. R. CIV. P. 23 cmt.).

These kinds of state interests and concerns are less likely to be impinged if a federal court were to allow a class action. And, in fact, federal courts in Mississippi have entertained class actions based on state law, which could not have been brought in state court. *See, e.g.*, Chancery Clerk v. Wallace, 646 F.2d 151, 155 (5th Cir. 1981) (approving district court's refusal to abstain from hearing class action, in part because that action could not have proceeded in state court); *In re* New Motor Vehicles Canadian Export Antitrust Litig., 241 F.R.D. 77, 83 (D. Me. 2007) (certifying class asserting claim under Mississippi state antitrust law and noting that although "Mississippi does not provide for class actions in its state courts at all," that "is Mississippi's choice to make as a matter of state procedure for its state courts, but not for the federal courts"). *But see Cole*, 554 F. Supp. 2d at 668–71 (refusing to certify class claim in federal court under state consumer protection act, because class actions for those kinds of claims were expressly precluded by statute).

On the other hand, an affirmative prohibition would be much closer to the unaddressed hypothetical statutes discussed in *Shady Grove* and would far more clearly evince a substantive concern for the remedies that might be obtained in a class action, and so they should be entitled to far more deference by federal courts in diversity actions.

227 130 S. Ct. 1575 (2010).

228 *See id.*

229 47 U.S.C. § 227 (2006).

230 *See id.* § 227(b)(1)(C).

231 *See id.* § 227(b)(3).

232 *Id.*

233 The Second Circuit had previously held that such TCPA claims "arise under" state law and so may not be brought under federal question jurisdiction. In *Holster*, the basis of jurisdiction was diversity of citizenship, with the amount in controversy satisfied by the requirements of the Class Action Fairness Act, 28 U.S.C. § 1332(d) (2006). *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 466 F. Supp. 2d 467, 475–76 (E.D.N.Y. 2006).

because of that statutory bar.[234] In *Holster* and a similar case decided the same day,[235] (and decided three weeks before its opinion in *Shady Grove*), the Second Circuit affirmed the district court's conclusion—because this action was not "otherwise permitted" in a New York state court, it also could not be maintained in federal court.[236] On remand, the court of appeals reaffirmed its affirmance of the trial court.[237] What will happen if the case reappears before the Supreme Court[238]—especially since the swing vote in *Shady Grove*, Justice Stevens, has been be replaced by Justice Kagan?[239]

Shady Grove will doubtless help to provide some guidance in dealing with these, and the dozens of other unforeseen questions, which will still arise in applying and interpreting the *Erie* doctrine. But, the uncertainty that existed before that decision has only been modestly

234 *See, e.g.*, Leyse v. Flagship Capital Servs. Corp., 803 N.Y.S.2d 52 (App. Div. 2005) (dismissing class action suit under the TCPA); Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc., 799 N.Y.S.2d 795 (App. Div. 2005) (barring plaintiff's suit to recover for "unsolicited faxes").

235 Bonime v. Avaya, Inc., 547 F.3d 497 (2d Cir. 2008).

236 *See id.* at 501–02. The court of appeals offered two independent reasons for its holding. First, it held that for *Erie* purposes, "[w]hile the TCPA is not state law, Congress has clearly indicated that the courts should treat it as though it were." *Id.* at 501. Failure to apply section 901(b) in federal court would be clearly inconsistent with the "twin aims" of *Erie*. *See id.* Second, it also held that the "statutory ['otherwise permitted'] language is unambiguous—a claim under the TCPA cannot be brought if not permitted by state law." *Id.* at 502.

The disagreement between Justices Scalia and Ginsburg had continued in their opinions accompanying the grant of certiorari and the remand order. Concurring in the Court's decision, Justice Scalia stated that the first of the court of appeals' two independent reasons was rejected by *Shady Grove* and the second ground was based on a "highly implausible" reading of the TCPA. *See* Holster v. Gatco, Inc., 130 S. Ct. 1575, 1576 (2010). In contrast, Justice Ginsburg (joined by Justice Breyer) was willing to concede that "*Shady Grove* may bear on the Second Circuit's *Erie* analysis," but asserted that "[t]he Second Circuit's interpretation of the TCPA's private-right-of-action authorization stands on its own footing as an adequate and independent ground for dismissing Holster's suit." *Id.* at 1577 (Ginsburg, J., dissenting). She saw no need to remand, so that the Second Circuit could reinstate its prior holding. *See id.*

237 Holster v. Gatco, Inc., 618 F.3d 214, 217–18 (2d Cir. 2010). The Second Circuit agreed with Justice Scalia that the previous decision's first ground was undercut by *Shady Grove*. *See id.* at 217. However, it also agreed with Justice Ginsburg—that the second ground provided independent justification for applying New York law. *See id.* at 218.

238 Since the Second Circuit's affirmance was based on non-*Erie* grounds, such a hypothetical decision is not likely to involve further refinement of *Shady Grove*.

239 Although we now all know of her Christmas Day dining preferences, not a single question arose at her confirmation hearings before the Judiciary Committee to elicit her views on the *Erie* doctrine.

alleviated. Hold on, as courts, litigators, and scholars continue to muddle along.

CONCLUSION

Shady Grove does not break new ground. Indeed, the Court was unanimous in employing the "familiar framework" for *Erie* analysis. Although unlikely, some aspects of this framework are deserving of reconsideration—in particular the extent to which it forecloses consideration of the "twin aims" of *Erie* when the clash is between state law and either a federal statute or one of the Federal Rules.

Even within the "traditional framework," *Erie* choices can be avoided by finding an absence of a clash, or at least mitigated even in the presence of a clash. When undertaking horizontal choice-of-law analysis, one method of promoting comity and achieving uniformity is enhanced deference to the interests of other jurisdictions in the application of their law to a disputed issue. Resolution of vertical choice-of-law questions in the federal courts would similarly be enhanced by increased deference to the interests of the other interested jurisdictions—in this case, the state that is the source of the substantive legal claim being litigated.

The Supreme Court has recognized the value of that approach. But, notably in *Shady Grove*, it did not find these benefits sufficient to avoid a clash or to support deference to state law. The values which are reflected in the *Erie* doctrine, and in particular the importance of federalism, will be enhanced if the Court would take seriously, rather than merely pay lip-service to, the agreed benefits of identifying, and then deferring to, state interests.