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# ARTICLE

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## REDEEMING THE MISSED OPPORTUNITIES OF *SHADY GROVE*

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[L]egal abstraction, while never socially neutral, always remains socially volatile. Without constant reference to changing social dynamics and consequences, students of procedure [including judges] can scarcely know what they are talking about.<sup>1</sup>

Edward A. Purcell, Jr.

*In Memory of Ben Kaplan*

INTRODUCTION

Few subjects in the field of Procedure are characterized by greater legal abstraction than the collection of doctrines that govern the relationship between the federal and state courts. The grand experiment by which the drafters of the Constitution “split the atom of sovereignty,”<sup>2</sup> as Justice Kennedy memorably put it, has not always produced readily administrable doctrines for the actual business of running parallel and overlapping judicial systems. The Court’s efforts to harmonize the operation of those systems through the *Erie* doctrine and its interpretations of the Rules Enabling Act<sup>3</sup>—the statute that both authorizes and limits the Federal Rules of Civil Procedure—have been most successful when undertaken with an informed awareness of social dynamics and consequences.<sup>4</sup> But successful harmonization of the judicial systems has been the exception, not the rule.

Two related problems under the Enabling Act cry out for pragmatism informed by both knowledge of history and realism about contemporary conditions, but have languished for decades without proper resolution. The first involves a broad interpretive question: how can the limitations on rulemaking authority contained in the Act be applied in a manner that reflects the separation-of-powers concerns that

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<sup>1</sup> EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 257 (2000).

<sup>2</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

<sup>3</sup> 28 U.S.C. §§ 2072–2077 (2006).

<sup>4</sup> See, e.g., *Guar. Trust Co. v. York*, 326 U.S. 99, 101-12 (1945) (identifying the jurisdictional policies that inform the *Erie* doctrine’s nonconstitutional dimensions and clarifying the role that those policies play in limiting a diversity court’s power to craft judge-made procedure); PURCELL, *supra* note 1, at 141-45, 149-55, 246-55 (discussing Justice Brandeis’s deep concern, which contributed to his opinion in *Erie* and is reflected in *Guaranty Trust*, about the waste and unfairness that corporate defendants created by jurisdictional manipulation designed to wear out their opponents and to take advantage of general federal common law).

animated them<sup>5</sup> while also exhibiting respect for the state regulatory arrangements that govern much of our economic and social activity? The Supreme Court has not yet provided a useful answer to that question. Instead, it has often relied on a rigid formalism that creates perverse incentives, leading the Court to give some Federal Rules implausibly broad interpretations in order to apply federal law while emptying others of content in order to avoid an Enabling Act challenge.

The second problem involves the intersection of the Enabling Act with class action practice: following the 1966 amendments to Federal Rule of Civil Procedure 23 and the ascendance of the class action to a position of central importance in the enforcement of many regulatory policies, how can Rule 23 be squared with any reasonable account of the Enabling Act's prohibition against rules that abridge, enlarge, or modify substantive rights?<sup>6</sup> The prospect of class certification is the single most important factor in the dynamics of litigation or settlement in any proceeding in which class treatment is on the table. Certification can transform unenforceable negative-value claims into an industry-changing event and dramatically alter the litigation or settlement value of high-stakes individual claims. After almost half a century of doctrinal development under modern Rule 23, the possibility that the entire endeavor may have unfolded in violation of the Enabling Act seems increasingly compelling, but the disruptive consequences of such a conclusion would be unacceptable.

*Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,<sup>7</sup> a closely watched case decided in the 2009–10 Term, presented the Supreme Court of the United States with an opportunity to speak to both issues. *Shady Grove* was a federal diversity case involving a potential conflict between a provision of New York law that prohibits the award of penalties or statutory damages on a classwide basis unless expressly authorized,<sup>8</sup> and Federal Rule 23, which broadly authorizes federal courts to

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<sup>5</sup> See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106-12 (1982) (arguing that the Rules Enabling Act's procedure/substance dichotomy was not designed primarily to safeguard state law, but rather to limit the prospective lawmaking power the Act granted to the Supreme Court and thereby maintain the separation of powers).

<sup>6</sup> See 28 U.S.C. § 2072(b) (stating that procedural rules "shall not abridge, enlarge or modify any substantive right").

<sup>7</sup> 130 S. Ct. 1431 (2010).

<sup>8</sup> See N.Y. C.P.L.R. 901(b) (McKinney 2006) ("Unless a statute . . . specifically authorizes the recovery [of a penalty or statutory damages] 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.").

certify, manage, and hear class action proceedings.<sup>9</sup> Sadly, the case shed little light. In a fractured opinion written for a divided Court, Justice Scalia held that Rule 23 displaced New York's law on the issue of classwide penalty liability. In the portion of his opinion that spoke for a majority, Justice Scalia offered an interpretation of Rule 23 that found a conflict with New York law where none need exist.<sup>10</sup> And when speaking for a plurality, he provided an account of federal and state policies on aggregate litigation that ignored the practical realities of the modern class action and the animating impulses behind it, an account that more accurately reflects class action practice in 1938 than in 2010.<sup>11</sup> There are some valid insights in the plurality opinion dealing with the proper interpretive approach to the Enabling Act, but they are eclipsed by oversimplification and overwhelmed by the tide of confusion that characterizes the rest of the opinion. *Shady Grove* called for a restrained and enlightened interpretation of both the Enabling Act and Rule 23, but the Justices did not deliver.

This Article seeks to redeem the missed opportunities of *Shady Grove* and provide the clarifying accounts of the Enabling Act and Rule 23 that the opinions fail to offer. After a brief overview of the *Shady Grove* dispute in Part I, Part II addresses the proper interpretive approach to the Rules Enabling Act. Building upon past work,<sup>12</sup> we identify the need for a more dynamic approach to the text of Federal Rules than the Court has exhibited—one that recognizes the indeterminacy inherent in prospective rulemaking, the role of federal common law in the interpretation of the Rules, and the role of the Rules in federal common law—and the need to revisit the line between “procedure” and “substance” in light of practical experience and evolving legal norms.

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<sup>9</sup> See FED. R. CIV. P. 23.

<sup>10</sup> See *Shady Grove*, 130 S. Ct. at 1437-42 (determining that Rule 23 was in conflict with section 901(b) and thus that, if valid, Rule 23 must govern in federal diversity suits).

<sup>11</sup> See *id.* at 1442-44 (Scalia, J., for himself, Roberts, C.J., Thomas, J., and Sotomayor, J.) (explaining that Rule 23 “merely enables a federal court to adjudicate claims of multiple parties at once . . . [and that] like traditional joinder, it leaves the parties’ legal rights and duties intact and the rules of decision unchanged”).

<sup>12</sup> See, e.g., Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington’s “Substance” and “Procedure” in the Rules Enabling Act*, 1989 DUKE L.J. 1012 [hereinafter Burbank, *Hold the Corks*]; Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986) [hereinafter Burbank, *Interjurisdictional Preclusion*]; Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693 (1988) [hereinafter Burbank, *Rules and Discretion*]; Burbank, *supra* note 5.

Part III then turns to the status of class action litigation under the Enabling Act. We regard *Shady Grove* as the occasion for a shift in understanding of the sources and content of aggregation policy. Although some may view the reorientation we propose as radical, it has deep roots in the history of the class action and its treatment under Rule 23, and it is consistent with much existing class action practice. The solution to the seeming dilemma caused by Rule 23's dramatic impact upon substantive liability and regulatory regimes is that Rule 23 is not the source of the aggregate-liability policies that generate that impact, and it never has been. Rather, courts must look to the substantive liability and regulatory regimes of state and federal law in determining whether aggregate relief is appropriate and consistent with the goals of that underlying law. Rule 23 is merely the mechanism for carrying an aggregate proceeding into effect when the underlying law supports that result. It is an important mechanism, and one that makes its own controlling policy choices for the federal courts about such matters as notice, opportunity to opt out, and immediate appeal of certification. But Rule 23 does not set policy on the propriety of aggregate remedies as a means of accomplishing regulatory goals—and it could not possibly do so.<sup>13</sup> In the dispute that produced *Shady Grove*, section 901(b) of the New York Civil Practice Law and Rules set liability policy under New York law. The Court did violence to the Enabling Act when it concluded that Rule 23 could supersede that policy.

### I. THE *SHADY GROVE* DISPUTE

*Shady Grove* arose out of a dispute between Allstate Insurance and Shady Grove Orthopedic concerning payments due under a no-fault

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<sup>13</sup> Justice Powell foreshadowed some aspects of our analysis in his incisive dissent in the *Roper* case:

The Court argues that the result will be to deny compensation to putative class members and jeopardize the enforcement of certain legal rights by “private [attorneys] general.” The practical argument is not without force. But predicating a judgment on these concerns amounts to judicial policymaking with respect to the adequacy of compensation and enforcement available for particular substantive claims. Such a judgment ordinarily is best left to Congress. At the very least, the result should be consistent with the substantive law giving rise to the claim. Today, however, the Court never pauses to consider the law of usury. Since Mississippi law condemns the aggregation of usury claims, the Court’s concern for compensation of putative class members in this case is at best misplaced and at worst inconsistent with the command of the Rules Enabling Act.

Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326, 354-55 (1980) (Powell, J., dissenting) (footnotes and citations omitted).

insurance scheme.<sup>14</sup> Shady Grove had provided medical treatment to an injured individual who was covered by no-fault automobile insurance as required by New York law.<sup>15</sup> After the individual assigned all her payment rights to Shady Grove, the company sought reimbursement directly from Allstate.<sup>16</sup> Allstate eventually paid, but not within the thirty-day period that was required for uncontested claims.<sup>17</sup> New York law imposes two percent monthly interest on late payments under the no-fault insurance scheme, a penalty that totaled around five hundred dollars in this instance.<sup>18</sup>

On the basis of this claim, Shady Grove became the named plaintiff in a putative class action filed against Allstate in federal court under the Class Action Fairness Act of 2005.<sup>19</sup> The suit alleged that Allstate regularly failed to make uncontested payments within the required thirty-day period, and that even after rendering payment for covered services it consistently failed to pay the two-percent monthly penalty required under New York law,<sup>20</sup> or otherwise acted in bad faith in seeking to avoid that penalty.<sup>21</sup> Plaintiff sought certification of a class to prosecute these claims on behalf of all insurance beneficiaries or their assignees whose rights Allstate had allegedly violated in this fashion.<sup>22</sup>

New York law includes a provision specifically addressing the availability of statutory-penalty or minimum-damage remedies in a class proceeding, which was enacted when New York updated its general class action provision following the 1966 amendments to Federal Rule 23.<sup>23</sup> In section 901(a) of the New York Civil Practice Law and Rules, New York adopted general requirements for certification of a class action that broadly parallel the requirements of its federal counterpart.<sup>24</sup> Section 901(b) further specified as follows: “Unless a statute creating or imposing a penalty, or a minimum measure of recovery

<sup>14</sup> See *Shady Grove*, 130 S. Ct. at 1436 (majority opinion).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1436-37; see also N.Y. INS. LAW § 5106(a) (McKinney 2009) (“All overdue payments shall bear interest at the rate of two percent per month.”).

<sup>19</sup> See 28 U.S.C. § 1332(d) (2006).

<sup>20</sup> *Shady Grove*, 130 S. Ct. at 1436-37.

<sup>21</sup> *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467, 475-76 (E.D.N.Y. 2006).

<sup>22</sup> See *Shady Grove*, 130 S. Ct. at 1436-37.

<sup>23</sup> See Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1549 (2008) (illustrating through an appendix state adoptions of Rule 23 as amended in 1966).

<sup>24</sup> N.Y. C.P.L.R. 901(a) (McKinney 2006).

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.”<sup>25</sup> Section 901(b) thus creates a default rule against the availability of classwide statutory penalties under New York law, requiring express authorization if classwide relief is to be available. Since the New York no-fault insurance laws do not include such authorization, section 901(b) prohibits the award of the two-percent late-payment penalty on a classwide basis.

*Shady Grove* presented the question whether a federal court sitting in diversity should apply section 901(b) and deny the classwide remedy as a state court would. The district court and the Second Circuit both concluded that section 901(b) was indeed binding upon the federal courts and that Federal Rule 23 did not purport to displace that provision,<sup>26</sup> a conclusion that earlier district court opinions had shared almost uniformly.<sup>27</sup> But the Supreme Court disagreed.

Speaking for a majority on this point only, Justice Scalia held that Rule 23 and section 901(b) unavoidably collide.<sup>28</sup> Rule 23(a), he pointed out, “states that ‘[a] class action may be maintained’ if two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) . . . and it also must fit into one of the three categories described in subdivision (b).”<sup>29</sup> Concluding that the Rule “creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action,”<sup>30</sup> the majority found that this

<sup>25</sup> N.Y. C.P.L.R. 901(b) (McKinney 2006).

<sup>26</sup> *See* *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467, 471-73 (E.D.N.Y. 2006) (holding that section 901(b) barred a class action in this case), *aff'd*, 549 F.3d 137, 145 (2d Cir. 2008).

<sup>27</sup> *See, e.g.,* *Leider v. Ralfe*, 387 F. Supp. 2d 283, 289-90 (S.D.N.Y. 2005) (holding that there was “no collision” between Rule 23 and section 901(b) because Rule 23 merely establishes procedure for pursuing class actions, while section 901(b) prohibits that mechanism for certain types of litigation); *Ansoumana v. Gristede’s Operating Corp.*, 201 F.R.D 81, 88 (S.D.N.Y. 2001) (noting that any plaintiffs wanting to preserve their right to recover liquidated damages would have to opt out of the class because of section 901(b)); *Dornberger v. Metro. Life Ins. Co.*, 182 F.R.D. 72, 84 (S.D.N.Y. 1998) (certifying a class under Rule 23 but severing a claim that arose under a statute providing for a specific penalty, holding that “[w]hereas this Court is bound by Fed.R.Civ.P. 23 in this action, the strictures of New York’s CPLR § 901(b) do not contravene any federal rule”). *But see* *Wesley v. John Mullins & Sons, Inc.*, 444 F. Supp. 117, 119-20 (E.D.N.Y. 1978) (assuming in dictum that statutory penalties would be recoverable in a class action but dismissing the state law claim on other grounds).

<sup>28</sup> *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438-42 (2010).

<sup>29</sup> *Id.* at 1437 (quoting FED. R. CIV. P. 23).

<sup>30</sup> *Id.*

supposed mandate conflicted with New York law, which uses bewitchingly parallel language in specifying that, except when specifically authorized, “an action to recover a penalty, or minimum measure of recovery created or imposed by statute *may not be maintained* as a class action.”<sup>31</sup>

This conclusion necessitated an analysis of Rule 23’s validity under the Enabling Act. Following the Court’s precedents, the “direct collision” between the two provisions required the application of the Federal Rule unless that result would violate the Act’s limitations on interference with substantive rights (or the Constitution).<sup>32</sup> Speaking for a plurality of four, Justice Scalia found it “obvious that rules allowing multiple claims (and claims by or against multiple parties) to be litigated together” are valid under the Enabling Act, since joinder rules “neither change plaintiffs’ separate entitlements to relief nor abridge defendants’ rights; they alter only how the claims are processed.”<sup>33</sup> Any impact that the availability of classwide relief might have on the levels at which a penalty provision can be enforced, including the danger of overenforcement—as one New York commentary put it, the threat of “annihilating punishment”<sup>34</sup>—was, in the plurality’s view, merely an “incidental effect[.]” that did not call into question the validity of Rule 23 or the propriety of the majority’s broad reading of that rule.<sup>35</sup>

Justice Stevens concurred separately, providing the fifth vote for the majority’s Rule 23 holding but rejecting the plurality’s strong embrace of *Sibbach v. Wilson & Co.*<sup>36</sup> in explaining that result under the Enabling Act.<sup>37</sup> Justice Ginsburg authored a four-Justice dissent that, among other things, offered a different account of the proper

<sup>31</sup> N.Y. C.P.L.R. 901(b) (McKinney 2006) (emphasis added); see also *Shady Grove*, 130 S. Ct. at 1438-39 (emphasizing the parallel language in the two provisions).

<sup>32</sup> See *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (“[T]he court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.”).

<sup>33</sup> *Shady Grove*, 130 S. Ct. at 1443 (Scalia, J., for himself, Roberts, C.J., Thomas, J., and Sotomayor, J.).

<sup>34</sup> N.Y. C.P.L.R. 901, cmt. C901:11 (quoting *Ratner v. Chem. Bank of N.Y.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972)).

<sup>35</sup> See *Shady Grove*, 130 S. Ct. at 1444.

<sup>36</sup> 312 U.S. 1 (1941).

<sup>37</sup> See *Shady Grove*, 130 S. Ct. at 1448-49 (Stevens, J., concurring in part and concurring in the judgment).

interpretive approach to Rule 23,<sup>38</sup> one with which Justice Stevens agreed in some respects.<sup>39</sup>

When the dust settled at the end of the opinions, little was resolved. The proper interpretive approach to the Enabling Act remains an open question. We take up that question in the next Part. Only the Court's interpretation of Rule 23—at once sweeping in scope and utterly barren in its account of the Rule's practical impact on the regulation of economic and social activity—had the backing of a majority. And, as we explain in Part III, the majority's analysis was so divorced from reality that *Shady Grove* will likely stand for little more than the bare holding that Rule 23 does not on its face violate the Enabling Act. With that proposition, at least, we can agree.

## II. SHADY GROVE AND THE RULES ENABLING ACT: MISSING THE FOREST AND THE TREES<sup>40</sup>

Although we have chosen to treat in separate sections *Shady Grove's* Enabling Act analysis and the interpretation of the Federal Rules, the two are linked; courts have responded to the inadequacies of doctrine in the former domain by exercising restraint in the latter. These inadequacies include the Court's persistent failure, starting with *Sibbach*, to acknowledge separation of powers as the primary purpose of the Enabling Act's allocation of lawmaking power. Although perhaps initially stimulated by the desire to augment its rulemaking power, the Court's erroneous invocation of federalism as the animating goal of the Enabling Act's procedure/substance dichotomy ensnared the Federal Rules in the confused jurisprudence that followed *Erie Railroad Co. v. Tompkins*,<sup>41</sup> providing one incentive for restrained interpretation. The Court eventually cleaned up part of the mess with *Hanna v. Plumer*<sup>42</sup> by making clear that the allocation of lawmaking

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<sup>38</sup> See *id.* at 1465-69 (Ginsburg, J., dissenting).

<sup>39</sup> See *id.* at 1456-57 (Stevens, J., concurring in part and concurring in the judgment) (discussing Justice Ginsburg's dissent).

<sup>40</sup> We have employed this metaphor in the past:

In more than one part of the opinion in *Ortiz*, as in *Amchem*, the Court expressed solicitude for the limitations on court rulemaking imposed by the Rules Enabling Act. Consistently with its previous misreadings of that statute, however, the Court missed the forest of separation of powers for the trees of federalism.

Stephen B. Burbank, *The Class Action in American Securities Regulation*, 4 ZEITSCHRIFT FÜR ZIVILPROZESS INTERNATIONAL 321, 335 (1999) (footnotes omitted).

<sup>41</sup> 304 U.S. 64 (1938).

<sup>42</sup> 380 U.S. 460 (1965).

power between the federal government and the States depends on the source of federal lawmaking power. Even so, the Court did nothing to call into question *Sibbach's* misdirected and wooden approach to the Enabling Act, thus providing a different incentive for restrained interpretation of the Federal Rules.

Whether prompted by concern about consistency with prevailing *Erie* jurisprudence or by implicit acknowledgment that *Sibbach* is hopeless, the Court's jurisprudence interpreting Federal Rules, although often restrained, has rarely been enlightened. That is not a surprise, since enlightened interpretation must be informed by attention to purpose, and the Court has never been willing to focus on the Act's purpose to safeguard the separation of powers—the respective policy spheres of Congress as lawmaker and the Supreme Court in its dual role as rulemaker and expositor of federal common law—let alone to grapple with the implications of that focus for the interpretive enterprise.

Our discussion of *Shady Grove's* Enabling Act analysis requires that we review the course of the Court's jurisprudence interpreting that statute. Doing so lays bare the tensions that have flowed from the erroneous choice, at the start, to privilege federalism over separation of powers, and the attendant consequences that have flowed from the Court's attempts to avoid undesirable consequences through restrained interpretation of Federal Rules—attempts undertaken without a coherent interpretive framework. An enlightened and restrained interpretation, we argue, requires attention to the actual policy choices that Federal Rules make and that Congress had an opportunity to review, and if necessary reject. By this route, the federal courts would honor the Enabling Act's purpose to affirm the separation of powers through a limited delegation of prospective lawmaking power, along with the process for congressional review of proposed Federal Rules that has been part of the statute since the beginning. It would also honor *Hanna's* federalism purpose to distinguish between sources of federal lawmaking power when considering state law prerogatives.

Our approach may reduce the domain of some Federal Rules, because it calls for careful attention to the role of federal common law as a necessary supplement to the Rules' open-ended text in identifying the source and content of litigation policies in the federal courts. Sometimes, federal common law will be required to implement federal interests reflected in valid federal law, including the Rules themselves. Where this is so, state law will be displaced. Sometimes, however, the federal common law analysis will fail to unearth interests that

are demonstrably rooted in existing federal law. In the latter class of cases, the limitations on federal common law in diversity litigation will often require that state law control the analysis because no valid federal interests requiring protection exist to displace it. This interpretive approach should change the perverse incentive structure that has contributed to the chaotic state of current law.

#### A. *False Start*

It is easy to forget that *Sibbach v. Wilson & Co.*<sup>43</sup>—the 1941 decision in which the Court first entertained a challenge to a Federal Rule under the Enabling Act—was, on that question, a 5-4 decision. It is even easier to forget—or even to overlook—that although the Court attributed the procedure/substance dichotomy in the first two sentences of the Act to concerns about the allocation of lawmaking power between the federal government and the States,<sup>44</sup> Justice Frankfurter’s opinion for the four Justices in the minority discerned correctly that the animating concern of the Act was separation of powers.

As Frankfurter pointed out, the Enabling Act authorizes prospective supervisory court rules for all civil actions in federal district court,<sup>45</sup> including cases governed by federal substantive law in which any concern about the allocation of lawmaking power relates exclusively to “national law.”<sup>46</sup> If concerns about federalism drove the Enabling Act’s allocation scheme, either its standards would have to do double duty—implementing limitations in federal question cases that were not informed by the relevant structural considerations—or the Act would impose no restrictions on prospective supervisory court rulemaking with respect to federal substantive rights. Neither option is analytically coherent. The separation-of-powers account is further

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<sup>43</sup> 312 U.S. 1 (1941).

<sup>44</sup> *See id.* at 9-10 (contrasting Congress’s power to regulate “procedure of federal courts” with its lack of authority to declare or abolish “substantive state law”); Burbank, *supra* note 5, at 1029-30 n.60 (“The link between the constitutional and statutory allocation of federal and state power and the scope of the delegation in the Rules Enabling Act is made clear in the paragraph [in *Sibbach*] following that suggesting limits on congressional power . . .”).

<sup>45</sup> *See Sibbach*, 312 U.S. at 19 (Frankfurter, J., dissenting) (“But Rule 35 applies to all civil litigation in the federal courts, and thus concerns the enforcement of federal rights and not merely of state law in the federal courts.”).

<sup>46</sup> *See id.* at 18 (“So far as national law is concerned, a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy, ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts.”).

strengthened by the fact that the Enabling Act became law in 1934, four years before *Erie* put an end to the infringements on state lawmaking prerogatives under the general federal common law that *Swift v. Tyson* authorized.<sup>47</sup> Moreover, in 1934, federal question cases dominated the civil docket of the federal courts.<sup>48</sup> The view that separation-of-powers concerns were the impetus for the Enabling Act's limitations on rulemaking becomes well-nigh impregnable when one also considers that, although the 1934 legislative history of the Enabling Act is both very short and not at all illuminating on this or any other question of consequence, the separation-of-powers account is confirmed in the detailed and very illuminating legislative history of court rulemaking bills that the Senate considered in the 1920s, including committee reports on a bill that, with the exception of one word, was identical to the statute enacted in 1934.<sup>49</sup>

We do not know why the *Sibbach* Court ignored such powerful evidence that separation of powers, rather than federalism, animated the Enabling Act's limitations on rulemaking by the Supreme Court. Perhaps it was the influence of *Erie*, which was decided the same year the Federal Rules became effective and three years before *Sibbach*, and

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<sup>47</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), *overruling* *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

<sup>48</sup> See AM. LAW INST., A STUDY OF THE BUSINESS OF THE FEDERAL COURTS pt. 2, at 53-57 (1934) (providing detailed statistics on the number of diversity and federal question cases that were terminated in federal district courts between June 1929 and June 1930); DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1936, exhibit 2, at 162, 177-79 (displaying the assortment and number of federal question cases that were tried in district courts in fiscal year 1936); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 619 (2004) (explaining that the original Advisory Committee for the Federal Rules was aware that the "litigation landscape" was not "dominated by simple diversity cases"); cf. Burbank, *supra* note 5, at 1109-10 (discussing the lack of concern for preservation of state law when the Rules Enabling Act was formulated and passed).

<sup>49</sup> See Burbank, *supra* note 5, at 1050-98. The research that explored this legislative history also unearthed a 1923 letter from the author of the relevant section of the bill, Senator Albert Cummins, to Chief Justice Taft in which Cummins requested that Taft "particularly note the sentence reading: 'Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.'" Letter from Sen. Albert B. Cummins to Hon. William H. Taft, *reprinted in* Burbank, *supra* note 5, at 1073 n.260. Cummins continued,

I hope you will not think that I overlooked the obvious principle that Congress could not if it wanted to, confer upon the Supreme Court, legislative power. I have suggested this sentence solely to quiet the apprehensions of those who may be opposed to any measure of this sort.

*Id.*

which became a “brooding omnipresence”<sup>50</sup> that for years assumed extraconstitutional influence. That does not seem a wholly satisfactory explanation, however, given that the relevant legislative history had been brought to the Court’s attention<sup>51</sup> and that four Justices grasped the inadequacy of the federalism account. Moreover, since the limitations, correctly understood, protect against inappropriate prospective federal lawmaking by the Supreme Court, they also serve to protect state interests (albeit in a derivative fashion) by preserving for Congress, and hence to legislators representing the States, the decision whether to enact prospective federal law on matters that exceed those limitations. If Congress chooses not to make federal law, then state law governs unless displaced by valid federal common law.

More likely, the majority in *Sibbach* believed that linking the Enabling Act’s allocation scheme to federalism constraints with respect to substantive law—constraints that, under *Erie*, the Constitution was thought to impose on Congress and that the Rules of Decision Act<sup>52</sup> does impose on the federal courts<sup>53</sup>—would maximize the Court’s rulemaking power and ensure the integrity of the recently promulgated Federal Rules. More generally, the federal judiciary would be able to regulate the broad landscape that the *Sibbach* majority’s author had advocated as appropriate for judicial control before he joined the Court,<sup>54</sup> rather than the narrower landscape that reformers in New York had advocated in work on which proponents of the

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<sup>50</sup> *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign . . .”); Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 *YALE L.J.* 267 (1946). For evidence of the “immediate impact of *Erie* in muddying the waters,” see Burbank, *supra* note 5, at 1110-11 n.435.

<sup>51</sup> See Burbank, *supra* note 5, at 1180 (noting that Mrs. Sibbach’s attorney “drew the Court’s attention to the support for her functional argument, and some of its implementing abstractions, in . . . the 1926 Senate Report”).

<sup>52</sup> 28 U.S.C. § 1652 (2006).

<sup>53</sup> See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941); sources cited *supra* note 44 (describing the Court’s linking of the Act to principles of federalism).

<sup>54</sup> See Owen J. Roberts, *Trial Procedure—Past, Present and Future*, 15 *A.B.A. J.* 667, 668 (1929) (arguing that the regulation of procedure should not be left in the care of the legislature but rather should “be in the hands of those who know best about it and who . . . can make rules to meet situations as they arise in the actual practice of law”), quoted in Burbank, *supra* note 5, at 1031 n.65; see also *Sibbach*, 312 U.S. at 14 (“[T]he new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth.”).

Enabling Act relied at various points in its long pre-1934 legislative history, including in a key Senate Judiciary Committee Report.<sup>55</sup>

On this view, a federalism account facilitated the monolithic formalism that suffuses the Court's opinion in *Sibbach*, painting a landscape in which there is only procedure and substantive law, with nothing in between.<sup>56</sup> Whether or not this move reflected the jurisprudential beliefs of the majority,<sup>57</sup> it was a useful tool to reach a desired result. The plurality opinion in *Shady Grove* illustrates that the tool still has its uses, even in the hands of Justices who are conversant with the lessons of legal realism and the significant changes in thought concerning the relationship between procedure and substantive law—in particular, the growing awareness that in “procedure” lurks power to alter or mask substantive results—that have occurred in the ensuing seventy years. That is reason enough to regret the plurality opinion. It becomes cause for remonstrance when one realizes that these Justices manifested awareness of the shortcomings of *Sibbach*'s interpretation of the Enabling Act<sup>58</sup> but chose neither to repudiate that inter-

<sup>55</sup> See Burbank, *supra* note 5, at 1055-61, 1087-88, 1125-27 (discussing the limitations on court rulemaking emphasized by the New York Reports and the extent to which House and Senate committees relied on them prior to 1934). That those primarily responsible for explaining the bills that preceded the Enabling Act drew heavily on these New York sources is additional evidence that federalism was not their primary concern. It also imparts an additional layer of irony to the decision in *Shady Grove*.

<sup>56</sup> See *id.* at 1028-31.

The references by the Court to “rights conferred by law to be protected and enforced in accordance with the adjective law of judicial procedure” and to procedure as “the judicial process for enforcing rights and duties recognized by substantive law” strongly suggested that the Rules Enabling Act divided the legal universe into two parts: rules of decision found within areas, such as contracts, tort, and property, that would be deemed purely substantive by anyone's definition, and all other rules, which would be considered procedural, even if they had some effect on the enforcement of pure substantive rules.

Ralph U. Whitten, *Erie and the Federal Rules: A Review and Reappraisal After Burlington Northern Railroad v. Woods*, 21 CREIGHTON L. REV. 1, 6-7 (1987).

<sup>57</sup> Justice Roberts was joined by Chief Justice Hughes and Justices McReynolds, Stone, and Reed. See *Sibbach*, 312 U.S. at 6, 19. For recent work challenging the traditional account of judicial behavior that sees a clear divide between formalism and realism, see BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010).

<sup>58</sup> *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1445-46 (2010) (citations omitted) (Scalia, J., for himself, Roberts, C.J., and Thomas, J.).

In reality, the concurrence seeks not to apply *Sibbach*, but to overrule it (or, what is the same, to rewrite it). [*Sibbach*'s] approach, the concurrence insists, gives short shrift to the statutory text forbidding the Federal Rules from “abridg[ing], enlarg[ing], or modify[ing] any substantive right.” There is something to that. It is possible to understand how it can be determined whether a

pretation nor to use other tools that the Court had previously, albeit inconsistently, employed to minimize the damage.

B. *Damage Control: From Too Little to Too Much Power in the Federal Rules*

Prior to *Shady Grove* the Court minimized the damage of *Sibbach's* wooden and, at least in its federalism orientation, demonstrably erroneous interpretation of the Enabling Act primarily by interpreting Federal Rules not to govern the matter in issue. In the beginning, that approach was straightforward and unexceptionable, as in *Palmer v. Hoffman*, where the Court clearly and correctly held that Rule 8(c) governs only the burden of pleading and does not speak to the burden of persuasion.<sup>59</sup> As time passed, the approach was less straightforward and, as a result, more easily contested. For example, in the *Ragan* case, the Court seemed to abjure interpreting Rule 3 to specify a rule for tolling a state statute of limitations because of concern that *Erie* forbade that result.<sup>60</sup> As a result of *Ragan* and some other cases, the baggage of *Erie's* “brooding omnipresence,” which *Sibbach* carried, seemed to threaten the integrity of the Federal Rules.<sup>61</sup> That threat prompted the Court’s unsuccessful attempt to clarify the relationship between federal and state law in *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*,<sup>62</sup> followed by its renewed, more successful attempt in *Hanna*.<sup>63</sup>

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Federal Rule “enlarges” substantive rights without consulting State law: If the Rule creates a substantive right, even one that duplicates some state-created rights, it establishes a new *federal* right. But it is hard to understand how it can be determined whether a Federal Rule “abridges” or “modifies” substantive rights without knowing what state-created rights would obtain if the Federal Rule did not exist. *Sibbach's* exclusive focus on the challenged Federal Rule—driven by the very real concern that Federal Rules which vary from State to State would be chaos—is hard to square with § 2072(b)’s terms.

*Id.*

<sup>59</sup> 318 U.S. 109, 117 (1943) (“Rule 8(c) covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases must apply.” (citation omitted)).

<sup>60</sup> See *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 533-34 (1949) (“We cannot give [this suit] longer life in the federal court than it would have had in the state court without adding something to the cause of action.”); Whitten, *supra* note 56, at 9-10 (“One cannot read the *Ragan* opinion without drawing the conclusion that the Court viewed the case as one in which a Federal Rule conflicted with state law, and in which *Erie* thus required application of the state provision.” (footnote omitted)).

<sup>61</sup> See *Burbank*, *supra* note 5, at 1032 (stating that cases interpreting the Rules in relation to *Erie* “raised fears for the integrity of the Federal Rules of Civil Procedure” (footnote omitted)).

<sup>62</sup> See 356 U.S. 525, 534-40 (1958) (explaining that because the state rule was not “intended to be bound up with the definition of the rights and obligations of the par-

As Professor Ely acknowledged in his exegetical mea culpa on *Hanna*, by relying on *Sibbach* the Court again failed to clarify whether and how the Enabling Act's limitations on the Court's power to promulgate prospective supervisory court rules differ from the Constitution's limitations on Congress.<sup>64</sup> That failure may help to explain why, in his much-noted concurring opinion, Justice Harlan elided the limitations of the Constitution and the Enabling Act. While expressing admiration for the Court's attempt to prevent the frustration of valid federal law under the cloud of the Court's prior *Erie* jurisprudence, Justice Harlan expressed concern that it had moved "too fast and far in the other direction,"<sup>65</sup> effectively insulating the Federal Rules from challenge for improperly infringing on state lawmaking prerogatives.

### C. *Sibbach's Inadequacies Revealed*

*Hanna's* clear distinction between the power that resides in the Federal Rules to override state lawmaking choices and the more qualified power of federal judge-made law to do the same yielded radically different tests for the validity of those two forms of federal lawmaking.

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ties," and because there was a strong federal policy concerning the allocation of power between judge and jury, the "policy of uniform enforcement of state-created rights and obligations" did not require application of the state rule). As we discuss below, *Byrd's* "affirmative countervailing considerations," *id.* at 537, if properly disciplined, can inform a more robust form of federal common law than has developed in the wake of *Hanna*. The *Byrd* Court did not discipline that concept, perhaps because the influence of the Seventh Amendment seemed so clear and also because the Court had not yet grasped *Hanna's* central insight about the relevance of different sources of federal lawmaking power. *See id.* at 537-38 & n.12 (citing *Sibbach* for the proposition that "[t]he policy of uniform enforcement of state-created rights and obligations cannot in every case exact compliance with a state rule").

<sup>63</sup> *See Hanna v. Plumer*, 380 U.S. 460, 463-74 (1965) (clarifying the intersection between the Federal Rules and state laws); *see also* Whitten, *supra* note 56, at 12 ("A more complete salvation for the Rules had to await the Court's decision in *Hanna* . . .").

<sup>64</sup> *See* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 698-99 (1974) ("By essentially obliterating the Enabling Act in *Sibbach v. Wilson & Co.* in 1941, [the Court] created a need for limits on the Rules, a need it subsequently filled not by reconsidering *Sibbach*, but rather by an undefended application of the *Erie* line of precedents. . . . All that should have changed in 1965, however, with the decision in *Hanna* . . ."); *see also id.* at 720 ("[T]he text of the opinion did little more, so far as the interpretation of the Enabling Act was concerned, than point to *Sibbach*"); *id.* at 693 (noting that Professor Ely was a law clerk to Chief Justice Warren during the term that Warren authored the Court's opinion in *Hanna*).

<sup>65</sup> *Hanna*, 380 U.S. at 476 (Harlan, J., concurring) (cautioning against "setting up the Federal Rules as a body of law inviolate"). Thus, both the majority and, to the extent that he had the Enabling Act in mind, Justice Harlan perpetuated *Sibbach's* myth that federalism, rather than separation-of-powers, concerns animate the Enabling Act's limitations.

As a result, the Court's incentive to give Federal Rules a restrained interpretation shifted from the cloud of *Erie's* "brooding omnipresence" to the cloud of *Sibbach's* ever-more-evident inadequacy. Putting aside the concerns that in fact animated the Enabling Act's limitations and the goal of the *Sibbach* Court not to invite "endless litigation"<sup>66</sup> about the new Federal Rules, the interpretation of "substantive rights" as confined to "rights conferred by law to be protected and enforced in accordance with the adjective law of judicial procedure"<sup>67</sup> was increasingly out of touch with the way in which law was made and applied in the United States. So too was the notion that prospective supervisory court rules may displace the policy choices of lawmakers (federal or state) as long as they "really regulate[] procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."<sup>68</sup>

The 1960s and 1970s brought broad recognition of the inability of traditional two-party litigation, which depends upon the traditional market for legal services, to provide adequate enforcement of statutes designed to cure the imperfections of the common law, provide equal economic opportunity, or otherwise implement important social norms. Inclined to rely on litigation in place of, or in addition to, centralized administrative enforcement, lawmakers employed a variety of techniques—in addition to new liability rules—to stimulate private enforcement. These techniques included multiple (e.g., treble) or punitive damages, statutory damages, attorney-fee shifting, and, as we shall discuss in Part III concerning New York law, class actions. Although these techniques for stimulating private enforcement were not new, their incidence increased enormously in the period in question.<sup>69</sup>

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<sup>66</sup> See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941) ("If we were to adopt the suggested criterion of the importance of the alleged right [for the definition of "substantive rights"], we should invite endless litigation and confusion worse confounded.").

<sup>67</sup> *Id.* at 13.

<sup>68</sup> *Id.* at 14.

<sup>69</sup> See, e.g., *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) ("Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees."); *City of Riverside v. Rivera*, 477 U.S. 561, 574-80 (1986) (reasoning that Congress granted attorneys' fees under § 1988 because of the public benefit created by civil rights litigation); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980) (positing that the incentives class actions provide to lawyers are "a natural outgrowth of the increasing reliance on the 'private attorney general' for the vindication of legal rights"); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401-03 (1968) (explaining that attorneys' fees are necessary in Title II cases to encourage those injured by racial discrimination to

The disconnect between *Sibbach's* incomplete and dichotomous vision of the legal landscape and emerging legislative views about private enforcement was made obvious by the controversy that greeted the application of Rule 68 (Offer of Judgment) to cases governed by a federal fee-shifting statute and successive proposals to amend Rule 68 in the early 1980s. Although the Court simply ignored the Enabling Act question that the operation of the existing version of Rule 68 posed,<sup>70</sup> the proposals to amend it attracted vigorous and very public opposition. The first such proposal would have authorized the federal courts to displace legislative policy choices concerning attorney-fee shifting in federal question cases under the Civil Rights Acts, choices that Congress deemed essential to the adequate enforcement of those

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seek judicial relief); *Davis v. Werne*, 673 F.2d 866, 869 (5th Cir. 1982) (clarifying that statutory damages are available under the Truth-in-Lending Act to encourage “private attorneys general” to aid in its enforcement).

For a rich and fascinating study of private enforcement of federal statutes that uses both econometric techniques and detailed historical analysis to test the author’s hypotheses, see SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010). As Farhang documents, although Congress’s use of plaintiff fee shifting or multiple or punitive damages (or both) to stimulate private enforcement began in the second half of the nineteenth century, it exploded in the late 1960s and the 1970s. *See, e.g., id.* at 66 fig. 3.1. The author was kind enough to provide us with his database of federal statutes containing such enforcement tools. According to our tally, although only three federal statutes contained such provisions from 1887 to 1899, and only twenty-six did so between 1900 and 1959, ten statutes contained one or both in the period from 1964 to 1969, and sixty did so in statutes enacted between 1970 and 1979. Farhang shows that, contrary to one hypothesis, the preference for litigation over administrative enforcement has not always been confined to Democrats—indeed, Republicans were responsible for that choice in the Civil Rights Act of 1964—but that in periods of divided government, the preference for litigation consistently has reflected concern about over- or underenforcement if the administrative enforcement option were pursued (because an ideologically distant executive could subvert congressional preferences). *See id.* at 76-78, 81, 127.

<sup>70</sup> *See Marek v. Chesny*, 473 U.S. 1 (1985). The Court may have done so because Justice Brennan’s dissent (joined by Justices Marshall and Blackmun) made it clear that engaging that question would require repudiation of *Sibbach's* federalism account. *See id.* at 35-38 (Brennan, J., dissenting) (arguing that the Court’s interpretation of Rule 68 was inconsistent with § 1988). Although taking a different view of the merits than did the dissenters, the Solicitor General’s amicus brief also alerted the Court to *Sibbach's* inadequacies, citing both the 1926 Senate Report and the research that established the historical support for a separation-of-powers account of the Enabling Act’s limitations. *See* Brief for the United States as Amicus Curiae Supporting Petitioners, *Marek v. Chesny*, 473 U.S. 1 (1985) (No. 83-1437), 1984 WL 565432, at \*25 n.19 (“The legislative history of the Rules Enabling Act supports [the separation-of-powers] construction of section 2072.”); Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REFORM 425, 433 n.42 (1986) (suggesting that if the Court had addressed the Enabling Act issue in *Marek*, it might have had to reformulate its interpretation of the Act).

statutes. The second, albeit less obviously (because under the cloak of the sanctions label) and less intrusively, would nonetheless have authorized some displacement of congressional policy choices designed to stimulate private enforcement.<sup>71</sup> Both attracted attention and adverse comment in Congress and were influential in an ultimately unsuccessful attempt to prompt the Court to abandon *Sibbach*.<sup>72</sup>

#### D. *The Court's Incoherent Jurisprudence of Scope*

*Hanna's* reconfiguration of the *Erie* doctrine, while solving some problems, left the federal courts ill-equipped to interpret the scope of the Federal Rules during the very period when the potential impact of those Rules on important questions of liability and regulatory policy was becoming clear. In this respect, the Court had only itself to blame for the belief of some litigants and lower courts that *Hanna* had overruled *Ragan*.<sup>73</sup> For, ironically in light of Justice Scalia's responses to the concurring and dissenting opinions in *Shady Grove*,<sup>74</sup> the *Hanna* Court manufactured a "direct collision" by dissecting a Massachusetts statute that prescribed service of process as a means to toll its limitations period and misrepresenting the statute's paragraphs as designed to address limitations and service separately.<sup>75</sup> Presumably, the Court granted review in *Walker* to dispel the confusion for which it was re-

<sup>71</sup> See Burbank, *supra* note 70, at 426-30, 435-39 (discussing proposed amendments to Rule 68 and their effect on congressional policy choices); see also *Marek*, 473 U.S. at 38-41 (Brennan, J., dissenting) (providing an overview of discussions regarding amendments to Rule 68).

<sup>72</sup> See H.R. REP. NO. 99-422, at 13 (1985) (discussing the criticism of the 1983 and 1984 proposals to amend Rule 68); Burbank, *Hold the Corks*, *supra* note 12, at 1031-33 (discussing the House Judiciary Committee Report on the bill that subsequently served as the cornerstone of the 1988 amendments); Burbank, *supra* note 70, at 438-40 (highlighting continued debates regarding the amendment of Rule 68).

<sup>73</sup> See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 n.8 (1980) ("Mr. Justice Harlan in his concurring opinion in *Hanna* concluded that *Ragan* was no longer good law.").

<sup>74</sup> See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1440 (2010) ("But even accepting the dissent's account of the Legislature's objective at face value, it cannot override the statute's clear text."); *id.* at 1445 (Scalia, J., for himself, Roberts, C.J., and Thomas, J.) ("[*Sibbach*] leaves no room for special exemptions based on the function or purpose of a particular state rule.").

<sup>75</sup> See *Hanna v. Plumer*, 380 U.S. 460, 462-63 n.1; Burbank, *supra* note 5, at 1174 ("The court of appeals' gloss confirms what a fair reading of the statute as a whole suggests, namely that the statutory provisions in question were the functional equivalent of a tolling rule."); see also *Hanna*, 380 U.S. at 478 (Harlan, J., concurring) ("The evident intent of the statute is to permit an executor to distribute the estate which he is administering without fear that further liabilities may be outstanding for which he could be held personally liable."). This helps to explain why Justice Harlan thought that *Hanna* was indistinguishable from *Ragan* and that the latter should be overruled. See *id.* at 476-78.

sponsible. No longer saddled with *Erie* jurisprudence that cast the validity of Rule 3 in doubt, but saddled instead with *Hanna's* retrospective explanation of *Ragan* as a reading of Rule 3,<sup>76</sup> the Justices sought to clarify the circumstances in which *Hanna's* test for the validity of a Federal Rule, which is virtually impossible to fail, and its test (in dictum) for the validity of judge-made federal law, which is very hard to satisfy, would apply. Unfortunately, the effort clarified nothing.

The *Walker* Court observed that *Hanna's* Federal Rule analysis applies only if "the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court,"<sup>77</sup> but it cautioned that courts should not narrowly construe Federal Rules "in order to avoid a 'direct collision'" when their "plain meaning" required otherwise.<sup>78</sup> Like the majority opinion in *Shady Grove*, the *Walker* Court's subsequent reasoning fortifies skepticism about the general utility of "plain meaning" interpretation. Rather than resting on the language of the Rule, the Court adduced the Advisory Committee Note and then read that Note tendentiously<sup>79</sup> when it concluded that "[t]here is no indication that the Rule was intended to toll a state statute of limitations."<sup>80</sup> Moreover, the Court addressed the policies underlying state law before concluding that "Rule 3 does not replace such policy determinations found in state law,"<sup>81</sup> not explaining how the plain meaning of Rule 3 could depend upon the content of state law. Finally and incredibly, when the Court confronted the operation of Rule 3 in a federal question case in *West v. Conrail*, it discovered a "plain meaning" that was altogether different.<sup>82</sup>

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<sup>76</sup> See *Hanna*, 380 U.S. at 470 & n.12 (citing *Ragan* as a case in which the Court found "the scope of [a] Federal Rule was not as broad as the losing party urged" so "*Erie* commanded the enforcement of state law"); Whitten, *supra* note 56, at 13 (explaining that *Hanna* reinterpreted *Ragan*).

<sup>77</sup> *Walker*, 446 U.S. at 749-50.

<sup>78</sup> *Id.* at 750 n.9.

<sup>79</sup> See *id.* at 750 n.10 ("[The Note] does not indicate . . . that Rule 3 was *intended* to serve as a tolling provision for statute of limitations purposes; it only suggests that the Advisory Committee thought that the Rule *might* have that effect."). "In fact, it is possible to infer from the published sources that the Advisory Committee intended Rule 3 to have a tolling effect, if that were within the Court's power under the Act." Burbank, *supra* note 5, at 1159 n.620.

<sup>80</sup> *Walker*, 446 U.S. at 750.

<sup>81</sup> *Id.* at 751-52.

<sup>82</sup> See *West v. Conrail*, 481 U.S. 35, 39 (1987) ("[W]hen the underlying cause of action is based on federal law and the absence of an express federal statute of limitations makes it necessary to borrow a limitations period from another statute, the action is not barred if it has been 'commenced' in compliance with Rule 3 within the borrowed period.").

Lurking beneath the surface of *Walker*, there may have been an awareness that even though *Sibbach*'s "test" for the validity of a Federal Rule under the Enabling Act could have supported a reading of Rule 3 that included a tolling function, categorical choices as to both the period of limitations and the event that tolls that period have a predictable and direct effect on rights under the substantive law (federal or state). By determining whether those rights subsist, policy choices about tolling and the limitations period thus abridge, enlarge, or modify substantive rights.<sup>83</sup> Lurking beneath the surface of *West*, on the other hand, may have been the view that the Enabling Act imposes no limitations in federal question cases, which seems unlikely if only because unthinkable. Alternatively, perhaps the *West* Court believed that Federal Rules are insulated against challenge under the Enabling Act when they incorporate or reflect rules that federal courts validly have fashioned or could fashion as federal common law—a more subtle approach, but one for which there is no evidence in the opinion.<sup>84</sup>

In an interpretive landscape where "direct collisions" are manufactured, the same language has multiple "plain meanings," and the governing precedent (*Sibbach*) is hopelessly out of step with legal developments, it is no surprise that, since *Walker*, the Justices have lurched from one extreme to the other, giving some Federal Rules a scope of application broader than appears plausible—certainly, broader than necessary to escape a charge of infidelity to the text—while emptying others of content. We strongly suspect that the unifying characteristic of these decisions has been an awareness that, although *Hanna* cleaned up some of the mess engendered (or facilitated) by *Erie*, it did not clean up enough.

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With sleight of hand that still leaves me blinking, the Court in *West* supplied a different "plain meaning" to Rule 3 for federal question cases and did not consider the Enabling Act problems that interpretation might be thought to present. In particular, the Court did not consider the fact that the original Advisory Committee, in a Note which had been quoted in *Walker*, feared such problems in both federal question and diversity cases.

Burbank, *Rules and Discretion*, *supra* note 12, at 702 (footnotes omitted).

<sup>83</sup> Cf. *Walker*, 446 U.S. at 751 ("In contrast to Rule 3, the Oklahoma statute is a statement of a substantive decision by that State that actual service on . . . the defendant is an integral part of the several policies served by the statute of limitations.").

<sup>84</sup> See Burbank, *Rules and Discretion*, *supra* note 12, at 703-09 (discussing this theory with reference to *West*). On the problem of incorporating in Federal Rules federal law that is (or was) valid under other sources of authority, see Burbank, *supra* note 5, at 1147-57, 1165-68. *West* may be viewed as an example of reverse incorporation—that is, using a Federal Rule as a source for a common law rule. It fares no better from that perspective. See *id.* at 1158-63 (examining tolling statutes and reverse incorporation).

In *Burlington Northern Railroad Co. v. Woods*,<sup>85</sup> the Court may have found it difficult to read Appellate Rule 38 (dealing with discretionary sanctions for frivolous appeals) to collide directly with state law (providing a mandatory ten-percent penalty when a stayed judgment is affirmed on appeal). The Court may thus have believed that it would have been necessary to apply the state statute under *Hanna*'s modified outcome-determination test.<sup>86</sup> The Court may also have believed, however, that federal law should control whether, when, and to what extent financial consequences attendant on continued lack of success shape losing federal court litigants' incentives to appeal. Or at least it may have so believed given the existence not only of Appellate Rule 38, on which it primarily relied, but also of 28 U.S.C. § 1912 (authorizing federal appellate courts to award delay damages and single or double costs to the prevailing party in their discretion),<sup>87</sup> Appellate Rule 37 (dealing with postjudgment interest),<sup>88</sup> and 28 U.S.C. § 1961 (dealing with prejudgment interest),<sup>89</sup> which it also cited.<sup>90</sup> That might explain why the Court in *Burlington Northern* framed "the initial step" as "to determine whether 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."<sup>91</sup> Moreover, it might explain why the Court focused not just on the fact that Appellate Rule 38's "discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty,"<sup>92</sup> but also on the fact that "the purposes underlying

<sup>85</sup> 480 U.S. 1 (1987).

<sup>86</sup> See Whitten, *supra* note 56, at 35-41 (discussing the questions raised by *Burlington Northern*, including those raised by Rule 38).

<sup>87</sup> 28 U.S.C. § 1912 (2006).

<sup>88</sup> FED. R. APP. P. 37.

<sup>89</sup> 28 U.S.C. § 1961.

<sup>90</sup> See *Burlington Northern*, 480 U.S. at 4, 7 n.5.

<sup>91</sup> *Id.* at 4-5 (quoting *Walker*, 446 U.S. at 749-50 & n.9). The problem is that the question "whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court," *Walker*, 446 U.S. at 749-50, and the question whether there is a "direct collision," *id.* at 750 n.9, between the Federal Rule and state law, are not obviously the same question, even though the *Walker* Court seemed to conflate them.

Logic indicates, . . . and a careful reading of the relevant passages confirms, that [the "direct collision"] language is not meant to mandate that federal law and state law be perfectly coextensive and equally applicable to the issue at hand; rather, the "direct collision" language, at least where the applicability of a federal statute is at issue, expresses the requirement that the federal statute be sufficiently broad to cover the point in dispute.

*Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 26 n.4 (1988).

<sup>92</sup> *Burlington Northern*, 480 U.S. at 7.

the Rule are sufficiently coextensive with the asserted purposes of the Alabama statute to indicate that the Rule occupies the statute's field of operation so as to preclude its application in federal diversity actions."<sup>93</sup>

On this view, whereas the *Walker* Court was preoccupied by conflict preemption, the *Burlington Northern* Court was, tentatively and alternatively, suggesting the possibility of field preemption. Moreover, in doing so, the Court relied on an analysis of the purposes underlying the respective laws in determining whether federal and state law could coexist.<sup>94</sup> The opinion would have been more persuasive if the Court had explicitly relied on all of the statutes and Federal Rules deemed pertinent, including presumably the statutes governing federal appellate jurisdiction, and if it had discussed policy considerations in addition to judicial discretion.<sup>95</sup> If the Court had understood that the analysis of scope involves reasoning akin to that underlying federal common law that is designed to implement the purposes and policies of federal statutes and Federal Rules,<sup>96</sup> it could have made a major contribution to the jurisprudence in the area, a matter we pursue further below. Instead, its unanimous opinion led one acute ob-

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<sup>93</sup> *Id.*; cf. *Stewart*, 487 U.S. at 30 ("Our cases make clear that, as between these two choices in a single 'field of operation,' the instructions of Congress are supreme." (citation omitted)).

<sup>94</sup> See *Burlington Northern*, 480 U.S. at 4 (purposes of state mandatory affirmance penalty); *id.* at 7 (purposes of Rule 38).

<sup>95</sup> See Whitten, *supra* note 56, at 22 (criticizing the Court's response to the fact that Alabama had a rule akin to Appellate Rule 38); *id.* at 23 (noting that an interpretation of Appellate Rule 38 as implicitly "negating the power to impose penalties for unsuccessful appeals in cases not expressly covered by its terms" would have to distinguish *Cohen*); *id.* at 23 n.117 (acknowledging that 28 U.S.C. § 1912 presented a "more plausible case for implied negation," but noting that the Court did not discuss it); *id.* at 25 ("To interpret Federal Rule 37 and 28 U.S.C. § 1961 as sufficiently broad in scope to cover the ground covered by the Alabama statute, one would again have to interpret the language of the federal provisions as impliedly negating the operation of all other laws that compensate a victorious appellee for loss of use of the judgment proceeds during the course of an unsuccessful appeal."). Professor Whitten thus separately responded to elements that in combination might have yielded a persuasive opinion. Note, moreover, that his consideration of the possible influence of federal jurisdictional policy was part of an analysis of the proper result if there were no pertinent Federal Rule, was hobbled by the uncertain status of *Byrd*, and did not distinguish between conflict and field preemption. See *id.* at 38-41.

<sup>96</sup> See Burbank, *Interjurisdictional Preclusion*, *supra* note 12, at 812-17 (discussing circumstances in which state law borrowed as federal common law should be displaced and distinguishing between "cases in which state preclusion law yields to federal common law in domestic litigation because a particular state rule is found hostile to or inconsistent with a particular federal substantive policy," and "occasions when state law is at odds, not with specifically identifiable federal substantive policies, but with the sum of such policies, that is, a scheme of federal substantive rights as a whole").

server to worry that “analysis of Federal Rules–state law conflicts ha[d] reached a dead end in the Supreme Court.”<sup>97</sup>

Conversely, in *Gasperini v. Center for Humanities, Inc.*,<sup>98</sup> with Justice Scalia (joined by two other dissenting Justices) contending that Rule 59 was in “direct collision” with state law regarding the standard judges should apply in ruling on motions for a new trial based on the asserted excessiveness of the verdict,<sup>99</sup> the Court reasoned that “there [was] no candidate for [governance of the question whether damages are excessive] other than the law that gives rise to the claim for relief.”<sup>100</sup> In support, the Court cited, inter alia, the Enabling Act and commentary noting that the Court had “interpret[ed] the federal rules to avoid conflict with important state regulatory policies.”<sup>101</sup>

Finally, in *Semtek International, Inc. v. Lockheed Martin Corp.*,<sup>102</sup> the Court acknowledged that reading Rule 41(b) to prescribe a rule of preclusion that had interjurisdictional effect “would arguably violate”<sup>103</sup> the Enabling Act and “would in many cases violate the federalism principle of *Erie*.”<sup>104</sup> Rather than directly confronting those problems and, in the process, revisiting *Sibbach*’s impoverished account of “substantive rights,” the Court engaged in a process that can only charitably be described as interpretation and only in Wonderland as an exercise in “plain meaning” interpretation. The Court reasoned that Rule 41(b), which prescribes the effect of an involuntary dismissal, speaks only to the ability of a claimant to “return[] later, to the same court, with the same underlying claim.”<sup>105</sup> The opinion rummaged in dictionaries and

<sup>97</sup> Whitten, *supra* note 56, at 41.

<sup>98</sup> 518 U.S. 415 (1996).

<sup>99</sup> *See id.* at 467-68 (Scalia, J., dissenting) (quoting *Burlington Northern*, 480 U.S. at 5). Readers who are struck by the radical inconsistency between Justice Scalia’s approach for the Court in *Shady Grove* and his approach for the Court in *Semtek*, *see infra* text accompanying notes 102-06, should compare his dissenting opinions in *Gasperini* and *Stewart*. Indeed, the passage in Justice Ginsburg’s opinion for the Court in *Gasperini* that is quoted in the text following this footnote may have drawn inspiration from Justice Scalia’s dissent in *Stewart*. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 35 (1988) (Scalia, J., dissenting) (“[T]he Court’s description of the issue begs the question: what law governs whether the forum-selection clause is a *valid* or *invalid* allocation of any inconvenience between the parties.”).

<sup>100</sup> *Gasperini*, 518 U.S. at 437 n.22.

<sup>101</sup> *Id.* at 438 n.22 (quoting RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 729-30 (4th ed. 1996)).

<sup>102</sup> 531 U.S. 497 (2001).

<sup>103</sup> *Id.* at 503.

<sup>104</sup> *Id.* at 504.

<sup>105</sup> *Id.* at 505.

engaged in multiple wordplays to reach a result that is demonstrably erroneous according to two very different interpretive techniques, including one that Justice Scalia, the author of the Court's opinion, usually favors: the exercise of logic in divining "plain meaning."<sup>106</sup>

### E. *Reinterpreting the Enabling Act*

Thus, as we pursue further in Part III, the *Shady Grove* Court's wooden interpretation of Rule 23 was hardly ordained by precedent. Moreover, although the Court has never held a Federal Rule invalid, that is hardly cause for the institutional self-satisfaction that Justice Scalia's opinion manifests.<sup>107</sup> The limitations in question, after all, concern the powers of the very institution that is interpreting them.<sup>108</sup> Moreover, the Congress that allowed the original Federal Rules to go into effect notwithstanding the objection of Senate leaders was assured that "the Court will be zealous to correct its mistake, if any has been made."<sup>109</sup> And, as part of the successful campaign to persuade

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<sup>106</sup> See Stephen B. Burbank, Semtek, *Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1039-47 (2002) (describing the discussion of Rule 41(b) in *Semtek*). As demonstrated there, the published and unpublished record concerning Rule 41(b)'s intended meaning contradicts the Court's interpretation. *Id.* at 1042-46. In addition,

[f]or those who are not disposed to consult or consider such materials, the Court's error (as a matter of interpretation) in confining the effects of a Rule 41(b) dismissal to the rendering court seems clear in light of the following consideration: if that had been the intended ambit of the rule, it would not have made sense to except dismissals for lack of jurisdiction and improper venue, since under the doctrine of direct estoppel (issue preclusion), the plaintiff would have been precluded from refiling the case in the same court in any event.

*Id.* at 1046-47 (footnotes omitted).

<sup>107</sup> See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1131, 1447 (2010) (Scalia, J., for himself, Roberts, C.J., and Thomas, J.) ("Undoubtedly some hard cases will arise (though we have managed to muddle through well enough in the 69 years since *Sibbach* was decided."); see also *id.* at 1442 (Scalia, J., for himself, Roberts, C.J., Thomas, J., and Sotomayor, J.) ("Applying [the *Sibbach* 'really regulates procedure' test, we have rejected every statutory challenge to a Federal Rule that has come before us.").

<sup>108</sup> See Burbank, *supra* note 5, at 1101-02 ("The statutory limitations in question were intended to confine the power of the Court itself, a fact that requires that the Court ever be open to the reconsideration of past interpretations on sufficient demonstration that it has erred in interpreting the statute's meaning."); Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1687 (1974) (noting the "inherent tendency of any institution to extend its own reach and power").

<sup>109</sup> Letter from Edgar B. Tolman to the Honorable Joseph C. O'Mahoney, the Honorable William H. King, the Honorable Edward R. Burke, and the Honorable Warren R. Austin (May 26, 1938), reprinted in *Hearings on S.J. Res. 281 Before a Subcomm. of the S. Comm. on the Judiciary*, 75th Cong., pt. 2, app. at 72 (1938).

the House not to insist on repeal of the supersession clause in the 1988 amendments to the Enabling Act, Chief Justice Rehnquist wrote a letter asserting that the Judicial Conference and its committees "have always been keenly aware of the special responsibility they have in the rules process and the duty incumbent upon them not to overreach their charter."<sup>110</sup> In addition, as suggested above, the failure to find a violation of the Enabling Act has frequently been made possible through Federal Rule interpretations that were restrained without being enlightened, many of which reflected implicit acknowledgment of the inadequacy of *Sibbach*, both in its federalism account of the Enabling Act's limitations and its narrow view of the substantive rights that are protected.

As in *Sibbach* itself, the Court was made aware of the former defect in *Marek v. Chesny*,<sup>111</sup> and both Justice Brennan's dissent in that case<sup>112</sup> and Justice Kennedy's dissent in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*<sup>113</sup> made it plain that separation-of-powers values must be served if the Enabling Act is not to be a dead letter in federal question cases. Moreover, since the research that uncovered the historical support for a separation-of-powers account was published, many, if not most, commentators have acknowledged that *Sibbach's* federalism account is erroneous.<sup>114</sup> This view is also clearly reflected in the legislative history of the 1988 amendments to the Enabling Act,<sup>115</sup> which the Court has never deigned to cite, for obvious reasons.

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With the exception of cases in which it has read Federal Rules not to apply, however, the main thing the Supreme Court has been zealous about in considering challenges to their validity has been taking cover behind the process employed prior to their effective date, particularly that part of it permitting congressional review.

Burbank, *supra* note 5, at 1179.

<sup>110</sup> Letter from the Honorable William H. Rehnquist to the Honorable Peter W. Rodino, Jr. (Oct. 19, 1988), reprinted in 134 CONG. REC. 31,873-74 (1988). *But see* Burbank, *Hold the Corks*, *supra* note 12, at 1038 n.163 (arguing that the rulemakers have "not always been keenly aware of" their duties).

<sup>111</sup> 473 U.S. 1 (1985).

<sup>112</sup> *See supra* note 70 (discussing Justice Brennan's dissent).

<sup>113</sup> 498 U.S. 533, 554-70 (1991) (Kennedy, J., dissenting); *see also id.* at 565 ("But Congress wanted the definition of substantive rights left to itself in cases where federal law applies, or to the States where state substantive law governs.")

<sup>114</sup> *See, e.g.,* Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 92 (1998) (stating that the separation-of-powers account is now "generally accepted," supplanting the "myth of federalism").

<sup>115</sup> *See* H.R. REP. NO. 99-422, at 20-21 (1985) ("[I]t is not the purpose of proposed section 2072 merely to restate whatever may be the constitutional restraints on the exercise of Congress' lawmaking power as against that of the States . . ."). This Report

Virtually incoherent as an example of the interpretive technique it prescribes, both standing alone and when paired with *West v. Conrail*, the *Walker* decision appears to reflect doubts about *Sibbach*'s adequacy in limning the substantive rights that are relevant under the Enabling Act. Further, the *Marek* Court's ostrich approach notwithstanding, Justice Brennan's dissent in that case, which included discussion of congressional views rejecting proposals to amend Rule 68 on the ground that federal attorney-fee shifting provisions confer a substantive right, is additional evidence supporting such doubts.<sup>116</sup> The law that determines "whether damages are excessive"<sup>117</sup> for purposes of a motion for a new trial is not unambiguously within the narrow reach of substantive law that *Sibbach* shields from prospective supervisory court rulemaking. Nonetheless, the *Gasperini* Court cited the Enabling Act as the first item of support for a reference to state law.<sup>118</sup> Finally, Justice Scalia's opinion in *Semtek* suggests that, if he had not rewritten Rule 41(b), the Court would have held that it violated the Enabling Act. If so, however, that would not have been because rules of preclusion are rules of substantive law in the *Sibbach* sense.<sup>119</sup>

Since there was no majority opinion on the interpretation of the Enabling Act in *Shady Grove*, it remains possible that the Court will find an occasion to reconsider *Sibbach* in the foreseeable future. If so, we hope that the occasion will be a case in which, as in *Marek* and *Business Guides*, federal substantive law governs. For if the Court accepts, as realistically it must, that the Enabling Act is not a dead letter in federal question cases, that may make it easier to accept what the historical record underlying both the 1934 Act and the 1988 amendments establishes: the primary purpose of the Enabling Act's procedure/substance dichotomy is to allocate prospective federal lawmaking between the Supreme Court and Congress, not to protect lawmaking choices already made, and certainly not to protect state lawmaking choices exclusively. To be sure, allocation standards may have the salutary effect of protecting existing lawmaking choices. Indeed, it is reasonable to impute to Congress a concern for protecting state lawmaking choices that affect state substantive rights, since that body often invokes federalism as warranting solicitude for state pre-

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was "specifically incorporated by reference in the Report of the 1988 House bill." Burbank, *Hold the Corks*, *supra* note 12, at 1031.

<sup>116</sup> See *supra* note 70.

<sup>117</sup> *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 437 n.22 (1996).

<sup>118</sup> See *supra* text accompanying notes 98-101.

<sup>119</sup> See *supra* text accompanying notes 102-06.

rogatives. But that is a secondary consequence of the Enabling Act's primary concern, which is preventing the Supreme Court, exercising delegated legislative power to promulgate court rules, from encroaching upon Congress's lawmaking prerogatives. Once this is clear, it is easier to see that Professor Ely's work on the Enabling Act,<sup>120</sup> although helpful in showing how *Hanna* disaggregated the "Erie problem," proposed the wrong path for dealing with *Sibbach's* inadequacies, and *Hanna's* as well.<sup>121</sup>

The path is wrong because it perpetuates the federalism myth that *Sibbach* initiated and *Hanna* reaffirmed. It is also wrong because, not laid out to reflect that the Act exists primarily to allocate lawmaking power prospectively, it leads those who take it to seek substantive rights in the wrong places. Ironically, in a number of cases where we believe that the realization of *Sibbach's* inadequacy influenced the decision, the Court followed that wayward path in seeking to ascertain the rights that call for protection. As an example, the problem with court rulemaking on the tolling rules for statutes of limitations is not that some such rules are themselves "substantive," as the Court suggests in *Walker* when discussing state statutes.<sup>122</sup> It is rather that the lawmaking choices required when framing all such rules may predictably and directly affect rights under the substantive law to which the limitations periods in question pertain—abridging, enlarging, or modifying those rights, federal or state. The same is true of preclusion rules, a fact that the *Semtek* Court, or at least Justice Scalia, may have grasped but chose to avoid by turning Rule 41(b) into something that those who drafted it would not have recognized.

Indeed, we think Justice Scalia likely did understand that preclusion rules would violate the Enabling Act, and he may even have seen that there was a way to reach that conclusion under *Sibbach* and its progeny. After all, the *Sibbach* Court left open the possibility that prospective supervisory court rules that ostensibly regulate the litigation process might be invalid because they in fact regulate rights under the substantive law "in the guise of regulating procedure."<sup>123</sup>

<sup>120</sup> Ely, *supra* note 64, at 718-40.

<sup>121</sup> See Burbank, *Hold the Corks*, *supra* note 12, at 1017-18 (arguing that Ely's "approach substitutes restrictions on rule application for restrictions on rule formulation"); Burbank, *supra* note 5, at 1122-23, 1127 n.510, 1180-81, 1187-88, 1191 n.752 (detailing the flaws in Ely's approach).

<sup>122</sup> See *supra* text accompanying note 12.

<sup>123</sup> See *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 10 (1941) ("The first [proviso or caveat in the Enabling Act] is that the court shall not 'abridge, enlarge, nor modify substantive rights,' in the guise of regulating procedure."). For other routes to a nar-

Moreover, in the *Murphree* case, which the *Hanna* Court also cited (in addition to citing *Sibbach*),<sup>124</sup> the Court left open the possibility that court rules regulating procedure in the *Sibbach* sense might nonetheless be invalid if they had greater than “incidental effects” on the enforcement of the substantive law.<sup>125</sup> In addition, the *Murphree* Court’s reliance on postpromulgation statements “by the authorized spokesmen for the Advisory Committee”<sup>126</sup> suggested that the purpose of the drafters is relevant in determining meaning and validity.

To be sure, these signals were muted by the Court’s subsequent reasoning that, although Rule 4(f) “will undoubtedly affect those [substantive] rights . . . it does not operate to abridge, enlarge or modify the rules of decision by which th[e] court will adjudicate its rights.”<sup>127</sup> Still, there should have been no doubt about the substantive rights that are relevant. Moreover, decisions rejecting Enabling Act challenges to Rule 11, in which the Court effectively responded to attempts by lower-court judges to turn that rule into either “a fee-shifting statute” or a collection of torts,<sup>128</sup> suggest the practical utility

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rowing construction of *Sibbach*, see Burbank, *supra* note 5, at 1029 n.59, 1033 n.71, 1195. See also Burbank, *supra* note 70, at 432.

The examples the concurrence offers—statutes of limitations, burdens of proof, and standards for appellate review of damages awards—do not make its broad definition of substantive rights more persuasive. They merely illustrate that in rare cases it may be difficult to determine whether a rule “really regulates” procedure or substance. If one concludes the latter, there is no pre-emption of the state rule; the Federal Rule itself is invalid.

*Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1446 n.13 (2010) (Scalia, J., for himself, Roberts, C.J., and Thomas, J.).

<sup>124</sup> See *Hanna v. Plumer*, 380 U.S. 460, 464-65 (1965).

<sup>125</sup> See *Mississippi Publ’g Corp. v. Murphree*, 326 U.S. 438, 445 (1946) (“Congress’ prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights.”); see also *Burlington N. R.R. v. Woods*, 480 U.S. 1, 5 (1987) (“Rules which incidentally affect litigants’ substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules.”).

<sup>126</sup> *Murphree*, 326 U.S. at 444.

<sup>127</sup> *Id.* at 446.

<sup>128</sup> See *Bus. Guides, Inc. v. Chromatic Commc’ns Enters., Inc.*, 498 U.S. 533, 553 (1991) (“Rule 11 is not a fee-shifting statute . . .”); *id.* (“Also without merit is Business Guides’ argument that Rule 11 creates a federal common law of malicious prosecution.”); *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 409 (1990) (“Rule 11 is not a fee-shifting statute . . .”). Among the lower-court opinions these decisions implicitly rejected, see, for example, *Hays v. Sony Corp. of Am.*, 847 F.2d 412, 418-19 (7th Cir. 1988), and *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987). See also AM. JUDICATURE SOC’Y, RULE 11 IN TRANSITION: THE REPORT OF THE

of staying alert to rulemaking or interpretation “in the guise of regulating procedure.”<sup>129</sup> Like *Marek*, they also suggest that “rules of decision” do not exhaust the universe of relevant substantive rights.

In Justice Scalia’s plurality opinion in *Shady Grove*, he correctly declined to make the validity of a Federal Rule turn on a particularistic and after-the-fact analysis of the policies underlying state law prescriptions on the very matter that the Federal Rule covered.<sup>130</sup> As one of us has previously observed in language very similar to Justice Scalia’s, that is a recipe for state laws of identical content, but animated by different policies, to render a Federal Rule “valid in one state and not in another, here today, gone tomorrow.”<sup>131</sup> Apart from its erroneous attention exclusively to state law, such an interpretation is hardly consistent with the vision of uniform and simple Federal Rules that animated the movement that brought us the Enabling Act.

Yet to say that a Federal Rule that was valid when promulgated (because reasonably thought not to make choices that predictably and directly affect rights under the substantive law) is forever after invulnerable to attack is neither necessary nor attractive as an alternative. Moreover, we part company with Justice Scalia when he extends his disdain for differential validity to the possibility of differential application.<sup>132</sup> That is, we believe that the application of a Federal Rule may

THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 10-13, 35-36 (Stephen B. Burbank rep., 1989) (criticizing the lower-court decisions).

<sup>129</sup> *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941). The same is true of the 1984 proposal to amend Rule 68, where the rulemakers hoped that by calling the consequences a sanction instead of fee shifting, they could avoid Enabling Act difficulties. See Burbank, *supra* note 70, at 428-29 (“What is in a word? A lot in this case, because that word carries with it baggage the rulemakers hope will insulate them from their critics.”).

<sup>130</sup> *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1444 (2010) (Scalia, J., for himself, Roberts, C.J., Thomas, J., and Sotomayor, J.).

The fundamental difficulty with both these arguments is that the substantive nature of New York’s law, or its substantive purpose, *makes no difference*. A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes).

*Id.*

<sup>131</sup> Burbank, *supra* note 5, at 1188.

<sup>132</sup> See *Shady Grove*, 130 S. Ct. at 1440-41 (majority opinion) (“[The dissent’s approach] would mean . . . that one State’s statute could survive pre-emption (and accordingly affect the procedures in federal court) while another State’s identical law would not, merely because its authors had different aspirations.”). The extension is fainthearted because it is dependent on whether a Federal Rule is thought to be ambiguous. See *id.* at 1442 n.7 (“[I]t is reasonable to assume that ‘Congress is just as concerned as we have been to avoid significant differences between state and federal

vary not according to the putative policies underlying state law on the same matter, but rather according to the structure and operation of state law as it interacts with and is implemented by the litigation process. Because schemes of substantive rights are not uniform, the respect for such schemes that the Enabling Act enjoins may require just such differential application.

There are limits to human foresight when engaged in prospective lawmaking, particularly when the lawmaking in question is transsubstantive. Over time, as thinking about law, litigation, and civil law enforcement has evolved, so has our understanding of what it means to have legal rights. We now better understand what in the legal landscape—in addition to rules defining rights and duties—determines whether citizens will be able to fructify their legal rights. Federal and state choices regarding matters like attorneys’ fees, when designed to affect the existence or extent of the enforcement of legal rights and duties, should be protected against infringement by Federal Rules. It is likely that those who promoted the bill that became the Enabling Act would have agreed. As one of us previously noted in explaining why the 1984 proposal to amend Rule 68 presented serious Enabling Act questions,

[T]here is evidence that those in Congress who drafted and gave serious attention to the bill that became the Enabling Act did not regard substantive law in this [i.e., *Sibbach’s*] sense as the only area to be avoided in or protected from supervisory court rulemaking. The 1926 Senate Judiciary Committee noted that “[s]ome of our most valued civil liberties have been obtained through the creation by legislative edict of mere remedial measures.” In its view, the grant of rulemaking power did not extend to “matters involving substantive legal and remedial rights affected by the considerations of public policy.” The Committee included in the category of remedial choices thus reserved for Congress [or the States] those that “define[] or limit[] . . . civil rights . . . using that term in the broad sense.”<sup>133</sup>

The legislative history of the 1988 amendments is to the same effect.<sup>134</sup>

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courts in adjudicating claims.’ The assumption is irrelevant here, however, because there is only one reasonable reading of Rule 23.”) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 37-38 (1988) (Scalia, J., dissenting)).

<sup>133</sup> Burbank, *supra* note 70, at 433 (alterations in original) (quoting S. REP. NO. 69-1174 at 9, 12 (1926)).

<sup>134</sup> The House Committee on the Judiciary reported that

the substantive rights protected by proposed section 2072 include rights conferred, or that might be conferred, by rules of substantive law, such as “the right not to be injured . . . by another’s negligence” or the right not to be subject to discrimination in employment on the basis of race. Thus, the bill does

Bringing *Sibbach* into the twenty-first century need not lead to the replication of the “here today, gone tomorrow” problem that repelled Justice Scalia. For just as the transsubstantive character of the Federal Rules limits the rulemakers’ ability to predict with confidence when the choices they make today might consequentially (i.e., not “incidentally”) affect the enforcement of federal and state substantive law in the future, so too it contributes to the high level of generality of the rules themselves. Many, if not most, of the Federal Rules are charters for discretionary decisionmaking, setting boundaries and leaving the actual choices to federal trial judges. To that extent, they are only superficially uniform and superficially transsubstantive.<sup>135</sup> The uniformity at which the Enabling Act aims must be measured in pragmatic terms, neither fatally undermined by an approach that focuses on policies underlying state law on the same issue, nor cemented by jingoistic dogma heedless of the evolving realities of court rulemaking and litigation practice—the fatal flaw of Justice Scalia’s opinion for the majority in *Shady Grove*, as we discuss in Part III.

Unless a Federal Rule alleged to violate the Enabling Act actually makes a policy choice that Congress has had an opportunity to review (and since the 1980s, that would have been the subject of an elaborate, multistage process involving notice, the opportunity for comment, and other requirements designed to enhance transparency and accountability),<sup>136</sup> the role that federal common law plays in providing

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not confer power on the Supreme Court to promulgate rules regarding matters, such as limitations and preclusion, that necessarily and obviously define or limit rights under the substantive law. The protection extends beyond rules of substantive law, narrowly defined, however. At the least, it also prevents the application of rules, otherwise valid, where such rules would have the effect of altering existing remedial rights conferred as an integral part of the applicable substantive law scheme, federal or state, such as arrangements for attorney’s fees under 42 U.S.C. 1988.

H.R. REP. NO. 99-422, at 21-22 (1985) (footnotes omitted); see also Burbank, *Hold the Corks*, *supra* note 12, at 1032-33 (citing the legislative history of the 1988 amendments).

<sup>135</sup> See Burbank, *Rules and Discretion*, *supra* note 12, at 716.

If one admits that only a lawyer can think about procedure and substantive law as if they were distinct preserves, that modern federal procedure is complex and in large measure unpredictable, and that the Federal Rules are in similar measure only superficially uniform and trans-substantive, alternative reform strategies appear in sharper focus.

*Id.*

<sup>136</sup> See generally Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1102 (2002) (“Congress’s delegation of rulemaking authority should constrain, rather than liberate, courts’ interpretation of the Rules.”).

content that the rulemakers did not prospectively entertain should be recognized and analyzed accordingly. Thus, the *Gasperini* Court was right in refusing, and Justice Scalia was quite wrong in seeking, to assimilate to Rule 59 a policy choice that its drafters did not make and that federal common law could not make for state law diversity cases.<sup>137</sup>

In urging resort to federal common law as a means to discipline, by testing the validity of, policy choices sought to be imputed to Federal Rules which do not clearly make them,<sup>138</sup> we hasten to add that we are not speaking of the unifocal, hypothetical federal common law associated with *Hanna's* dictum, *Walker*, and subsequent cases that have found Federal Rules not to apply. One of the costs of *Hanna* has been to discourage rigorous thinking about the relationship between Federal Rules and federal common law. Alternatively, sloppy thinking about that relationship has contributed to the degraded state of *Hanna* jurisprudence. *Byrd* was undoubtedly imperfect, but it was correct when it said that one must consider “affirmative countervailing considerations,”<sup>139</sup> properly conceived, in determining whether federal common law may validly be applied.

Rule 23 was not the source of the limitations-tolling rule that the Court announced in *American Pipe & Construction Co. v. Utah*<sup>140</sup> nor of

<sup>137</sup> See Burbank, *supra* note 70, at 437 (“When a Federal Rule confers substantial discretion on the trial judge, it is hard to understand why an exercise of that discretion should not be required to be consistent with federal statutes—that is treated like federal common law.”); see also Burbank, *supra* note 5, at 1193 & nn.762-63 (describing the “lawmaking choices” related to the Federal Rules). For a somewhat similar approach, which in our view does not deploy an adequately robust concept of federal common law, see Adam N. Steinman, *What Is the Erie Doctrine? (and What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245 (2008). See also *id.* at 282-87, 297-301 (treating aspects of pleading, summary judgment, and class certification as “unguided *Erie* choices”); Lucas Watkins, *How States Can Protect Their Policies in Federal Class Actions*, 32 CAMPBELL L. REV. 285, 297-98 (2010) (“Because [interpretive] results are not dictated by the Federal Rules, but rather by judicial gloss, they should not be protected by the Rules’ presumption of validity. Instead, federal interpretations of Rule 23 should be treated as an ‘unguided *Erie* choice between state and federal law.” (footnotes omitted) (quoting Steinman, *supra*, at 287)).

<sup>138</sup> Cf. Struve, *supra* note 136, at 1102 (arguing that consideration of all of the aspects of the post-1980s Enabling Act process suggests less, rather than greater, freedom in interpreting the Federal Rules).

<sup>139</sup> *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958); see also *supra* note 62.

<sup>140</sup> 414 U.S. 538 (1974).

Even though Rule 23 does not and could not validly provide a tolling rule, in devising such a rule “not inconsistent with the legislative purpose,” the Court was not required to ignore the policies exogenous to limitations that animate Rule 23, including in particular the policy against “multiplicity of activity.”

the rule of preclusion that it announced in *Cooper v. Federal Reserve Bank of Richmond*.<sup>141</sup> Rather, the application of Rule 23 in those proceedings was the occasion for the Court to implement class action policies in federal common law that it was otherwise authorized to make. Whether the same policies would suffice with respect to either question to justify a federal judge-made rule different from a state rule in a state law diversity case is a difficult question. The same is true, as another example, of the question whether Rule 13(a) can be used to support the application of a federal common law rule of preclusion, waiver, or estoppel to a defendant's failure to assert a transactionally related counterclaim in federal diversity litigation when the state in which the court sits imposes no such requirement. Using Rule 13(a) in that manner would presumably need to be justified by its non-preclusion policies, such as the quest for enhanced accuracy in the resolution of related claims.<sup>142</sup>

Using federal common law "to discipline, by testing the validity of, policy choices sought to be imputed to Federal Rules which do not clearly make them"<sup>143</sup> is one way to make sense of the *Hanna* Court's observation that "a court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts."<sup>144</sup> It also would make sense, without in-

Burbank, *Hold the Corks*, *supra* note 12, at 1027-28 (footnotes omitted) (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551 (1974)).

<sup>141</sup> 467 U.S. 867 (1984); *see also* Burbank, *Interjurisdictional Preclusion*, *supra* note 12, at 773 ("In authorizing the Court to promulgate Federal Rules, Congress must have contemplated that the federal courts would interpret them, fill their interstices, and, when necessary, ensure that their provisions were not frustrated by other legal rules.").

<sup>142</sup> *See* Burbank, *Interjurisdictional Preclusion*, *supra* note 12, at 774 n.195 (noting that Rule 13(a) "might be animated by procedural purposes within the contemplation of the Rules Enabling Act"); *id.* at 772-73, 782 (noting that Rule 13 does not "provide a rule of preclusion" and describing the Rule's origins); *see also id.* at 782-83 & n.242 (discussing penalty dismissals under Rule 41(b), as to which "there is a federal interest relating solely to the initial litigation that justifies a federal [judge-made] rule"); Stephen B. Burbank, *Where's the Beef? The Interjurisdictional Effects of New Jersey's Entire Controversy Doctrine*, 28 RUTGERS L.J. 87, 115-16 (1996) (exploring whether the "federal interests [underlying Rule 19] are sufficiently important, and the threat to those interests sufficiently plausible, to justify the displacement of" New Jersey's entire-controversy doctrine, which, if applicable, would prompt joinder in situations not required by Rule 19).

<sup>143</sup> *See supra* text accompanying note 138.

<sup>144</sup> *Hanna v. Plumer*, 380 U.S. 460, 473 (1965). This interpretation reads "in measuring a Federal Rule" to mean "in determining the scope of a Federal Rule." "This comment, however, cannot seriously be interpreted to import an outcome determina-

terpretive gymnastics, of the otherwise puzzling invocation of “the federalism principle of *Erie*” in Justice Scalia’s opinion for the Court in *Semtek*,<sup>145</sup> where, however, only such gymnastics could save Rule 41(b) from invalidity. Very occasionally it will be necessary to swallow misplaced pride, accept that a Federal Rule has made a forbidden policy choice, invalidate it, and move on.<sup>146</sup> If, however, the version of federal common law employed does not focus exclusively on the incentives or perceptions that differences in outcome create, this approach to the interpretation of Federal Rules should usually implement the important insight of Professor Cover about what it means to have trans-substantive rules of procedure.<sup>147</sup>

Even though Justice Scalia’s interpretation of the Enabling Act did not command a majority in *Shady Grove*, some of his approach is faithful to the original understanding. In particular, his insistence on a test for validity that does not depend on idiosyncratic aspects of state law rings true for a statute that was designed primarily to allocate federal lawmaking power *ex ante*, rather than to protect policy choices (let alone only state law policies) *ex post*. Laws that are idiosyncratic in one historical period, however, may become the norm in another. In addition, whether or not the traditional account of the relationship between formalism and realism is correct, the *Sibbach* Court analyzed the Enabling Act, as the original Advisory Committee justified its work, in monolithic dichotomous terms that no longer ring true (if they ever did). Even Congress has learned the power of procedure and knows how to pursue or mask substantive aims in procedural dress.<sup>148</sup>

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tive test of the *Guaranty Trust* variety into the Enabling Act given the Court’s other remarks, and if it does not do that, it is not clear what the Court had in mind.” Whitten, *supra* note 56, at 16-17 n.83.

<sup>145</sup> *Semtek Int’l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001); *see also supra* text accompanying notes 102-06 (discussing *Semtek*).

<sup>146</sup> *See Burbank, supra* note 106, at 1047 (“It might have been better, after all, to decide the Enabling Act question.”).

<sup>147</sup> *See* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 735 (1975) (advocating reading the Enabling Act “to mean that the courts, in applying the Federal Rules of Civil Procedure . . . may not forsake their responsibility to justify substantive impact in terms of substantive values [so that] [i]t would not be enough to point to Rule 23; one would have to justify invoking it”).

<sup>148</sup> *See* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1726 (2004).

The specific experience of the proposed Evidence Rules and a new jurisprudential climate combined to make members of Congress and their staffs aware of the potential of rulemaking choices to submerge substantive in favor of procedural policies, of supervisory court rulemaking to impinge on Con-

For both reasons, there is greater reason for anxiety today than there was in 1941 about an interpretation of delegated legislative power that reads language of limitation out of the statute. It is no surprise that the Court has ignored the attempt in 1988 to provide a standard more faithful to both the original understanding and evolving needs, both because the Court does not easily accept imposed limitations on its own power and because the attempt was confined to legislative history. Yet acknowledging that reasonable minds can differ about what the standard for the validity of a Federal Rule under the Enabling Act should be—albeit not about the primary goal of the allocation scheme employed—we hope to have made clear the need for moderate and restrained interpretation of Federal Rules that otherwise would impinge on the freedom of Congress or the States to pursue lawmaking aims that might traditionally be characterized as substantive through means that one might traditionally characterize as procedural.<sup>149</sup> The key to that approach is a nuanced appreciation of Federal Rules—one that, in the absence of express policy choices, resolves questions of scope by paying attention to what federal common law might achieve if the court could consider, in addition to outcome and the twin aims of *Erie*, federal policies demonstrably rooted in sources of unquestioned validity, including the Constitution, federal statutes, and Federal Rules.<sup>150</sup>

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gress's lawmaking prerogatives, and of procedure consequentially to affect substantive rights.

*Id.* Likewise,

for those many matters where the Federal Rules make no choices, leaving the procedure/substance accommodation to discretionary decisionmaking, the claim must be that Congress's substantive agenda is *always* better served by trusting to the discretion of federal judges and thus abjuring the potentially potent technique of using procedure to drive, or to mask, substance.

*Id.* at 1731-32.

<sup>149</sup> See *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 544 n.2 (1984) (Stevens, J., concurring in the judgment) (stating that a demand requirement in shareholder derivative litigation, "designed to improve corporate governance, is one of substantive law," and because Rule 23.1 "does not clearly create such a substantive requirement by its express terms, it should not be lightly construed to do so and thereby alter substantive rights"); see also *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96-97 (1991) (citing Justice Stevens's concurrence in *Daily Income Fund* with approval).

<sup>150</sup> "[T]he major obstacle to the development of principled guides to decision is the articulation of processes by which the competing policies are identified and decisional weight attached to them." Burbank, *Interjurisdictional Preclusion*, *supra* note 12, at 789. In our view, "[f]ederal courts are not free to conjure up 'interests'; rather, they must tie them to policies already articulated in, or at least articulable from, valid legal prescriptions." *Id.* at 789-90.

### III. RECAPTURING THE ROLE OF LIABILITY AND REGULATORY POLICY IN AGGREGATE LITIGATION

#### A. *Federal Rule 23*

The dynamic process of interpretation that we describe above, and that we believe is necessary for the sensible and faithful interpretation of rules promulgated under the limited delegation of authority that the Enabling Act contains, is hardly new. In fact, it provides an apt vocabulary for describing the terms of the debate that surrounded the promulgation of the 1966 revisions to Rule 23, as well as some of the calls for reform that followed those revisions. The tension between the potential for aggregate litigation to transform liability policy and the limited mandate of the Federal Rules has been one of the dominant themes in many discussions of the class action device. So too has an understanding that rigid formal categories are inadequate, indeed counterproductive, when one seeks to describe and justify the permissible bounds of a class action proceeding and the binding effect of a resulting judgment. That history makes all the more remarkable Justice Scalia's opinion for the majority in *Shady Grove*, which disregards the lessons of history and the realities of the present in favor of a formalistic description of the class action as nothing more than a joinder rule like any other.

The 1966 revisions to Rule 23 were preceded by a decades-long debate that centered largely on the binding or preclusive effect of the judgment a class proceeding produces, along with the manner in which the nature of the rights being asserted shaped that binding effect. As Professors Hazard, Geded, and Sowler have explained in detail, the modern class action had its origins in equity practice, which developed specialized proceedings for specific types of substantive actions that would allow a court to adjudicate claims affecting multiple parties despite the absence of some parties from the proceeding.<sup>151</sup> In the terminology associated with original Rule 23, the "true" class action was available to resolve rights deemed joint or common among class members, the "hybrid" action permitted the resolution of claims that were several in nature but respected a specific res or common property interest, and the disfavored "spurious" class action described proceedings in which class members possessed rights that were several in nature and not limited to a specific res but that nonetheless shared common issues of

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<sup>151</sup> See Geoffrey C. Hazard, Jr., John Geded & Stephen Sowler, *The Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998).

law or fact and a common request for relief.<sup>152</sup> In each case, the putative nature of the right at issue—a characterization that was often contested—determined the potential availability of expansive joinder and, an importantly distinct question, the potential for the judgment resulting from the proceeding to bind all class members.<sup>153</sup>

As originally drafted, Rule 23 sought to accommodate this taxonomy, setting forth a mechanism that enabled claimants to initiate a class proceeding in one of three categories that broadly tracked existing equity doctrine and explicitly tied the availability of a class proceeding to the “character of the right sought to be enforced”<sup>154</sup> while providing little additional guidance about how to administer the proceeding once it was underway. The Rule did not purport to define the “character of the right” that claimants possessed, of course—a matter that self-evidently fell outside the mandate of the Enabling Act. Neither did the Rule purport to define the binding or preclusive effect that would result from the judgment, a matter that was a more active topic of discussion. Professor Moore, the drafter of the 1938 Rule, had proposed including a subsection entitled “Effect of Judgment” that would have locked in place the prevailing doctrine on the respective preclusion rules applicable in each of the established categories of class proceeding.<sup>155</sup> The different treatment of preclusion law among these categories was significant. As Professor Kaplan has explained, Moore’s proposal would have “declar[ed] that the judgment in true actions was conclusive on the class; in hybrid actions, conclusive upon the appearing parties and upon all claims whether or not presented insofar as they affected the property; and in spurious actions, conclusive only upon the appearing parties.”<sup>156</sup> But the Advisory Committee on Civil Rules rejected the suggestion, believing that the power to specify the binding effect of a class judgment upon ab-

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<sup>152</sup> *Id.* at 1937-39.

<sup>153</sup> See Tobias Barrington Wolff, Tribute, *Geoffrey C. Hazard, Jr., and the Lessons of History*, 158 U. PA. L. REV. 1323, 1324-25 (2010) (noting the separate “provenance and . . . evolutionary path” of these distinct doctrines and the importance of Hazard et al.’s work in clarifying that history). The potential for “one way” spurious classes, in which class members could sit out the proceedings and wait to see the outcome, only choosing to appear and be bound if the result was favorable, was the focus of some of the most intense scrutiny. See Hazard et al., *supra* note 151, at 1857.

<sup>154</sup> FED. R. CIV. P. 23(a)(1)–(3) (1938).

<sup>155</sup> See James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570-76 (1937) (discussing the rejection of his “Effect of Judgment” proposal).

<sup>156</sup> Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 377-78 (1967) (footnotes omitted).

sentees exceeded their mandate: “The Committee consider it beyond their functions to deal with the question of the effect of judgments on persons who are not parties.”<sup>157</sup> Professor Moore instead included his account of the binding effect of class proceedings in his influential treatise, which went on to shape the development of federal common law in the area.<sup>158</sup>

As class action practice developed in the decades that followed, this rigid formulation of original Rule 23 was predictably constraining. By limiting the availability of the class action mechanism to cases involving specific categories of rights, the Rule pressured courts to conform their substantive analysis to those categories, and the abstract nature of the categories prevented the resulting doctrine from cohering.<sup>159</sup> This, combined with the Rule’s lack of guidance regarding the administration of class proceedings, caused the class action device to “become snarled,”<sup>160</sup> leading the Advisory Committee to conclude that a reformulation was in order. Among the lessons that were apparent following the drafters’ first effort was “that right answers should not depend on the mere preservation of the categories or terminology of rule 23, but rather on the play of the intrinsic policies.”<sup>161</sup>

When the Advisory Committee undertook to reformulate Rule 23 and produced the basic framework under which the Rule now operates, two opposing forces—the limits of the Enabling Act and the demonstrated ability of this powerful Rule to shape underlying doc-

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<sup>157</sup> ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, PROPOSED RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS 60 (1937), *reprinted in* Kaplan, *supra* note 156, at 378 & n.79.

<sup>158</sup> *See, e.g.*, 2 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE ¶ 23.07 (1st ed. 1938) (recounting the Advisory Committee’s refusal to include an “Effect of Judgment” section and offering an approving summary of the current state of the law on the binding effects of different class proceedings); 3B JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE ¶ 23.11 (2d ed. 1948 & 1974 Supp.) (offering a more mollified account of the Advisory Committee proceedings and summarizing caselaw on the binding effects of different class proceedings under original Rule 23).

As Professor Chafee put it:

Nowise discouraged at being thus locked out at the front door, Mr. Moore soon contrived to slip in by the back door. . . . So great is the deserved respect for his treatise, that his scheme about binding outsiders has had almost as much influence upon judges as if it had been embodied in Rule 23.

ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 251 (1950); *see also* Kaplan, *supra* note 156, at 378-79 & n.82 (noting the influence of Moore’s work on the Committee).

<sup>159</sup> *See* Kaplan, *supra* note 156, at 380-86 (discussing different courts’ various interpretations of the categories).

<sup>160</sup> *Id.* at 385.

<sup>161</sup> *Id.* at 384.

trine—occupied a prominent position in their efforts. Professor Kaplan, who served as the Reporter to the Committee, captures this shifting balance when describing the changes that the 1966 revision worked in the structure and operation of the Rule:

It is implicit in what has been said that the anomaly of a class action covering only the particular parties does not survive under the new rule. Subdivision (c)(2) makes clear that the judgment in any class action maintained as such extends to the [entire] class (excluding opters-out in (b)(3) cases), whether or not favorable to the class. *This is a statement of how the judgment shall read, not an attempted prescription of its subsequent res judicata effect, although looking ahead with hope to that effect.*<sup>162</sup>

The constraints of the old Rule had limited the effectiveness of the class action device. Those limits flowed from the form of substantive rights for which the Rule authorized enforcement, not from any definition of the content of those rights or of the preclusive consequences of litigating them in an aggregate proceeding prescribed by the Rule itself. But their effect was still significant. In seeking to sweep away those constraints and respond to “the insistent need to improve the methods of handling litigation affecting groups,”<sup>163</sup> the Committee sought to benefit from this same dynamic tension. It restructured the Rule in a manner that relied on corresponding alterations in the law of preclusion, disclaiming any power to effectuate those changes itself but “hop[ing]”<sup>164</sup>—one might say expecting—that subsequent courts pronouncing on the underlying law would follow suit.

The Committee’s approach to Rule 23(b)(3) and the requirements of diversity jurisdiction evinces this same tension between the limits of the Enabling Act and the power of Federal Rules to shape or catalyze developments in the underlying law. Under the old categories, jurisdiction over nondiverse absent class members in true or hybrid proceedings was justified on a theory of ancillary jurisdiction, but the spurious class action, which bound only parties who actually made an appearance, was ill suited for such treatment. These old doctrines raised the question whether the new (b)(3) action, which made no exception for nondiverse absentees, would entail an extension of subject matter jurisdiction that would violate either Rule 82 (which prohibits the extension of jurisdiction by rule) or the Enabling Act itself. Professor Kaplan notes this potential objection in his account of the Committee’s work but then dismisses it, invoking the active relation-

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<sup>162</sup> *Id.* at 393 (emphasis added).

<sup>163</sup> *Id.* at 394.

<sup>164</sup> *Id.* at 393.

ship between the Rules and the underlying law as the proper frame within which to address this question:

[E]ven if one should accept dubious doctrine about the outworn spurious category as immovable law, it would not be decisive of problems under the new rule. New rule 23 alters the pattern of class actions; subdivision (b)(3), in particular, is a new category deliberately created. Like other innovations from time to time introduced into the Civil Rules, those as to class actions change the total situation on which the statutes and theories regarding subject matter jurisdiction are brought to bear. From the start the Civil Rules, elaborating and complicating actions through joinder of claims and parties, have profoundly influenced jurisdictional result. . . . Not only must new rule 23 be considered a fresh datum for deciding whether diversity of citizenship requirements are satisfied by the original parties or intervenors; it also presents a new complex in deciding questions of permissible “aggregation” of amounts in controversy.<sup>165</sup>

The reformulated Rule did not purport to change jurisdictional policy, but it changed the landscape against which courts and legislatures must shape that policy.

The implications of the revised Rule for the enforcement of important public norms were immediately apparent, particularly for Rule 23(b)(3). Professor Kaplan’s predictions regarding the effect of the revisions on the underlying law were less prescient here than in the case of preclusion, however. In several of its first major decisions on the revised Rule, the Supreme Court undercut the power of Rule 23 as a mechanism for enforcing small claims. Although it reaffirmed the *Cauble* rule for measuring diversity in class actions according to the citizenship of the named plaintiffs,<sup>166</sup> the Court interpreted the diversity statute to prohibit aggregation<sup>167</sup> or ancillary jurisdiction<sup>168</sup> as a means of satisfying the amount-in-controversy requirement, effectively removing the federal courts from the business of hearing small claims based on state law.<sup>169</sup> And in *Eisen v. Carlisle & Jacquelin*, the Court disapproved efforts by a district court to resolve practical

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<sup>165</sup> *Id.* at 399-400 (footnotes omitted).

<sup>166</sup> See *Snyder v. Harris*, 394 U.S. 332, 340 (1969) (describing the rule of *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), as “current doctrine”).

<sup>167</sup> See *id.* at 338 (“[T]he 1966 changes in Rule 23 did not and could not have changed the interpretation of the statutory phrase ‘matter in controversy.’”).

<sup>168</sup> See *Zahn v. Int’l Paper Co.*, 414 U.S. 291, 300 (1973) (holding that the *Snyder* rule requires dismissal of any plaintiff who fails to meet the jurisdictional amount), *overruled by* 28 U.S.C. § 1367 (2006), as recognized in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005).

<sup>169</sup> That state of affairs has changed since the enactment of the Class Action Fairness Act of 2005. See *infra* text accompanying notes 242-43.

obstacles in small-claim class actions brought under federal law, finding that Rule 23 imposed a strict individual-notice requirement that prohibited reliance upon a sample-based approach and did not authorize the imposition of notice costs upon the defendant.<sup>170</sup>

Nonetheless, the power of the class action was being unleashed during this period, with attendant complaints about the quest for out-sized fees by class counsel and the settlement pressure that large exposure and discovery costs can impose upon defendants.<sup>171</sup> The lobbying of energized interest groups led Congress and the Advisory Committee to consider further adjustments. In 1978, the Office for Improvements in the Administration of Justice of the Department of Justice completed a proposal recommending that Rule 23(b)(3) be replaced by a statutory mechanism that would provide greater access and accountability for small-claims actions, coupled with mechanisms for more government oversight in higher-stakes damages actions. The proposal, reproduced in the Congressional Record in conjunction with a debate in the Senate Judiciary Committee, begins by setting forth the Justice Department's view that "revision of class damage procedures should be accomplished by direct legislative enactment rather than through the rule-making process" because of "the perception that such revision would have a significant impact on public policy."<sup>172</sup> It continues:

The deterrence of widespread injury is of substantial public interest, and Congress should devote extensive consideration to any proposal. Also, revision of class damage procedures would have significant economic ramifications, which raise serious questions as to whether such revision is

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<sup>170</sup> See 417 U.S. 156, 173-79 (1974). In *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), the Court held that representative plaintiffs usually must pay the costs of identifying class members for notice purposes. See *id.* at 359.

<sup>171</sup> See *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1604-23 (1976) (discussing the concern that class counsel were receiving "spectacularly large" fee awards and describing courts' efforts to control those awards). Although advocating invigoration of the spurious class action (in 1941) for purposes of private enforcement, Kalven and Rosenfield noted that administrative enforcement had a number of advantages, in particular with respect to "much new social legislation," where "the tempering of the enforcement of law by such discretion," which they had defined as "consistent, coherent, politic application, . . . is of real importance." Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 719 (1941). They continued, "No such restraint can be expected if the law is administered through private litigation; rather, the method will result in an insistence upon the harshest results and the most technical interpretations." *Id.*

<sup>172</sup> 124 CONG. REC. 27,860 (1978).

appropriately within the scope of the rule-making authority granted by the Rules Enabling Act.<sup>173</sup>

The proposal suggests (1) replacing the small-claim damages class action with a public action that aims exclusively at deterrence and vests the right of recovery directly in the government—a formal alteration of substantive rights that would unquestionably have exceeded the mandate of the rulemakers; and (2) restructuring class actions involving larger damages claims to improve efficiency and fairness of administration without sacrificing individual compensation.<sup>174</sup>

As with the 1966 amendments, this ultimately unsuccessful push for reform had to grapple with the indefinite status of Rule 23 in relation to underlying substantive law. That effort was not always enlightening. In his remarks introducing the proposal, for example, Senator DeConcini framed the issue by explaining that the “primary purpose” of a small-claims class action under Rule 23(b)(3) was “to prevent unjust enrichment and to deter illegal conduct rather than to compensate the injured parties,” whereas the “primary focus” in class litigation involving larger claims was “compensation of the parties.”<sup>175</sup> As a broad account of the policy goals that the underlying law will often want to see vindicated in such actions, these descriptions are apt. But the failure to clarify that it is the underlying law, and not Rule 23, that is the source of these policy priorities is unfortunate, particularly in an introduction to a proposal that focuses such explicit attention on that distinction.

But Senator DeConcini is to be forgiven, for this failure to distinguish clearly between the class action mechanism and the policies of the underlying law that it helps to enforce is endemic.<sup>176</sup> Judge Posner’s much-noted opinion for the Seventh Circuit in *In re Rhone-Poulenc Rorer Inc.*<sup>177</sup> is illustrative. *Rhone-Poulenc* involved a proposed nation-

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 27,860-61.

<sup>175</sup> *Id.* at 27,859.

<sup>176</sup> See Burbank, *supra* note 23, at 1522 n.329.

Recent scholarship has correctly noted the weakness of an agency-costs critique when applied to negative-value class actions in which the main goal can plausibly be deemed deterrence rather than compensation. . . . In my view, however, those authors have not succeeded in articulating a principled method for determining when deterrence *is* plausibly deemed the main goal of litigation (which surely requires attention to the substantive-law scheme), or in suggesting means to prevent inefficient overenforcement.

*Id.* (citations omitted).

<sup>177</sup> 51 F.3d 1293 (7th Cir. 1995).

wide class action filed on behalf of hemophiliacs who were accidentally infected with HIV through their use of tainted blood products.<sup>178</sup> A district court had certified a nationwide class encompassing all such individuals, limited to the issue of the defendant drug companies' negligence in failing to detect the virus.<sup>179</sup> There being no avenue at that time for immediate appellate review of certification orders,<sup>180</sup> the defendants requested that the Seventh Circuit interrupt the proceedings with a writ of mandamus.<sup>181</sup> The majority granted the request for extraordinary relief and ordered that the issue class be decertified.<sup>182</sup>

In explaining the reasons for rejecting the nationwide class, Judge Posner raised two concerns. The first related to the impact of a class proceeding on the industry for manufactured blood products and the then-nascent state of negligence litigation on individually filed claims. By certifying a nationwide class, Judge Posner observed, the district court is "forcing these defendants to stake their companies on the outcome of a single jury trial" or else "to settle even if they have no legal liability" for "fear of the risk of bankruptcy."<sup>183</sup> At the time, thirteen negligence cases had been litigated to verdict, with only one producing a judgment for the plaintiffs. Judge Posner opined that it would be preferable to defer industry-wide resolution of the liability question until "a decentralized process of multiple trials, involving different juries, and different standards of liability" was given the opportunity to produce a "consensus or maturing of judgment" on the appropriate liability response to the tragedy that had befallen this population of claimants.<sup>184</sup> Judge Posner did not tie these observations to any particular liability policies, instead seeming to offer them

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<sup>178</sup> *Id.* at 1296.

<sup>179</sup> *Id.* at 1294-95, 1296-97. This was an aggressive use of the authority Rule 23(c)(4)(A) (now restyled as 23(c)(4)) grants to certify a class "with respect to particular issues." FED. R. CIV. P. 23(c)(4).

<sup>180</sup> Rule 23 was amended in 1998 to authorize appellate courts to review certification decisions at their discretion. *See* FED. R. CIV. P. 23(f).

<sup>181</sup> *Rhone-Poulenc*, 51 F.3d at 1294.

<sup>182</sup> *Id.* at 1304.

<sup>183</sup> *Id.* at 1299.

<sup>184</sup> *Id.* at 1299-1300. It cannot have escaped Judge Posner's notice that mass tort defendants typically devote careful attention to which cases are tried (and in what order), settling those that they consider weak from a defense perspective. This phenomenon casts in a somewhat different light the statistics adduced in *Rhone-Poulenc*.

as a statement about class action policy under Rule 23, which is how other courts have understood them.<sup>185</sup>

The court's second concern was the liability standard that would govern in a nationwide negligence action. Choice-of-law principles might well call for the application of the negligence laws of fifty different states, but the district court had concluded that it could harmonize these standards so as to produce a single instruction for the jury.<sup>186</sup> In another memorable turn of phrase, Judge Posner disapproved such an "Esperanto instruction," which he found tantamount to a rejection of *Erie* and a return to a general common law standard that would disregard or erase differences among States about the nuances (and potentially the core features) of negligence policy.<sup>187</sup> For both these reasons, the court concluded, the class had to be decertified.<sup>188</sup>

What is striking, for present purposes, is Judge Posner's lack of attention in the first part of his analysis to the policy differences that States might have regarding the "mature tort" problem and the relative merits of decentralized adjudication, which offers the benefit of accreted wisdom over time but may produce results that lack uniformity and appear arbitrary, versus a high-stakes industry-wide trial, which creates greater risks of inaccurate or unreliable results but also provides greater parity and fairness among claimants. There is no right answer to the question whether this is a matter of class action policy or liability policy. It partakes of both—and the existence of a new and robust procedural mechanism for the adjudication of claims enables courts and legislatures to confront new questions of liability policy that had previously lain quiescent or gone wholly unaddressed.<sup>189</sup> As Professor Cover has explained,

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<sup>185</sup> See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748-49 (5th Cir. 1996) (adopting Judge Posner's treatment of "maturing" torts in rejecting proposed nationwide class action on behalf of all nicotine-dependent smokers).

<sup>186</sup> *Rhone-Poulenc*, 51 F.3d at 1300-02.

<sup>187</sup> *Id.* at 1300-01.

<sup>188</sup> *Id.* at 1300-02. The court also raised Seventh Amendment concerns about the district court's plan to bifurcate the trial of the common and individual issues, with separately empanelled juries deciding the latter as needed, suggesting that such a procedure might violate the Seventh Amendment's Reexamination Clause. *Id.* at 1302-04. That part of the court's analysis, not germane here, is unconvincing. See Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 776-82 (2005) (critiquing Judge Posner's reliance on the "sparse words" of the Reexamination Clause to limit successive class action suits as "simply not sustainable").

<sup>189</sup> In this respect, our view differs from that of Professor Richard Nagareda, who appears to posit a more static relationship between class action practice and the underlying substantive law. In his highly theorized account of these matters, Professor Naga-

Federal Rule 23 presents a procedural possibility which, once present, cannot help but shape and articulate substantive law. That shaping is as real if the opportunity is foregone as it is if the possibility is seized. For a choice to forego is pregnant in a way that doing without can never be.<sup>190</sup>

Judge Posner, too, reverted to Esperanto when providing guidance on these matters.

The history of Rule 23, then, entails a seventy-year-long discussion of the deeply intertwined relationship between the procedural mechanism that enables aggregation of large numbers of claims for adjudication and the capacity of that mechanism to ossify certain liability rules (in the case of original Rule 23) or to catalyze innovation in the liability policies of the underlying law (in the case of the post-1966 version of the Rule, and particularly Rule 23(b)(3)). The Court's inattention to the Enabling Act implications of this powerful device during most of that time, including the proper construction of the Rule in light of those implications, has been surprising. Before *Shady Grove*, the Court's only substantial statement on the issue came in *Ortiz v. Fibreboard*, where it rejected an adventuresome use of Rule 23(b)(1)(B) that sought to aggregate individual personal-injury claims into a mandatory class settlement on the theory that the total value of the defendant's insurance coverage and net worth could be treated as a "limited fund."<sup>191</sup> Vaguely gesturing toward "the tension between the limited fund class action's pro rata distribution in equity and the rights of individual tort victims at law," the Court adopted a restrained interpretation of Rule 23(b)(1)(B) that hewed more closely to the historical an-

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reda correctly distinguishes between the limited delegation of rulemaking authority contained in the Enabling Act and the role of politically accountable policymakers in defining the content and scope of enforceable rights. See Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 181-98 (2003). As suggested by the name that he chooses for his theory, however, Professor Nagareda appears to conceptualize those rights as having a fixed status that is unrelated to the potential use of aggregation for enforcement. See, e.g., *id.* at 197 ("The [preexistence] principle prefers to respect the bundle of rights previously generated through processes in which there is a long run—flawed though that bundle might be—over the alternatives that might be created through the one-shot, and thus more fallible, vehicle of private delegations by class action rule."); see also *id.* (acknowledging the potential for this approach to produce "inaction"). In so doing, we believe, Nagareda misses the dynamic nature of the relationship that has in fact existed between liability rules and the procedural and jurisdictional backdrop against which policymakers play those rules out.

<sup>190</sup> Cover, *supra* note 147, at 720; see also Geoffrey C. Hazard, Jr., *The Effect of the Class Action Rule on the Substantive Law*, 58 F.R.D. 307, 307 (1973) ("Substantive law is shaped and articulated by procedural possibilities.")

<sup>191</sup> See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999).

tecedents mentioned in the Advisory Committee notes<sup>192</sup>—an unsatisfying analysis, but one that at least acknowledged the dynamic tension that has characterized the entire history of the Rule.<sup>193</sup>

Read against this history, the Court’s treatment of the interplay between the Enabling Act and the proper interpretation of Rule 23 in *Shady Grove* exhibits a lack of sophistication that is difficult to fathom.

First, Justice Scalia dismisses the proposition that a court should look to the policies embodied in the underlying substantive law when deciding whether class certification is appropriate, pointing to the language in Rule 23 providing that a class action “may be maintained” if the requirements of the Rule are satisfied:

There is no reason . . . to read Rule 23 as addressing only whether claims made eligible for class treatment by some *other* law should be certified as class actions. Allstate asserts that Rule 23 neither explicitly nor implicitly empowers a federal court “to certify a class in each and every case” where the Rule’s criteria are met. But that is *exactly* what Rule 23 does: It says that if the prescribed preconditions are satisfied “[a] class action *may be maintained*” (emphasis added)—not “*a class action may be permitted.*” Courts do not maintain actions; litigants do. The discretion suggested by Rule 23’s “may” is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes. And like the rest of the Federal Rules of Civil Procedure, Rule 23 *automatically* applies “in all civil actions and proceedings in the United States district courts.”<sup>194</sup>

Notwithstanding Justice Scalia’s attempt to buttress his analysis through the aggressive use of *italics* for *emphasis*, there is ample reason to read Rule 23 as requiring attention to the question that the majority dismissed: whether the use of the class action mechanism in a given case will promote or frustrate the substantive liability policies of the

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<sup>192</sup> *Id.* at 845-48.

<sup>193</sup> Professor David Shapiro’s scholarly voice has been one of the most important in developing an advanced understanding of the relationship between the class action mechanism and the underlying substantive law. Shapiro’s classic 1998 article offered a strong defense of an aggregate-litigation model that treats some claims as no longer the property of individual rights holders but rather the possession of an entity—the class—that should be the primary point of reference when thinking about questions of autonomy and agency in the litigation process. See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 918-42 (1998). In exploring the implications of this approach, Shapiro correctly concludes that the decisions involved in such a shift in paradigm must come from responsible policymakers, rather than Rule 23 itself. See *id.* at 957 (“In my view, [Rule 23] should be framed in a way that does not place unreasonable roadblocks in the way of movement toward an entity model by responsible policymakers, nor should it impede recognition of the present force and effect of the model in the administration of class actions.”).

<sup>194</sup> *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010) (citations omitted).

underlying law. That question has in fact served as a constant counterpoint, both in the application and interpretation of the Rule and in discussions about reform. As Justice Ginsburg noted in her dissent, “*Palmer, Ragan, Cohen, Walker, Gasperini, and Semtek* provide good reason to look to the law that creates the right to recover” in determining the proper scope and operation of a Federal Rule.<sup>195</sup> In the case of Rule 23 itself, the Court in *Ortiz* rejected the notion that certification was mandatory whenever the Rule’s enumerated requirements were satisfied, explaining that “tension” between the application of the Rule and the goals of the underlying law, even if “acceptable under the Rules Enabling Act,” should nonetheless be “kept within tolerable limits” by offering a restrained interpretation of the Rule’s open-ended provisions.<sup>196</sup>

Justice Scalia, however, refused even to acknowledge the existence of such tension in *Shady Grove*. Speaking for the four-Justice plurality, he characterized Rule 23 as nothing more than a claims-processing mechanism, requiring no more attention under the Enabling Act than any other joinder rule. “A class action, no less than traditional joinder,” he wrote, “merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties’ legal rights and duties intact and the rules of decision unchanged.”<sup>197</sup> Justice Scalia likewise dismissed the impact of class certification on the defendant’s exposure to liability with another formalistic account of aggregate litigation:

Allstate contends that . . . [a]llowing *Shady Grove* to sue on behalf of a class “transform[s] [the] dispute over a five *hundred* dollar penalty into a dispute over a five *million* dollar penalty.” Allstate’s aggregate liability, however, does not depend on whether the suit proceeds as a class action. Each of the 1,000-plus members of the putative class could . . . bring a freestanding suit asserting his individual claim. It is undoubtedly true that some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action. That has no bearing, however, on Allstate’s or the plaintiffs’ legal rights.<sup>198</sup>

Rather, Justice Scalia asserts, “[t]he likelihood that some (even many) plaintiffs will be induced to sue by the availability of a class action is just the sort of ‘incidental effec[t]’ we have long held does not violate

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<sup>195</sup> *Id.* at 1468 (Ginsburg, J., dissenting).

<sup>196</sup> *Ortiz*, 527 U.S. at 845.

<sup>197</sup> *Shady Grove*, 130 S. Ct. at 1443 (Scalia, J., for himself, Roberts, C.J., Thomas, J., and Sotomayor, J.).

<sup>198</sup> *Id.* (citation omitted).

§ 2072(b).”<sup>199</sup> Nowhere in any part of his opinion, either for the majority or the plurality, does Justice Scalia even mention the monumental pressure that class certification imposes on defendants to settle—a dominant factor in the practical dynamics of class litigation<sup>200</sup>—or the decades of effort by courts, including the Supreme Court itself in *Ortiz*, to shape class action practice to avoid compromising important policies bound up in the substantive law.

What is one to make of this performance? The most charitable interpretation, we think, is that the majority simply could not see a way to uphold the facial validity of Rule 23 while at the same time acknowledging the industry-changing impact of class action practice. But describing Rule 23 as a prosaic joinder provision whose expansion of liability exposure is merely an “incidental effect” does not describe reality, and we should not pretend otherwise.<sup>201</sup> The legislative history and statutory findings that undergird the Class Action Fairness Act of 2005 certainly represent Congress’s repudiation of that proposition, whatever else one might say about them.<sup>202</sup>

Less charitably, Justice Scalia and others who joined his opinion may have been methodologically hostile to the more textured mode of analysis required to harmonize Rule 23 with the Enabling Act—one that rejects dogmatic adherence to transsubstantive procedure and

<sup>199</sup> *Id.* *But cf.* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))). Since *Amchem* found that the settlement class action before it stood in violation of Rule 23, the Court was not required to offer a careful analysis of the origins of this policy preference. Justice Ginsburg’s reference to the “class action mechanism,” *see Amchem*, 521 U.S. at 617, suggests a lack of precision in that regard—this incentive problem is one that the underlying substantive law must address, not Rule 23.

<sup>200</sup> Even Justice Ginsburg—in whose dissent we find much to admire—only mentions settlement once, in two brief sentences in a footnote. *See Shady Grove*, 130 S. Ct. at 1465 n.3 (Ginsburg, J., dissenting) (“A court’s decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims. When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury.” (citation omitted)).

<sup>201</sup> *Cf.* Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2086-94 (2008) (describing the Court’s unrealistic treatment of the opt-out procedure in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), and the doctrinal distortions that it has produced).

<sup>202</sup> *See* Burbank, *supra* note 23, 1444 n.12 (discussing the 2005 Senate Report on the Class Action Fairness Act and reactions of courts and commentators); Wolff, *supra* note 201, at 2038-40 & nn.6-9 (discussing factual findings in the Class Action Fairness Act concerning the impact of class action litigation on industry and public policy); *see also* S. REP. NO. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3.

the allure of artificially crisp formalisms, recognizing instead the dialectic relationship that necessarily exists between the prospective intentions of rulemakers and the actual application of open-textured provisions over time.<sup>203</sup> Such a mode of analysis would have produced a very different result in *Shady Grove*.

Rule 23 empowers federal courts to construct representative proceedings that bind absent class members on the promise of adequate representation and other important “procedural protections.”<sup>204</sup> Contrary to Justice Scalia’s dismissive view, authorizing such a proceeding bears directly upon liability policy when it radically alters the levels of enforcement of public norms. Discussing standing cases, for example, Professor Cover put the point this way:

The conferral of rights of participation upon those whose interest is remote or, in a sense, gratuitous, must represent in large part a judgment about the likelihood of a particular form of litigation taking place without such participation, and about the desirability of encouraging such litigation. . . . One might wish to encourage litigation in order to deter a certain kind of conduct (by structuring litigation risks and making adverse results more likely) or in order to protect a certain class of persons considered particularly vulnerable to some specified form of predatory conduct.<sup>205</sup>

These are judgments, Cover explained, that “must be made on an individual basis for each substantive question.”<sup>206</sup>

The proximity of class action litigation to matters of such substantive moment need not pose a threat under the Enabling Act, unless one views Rule 23 itself as the source of all such policy judgments. Manifestly, it cannot be. But the unleashing of a powerful new procedural mechanism can serve as the occasion for substantive innovation through the common law process.<sup>207</sup> Again Professor Cover captures this dynam-

<sup>203</sup> This species of sensible pragmatism is a hallmark of Justice Ginsburg’s work in procedure and related fields. See generally Tobias Barrington Wolff, *Ruth Bader Ginsburg and Sensible Pragmatism in Federal Jurisdictional Policy*, 70 OHIO ST. L.J. 839 (2009).

<sup>204</sup> See *Taylor v. Sturgell*, 128 S. Ct. 2161, 2176 (2008) (describing conditions necessary for a representative proceeding to be binding on absent parties).

<sup>205</sup> Cover, *supra* note 147, at 728.

<sup>206</sup> *Id.*

<sup>207</sup> The historical record reflects that the drafters of Rule 23 viewed the possibility that the Rule would catalyze substantive innovation as both inevitable and desirable.

There has been much debate about the goals of the drafters of Rule 23(b)(3). Study of the published and unpublished material relating to their work persuades me that, although they did not foresee, and could not have foreseen, all of the effects of this change, they were aware that they were breaking new ground and that those effects might be substantial. Seeking to ensure that members of a class would be bound by an adverse judgment as

ic relationship with characteristic grace: “As part of the repository of our collective procedural imagination the Federal Rules of Civil Procedure would be read to include remedial structures which could be applied where appropriate in light of substantive objectives.”<sup>208</sup>

When the underlying law is federal, the role of federal judges in shaping the relationship between remedial structures and substantive policy objectives is unproblematic: it is coextensive with their role as expositors of federal common law.<sup>209</sup> When state liability policies govern the proceeding, however, the common law role of the federal judiciary has a different character. A federal court’s task in a diversity class action is to determine the content of the applicable state law concerning the impact and desirability of an aggregate remedy on liability and regulatory goals. In many cases, the courts and legislature of a state will not have had occasion to offer guidance about such questions. Where that is so, a federal court must necessarily rely upon its best judgment—informed by a combination of existing statements of state liability policy and general principles of class adjudication—as to the direction in which state authorities would move the law.<sup>210</sup> Judge Posner’s “Esperanto” assertions in *Rhone-Poulenc* about the dan-

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well as benefit from one that was favorable, the drafters recognized that Rule 23(b)(3) would enable those with small claims for whom individual litigation would be economically irrational to band together in group litigation against a common adversary.

Burbank, *supra* note 23, at 1487 (footnotes omitted). *But cf.* Richard Marcus, *Exceptionalism and Convergence: Form Versus Content and Categorical Views of Procedure*, 49 SUP. CT. L. REV. (2d ser.) 521, 532 (2010) (“The 1966 revision of the federal class action rule was intended, in large measure, to empower the courts to implement an aggressive strategy of social change through litigation.” (footnote omitted)).

<sup>208</sup> Cover, *supra* note 147, at 735.

<sup>209</sup> Even in such a case, being clear about whether the Federal Rule or the underlying federal law drives a rule of decision is still of great importance, as recent developments in the law of pleading amply demonstrate. *Compare* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-57 (2007) (introducing a “plausibility” standard into the law of pleading in an antitrust dispute and leaving some doubt as to whether that standard would apply with equal force in other legal contexts), *with* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (holding that the new “plausibility” standard applies to all complaints governed by Federal Rule of Civil Procedure 8). Indeed, *Iqbal* itself could have—and perhaps should have—been decided on the basis that the federal common law of official immunity required a stricter pleading standard. *See* Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 555-56, 558.

For a fascinating account of the Rule 23(b)(2) class action that demonstrates the extent to which its drafters were seeking to advance the goals of the emerging federal substantive law of desegregation, see David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. (forthcoming 2011).

<sup>210</sup> *See* *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231-32 (1991) (offering guidance to diversity courts in determining the content of state law).

ger of adjudicating an immature tort in a nationwide class action were not misplaced; they were simply incomplete.<sup>211</sup>

But when state law does contain a clear statement of the circumstances in which an aggregate remedy is or is not consistent with the applicable liability or regulatory policies, that statement has the same controlling effect as the liability rule itself. Such was the situation confronting the *Shady Grove* Court under section 901(b) of the New York Civil Practice Law and Rules.

#### B. Section 901(b)

The sequence of events associated with the enactment of section 901(b) paints a remarkably clear picture of the purpose of that statute and the position that it occupied in the law of aggregate liability in New York. Prior to 1975, the class action was nearly absent as a tool in New York's judicial machinery. The statute that preceded section 901(a) (New York's current general class action provision), section 1005, said the following (and only the following) regarding when an aggregate representative proceeding was authorized:

(a) When allowed. Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.<sup>212</sup>

The courts of New York had interpreted this provision restrictively, holding that damages class actions were generally available only in cases involving a privity relationship or its functional equivalent, often also requiring that both the facts supporting the claim and the relief

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<sup>211</sup> This clarification of the sources of policy on aggregate liability helps to illustrate one of the great costs to federalism values that the Class Action Fairness Act of 2005 (CAFA) imposes. By moving huge numbers of state law class actions into the federal courts—including *Shady Grove* itself—CAFA will deprive states of the opportunity to rule in the first instance on these important questions concerning the policies bound up in their liability and regulatory rules and the impact of aggregate relief upon those policies. “These potential costs of ordinary diversity litigation are much more salient when state courts can, and predictably will, be stripped of the capacity to use a potent remedial form to implement substantive policy in a jurisdictional world that is no longer meaningfully concurrent.” Burbank, *supra* note 23, at 1529. It would behoove the federal courts to consider employing procedures for certifying questions of state law to state courts more actively in such cases so that their rulings on the content of state law can be authoritative, rather than predictive.

<sup>212</sup> N.Y. C.P.L.R. 1005(a) (McKinney 1963), *repealed by* L.1975, ch. 207, § 2 (1975). Section (b) of the statute set forth provisions for protective orders and notice, and section (c) required court approval for dismissal or settlement of a class proceeding. *See id.* at (b), (c).

sought be identical among class members.<sup>213</sup> By 1973, the New York Court of Appeals took the unusual step of acknowledging the need for reform in an opinion, explaining that “the restrictive interpretation in the past of [section 1005] and its predecessor statutes no longer has the viability it may once have had” and that those restrictive doctrines had produced “general and judicial dissatisfaction . . . [and] in many instances may mean a total lack of remedy.”<sup>214</sup> Observing that legislation was preferable to “judicial development in the same direction” because “the proposed statute would assure limitations and safeguards which would be highly desirable,” the court gave its explicit approval to efforts then pending in the New York legislature to overhaul the provision, a change that it characterized as “urgen[t].”<sup>215</sup>

Two years later, the efforts of the New York legislature bore fruit, producing two new statutory provisions. The first, section 901(a) of the Civil Practice Law and Rules, sets forth basic requirements for certification of a class that are similar to those contained in the 1966 version of Federal Rule 23.<sup>216</sup> The second, section 901(b), then imposed a limitation prohibiting class treatment of any “action to recover a penalty, or minimum measure of recovery created or imposed by sta-

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<sup>213</sup> See, e.g., *Onofrio v. Playboy Club of New York, Inc.*, 205 N.E.2d 308 (N.Y. 1965), *adopting* 244 N.Y.S.2d 485, 489-90 (N.Y. App. Div. 1963) (Stevens, J., dissenting) (disallowing a class action seeking to represent 50,000 people who had paid dues for the establishment of a private club that never came into being, where some class members might not wish to sue or might pursue a different form of remedy); *Kovarsky v. Brooklyn Union Gas Co.*, 18 N.E.2d 287, 290-91 (N.Y. 1938) (disallowing a damages class action, but permitting a declaratory class action, in a case seeking reimbursement on behalf of a class of similarly situated customers whom the defendant utility company allegedly charged illegal fees); see also ADMIN. BD. OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, EIGHTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK app. D at A35-36 (1973) (describing class actions in New York as generally limited “to the closely associated relationships growing out of trusts, partnerships, or joint ventures, and ownership of corporate stock”).

<sup>214</sup> *Moore v. Metro. Life Ins.*, 307 N.E.2d 554, 558 (N.Y. 1973) (citations omitted).

<sup>215</sup> *Id.*

<sup>216</sup> Importantly, however, the New York provision requires that common issues predominate over individual issues in any class action, not just those seeking compensatory damages. Compare N.Y. C.P.L.R. 901(a) (McKinney 2006) (“One or more members of a class may sue or be sued as representative parties on behalf of all if: 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members; 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class; 4. the representative parties will fairly and adequately protect the interests of the class; and 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”), with FED. R. CIV. P. 23(a)–(b) (employing similar language and standards).

tute” unless specifically authorized by the statute itself—that is, unless the statute “creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action.”<sup>217</sup> As the Court of Appeals explained in *Sperry v. Crompton Corp.*, this limitation on aggregate liability in New York “was the result of a compromise among competing interests”<sup>218</sup> that arose from concerns among prodefendant groups that the aggregation of penalties would lead to gross and destructive overenforcement. “These groups feared that recoveries beyond actual damages could lead to excessively harsh results . . . . They also argued that there was no need to encourage litigation by aggregating damages when statutory penalties and minimum measures of recovery provided an aggrieved party with a sufficient economic incentive to pursue a claim.”<sup>219</sup> Section 901(b), the Court held, “[r]espond[ed] to these concerns” by eliminating the “additional encouragement” of penalty liability in cases where it was “not necessary” and could in fact subvert state regulatory policies.<sup>220</sup>

In addition to these controlling statements by New York’s highest court, which define section 901(b) as an integral component of the state’s policies on penalty liability,<sup>221</sup> the structure and operation of the statute also reflect its focus on New York liability law. The law requires that any “statute creating or imposing a penalty, or a minimum measure of recovery specifically authorize[] the recovery thereof in a class action” in order for aggregate liability to be available.<sup>222</sup> In so doing, section 901(b) creates a point of reference—express statutory authorization for aggregate penalty liability—to which no other legislature (state or federal) would have reason to be attentive. Why would New Jersey, Montana, or the United States Congress have any occasion to include such an express authorization in their penalty statutes, since their law contains no general limitation on the availability of pe-

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<sup>217</sup> N.Y. C.P.L.R. 901(b).

<sup>218</sup> *Sperry v. Crompton Corp.*, 863 N.E.2d 1012, 1015 (N.Y. 2007).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* (quoting Sponsor’s Mem., Bill Jacket, L.1975, ch. 207).

<sup>221</sup> *Cf. Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 683 (N.Y. 1985) (authoritatively defining New York’s law abrogating charitable immunity as a “loss-distribution rule” applicable only to New York residents and entities, not a conduct-regulating provision applicable to harm carried out on New York soil, and hence inapplicable to out-of-state litigants).

<sup>222</sup> N.Y. C.P.L.R. 901(b).

nalties on an aggregate basis?<sup>223</sup> As Justice Ginsburg aptly observes in describing the policies that the statute addresses,

The limitation was not designed with the fair conduct or efficiency of litigation in mind. Indeed, suits seeking statutory damages are arguably *best* suited to the class device because individual proof of actual damages is unnecessary. New York's decision instead to block class-action proceedings for statutory damages therefore makes scant sense, except as a means to a manifestly substantive end: Limiting a defendant's liability in a single lawsuit in order to prevent the exorbitant inflation of penalties—remedies the New York Legislature created with individual suits in mind.<sup>224</sup>

The New York Court of Appeals relied upon these precepts in concluding that the state's antitrust law, which was amended to include treble damages shortly after section 901(b) was enacted but did not include express authorization for a class action, must be read in light of section 901(b) to disallow recovery of those treble damages on an aggregate basis.<sup>225</sup> The court even made clear that it would not be guided by federal antitrust precedents on the proper characterization of treble damages as a penalty *vel non*, since section 901(b) indicated that “State policy . . . or the legislative history” justified “interpret[ing] our statute differently.”<sup>226</sup>

The Connecticut Supreme Court has issued a choice-of-law ruling—apparently without the benefit of *Sperry*, which was decided four months earlier but is not cited in the opinion—that arrives at the same conclusion about the role of section 901(b) in New York's overall liability scheme. In *Weber v. U.S. Sterling Securities*,<sup>227</sup> a New York resident brought a putative class action in the state courts of Connecticut against a corporation headquartered in New York, alleging violations of the federal Telephone Consumer Protection Act (TCPA).<sup>228</sup> That unusual federal statute provides a penalty remedy of five hundred dol-

<sup>223</sup> The opposite rule of construction applies to federal statutes, which are generally assumed to be enforceable through a class proceeding unless Congress clearly signals a contrary intent. *See* *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) (“We do not find in § 205(g) the necessary clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure.”).

<sup>224</sup> *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 (2010) (Ginsburg, J., dissenting).

<sup>225</sup> *See Sperry v. Crompton Corp.*, 863 N.E.2d 1012, 1015-17 (N.Y. 2007).

<sup>226</sup> *Id.* at 1018 (quoting *Anheuser-Busch, Inc. v. Abrams*, 520 N.E.2d 535, 539 (N.Y. 1988)). The omitted text includes “differences in the statutory language” as a basis for divergences of interpretation between the state and federal antitrust laws, *id.*, a factor that was not pertinent to the question with which the court was grappling.

<sup>227</sup> 924 A.2d 816 (Conn. 2007).

<sup>228</sup> 47 U.S.C. § 227 (2006).

lars (with the possibility of treble damages) for every unsolicited fax that a defendant sends to an unwilling recipient, but only when the cause of action is “otherwise permitted by the laws or rules of court of a State.”<sup>229</sup> The Connecticut Supreme Court interpreted the TCPA to require a determination as to whether the applicable “state substantive law” recognizes the action, and it concluded that Connecticut choice-of-law rules called for the application of New York tort law.<sup>230</sup> Section 901(b), the court concluded, was a part of that liability regime:

“While there is no precise definition of either [substantive or procedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress.” It is clear that § 901(b) is substantive because it abridges the rights of individuals to bring class action claims in New York state. We have determined that statutes, like § 901(b), that affect an individual’s cause of action clearly are substantive in nature.<sup>231</sup>

The Connecticut Supreme Court’s reasoning is not as precise here as one might like, but its conclusion is sound: section 901(b) defines the scope of penalty liability under New York law, not merely the mechanisms available to enforce an aggregate proceeding.

Because the New York legislature chose to effectuate this shift in liability policy “in wholesale, rather than retail, fashion,” as Justice Ginsburg puts it<sup>232</sup>—i.e., through a single provision of the Civil Practice Law and Rules that iterates throughout all New York law,<sup>233</sup> rather

<sup>229</sup> *Id.* § (b) (3).

<sup>230</sup> *Weber*, 924 A.2d at 825-28.

<sup>231</sup> *Id.* at 827 (quoting *D’Eramo v. Smith*, 872 A.2d 408, 416 (Conn. 2005)). This ruling drew in part on a string of cases deciding the related but distinct issue of whether section 901(b) controls in actions brought under the TCPA in federal court. Every district court to confront that question appears to have answered in the affirmative. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 & n.4 (2010) (Ginsburg, J., dissenting) (discussing the treatment of section 901(b) in TCPA litigation and collecting authorities).

<sup>232</sup> *Shady Grove*, 130 S. Ct. at 1466.

<sup>233</sup> We have noted the irony arising from reliance on New York sources in explanations of the limitations on court rulemaking in predecessor bills to the Enabling Act. *See supra* note 55. To the extent that New York’s mode of allocating lawmaking responsibility and organizing statutory law contributed to Justice Scalia’s confusion, he would have benefited from reading a published speech that the Chair of the original Advisory Committee gave to the New York State Bar Association in 1938. Having quoted the second sentence of the Enabling Act, William D. Mitchell observed that “[t]he present New York Civil Practice Act contains some chapters, such as the statute of limitations, which obviously do not belong in rules of procedure, but in addition to that, many of the procedural sections are interspersed with provisions affecting substantive rights.” William D. Mitchell, *Reform in Judicial Procedure*, 24 A.B.A.J. 197, 199 (1938).

than amendments to the same effect in each New York statute prescribing minimum damages or a penalty—the question does arise whether the courts of New York would also apply section 901(b) in a multistate case governed by the law of another jurisdiction. The better answer is that they should not. As noted above, other jurisdictions would have no reason to include an express authorization for class-wide liability in their penalty statutes, and it would create a mismatch that might well improperly foreclose aggregate relief if a New York court applied the disqualification of section 901(b) to out-of-state causes of action.<sup>234</sup> But the courts of New York could come to a different conclusion without undermining what is set forth above.<sup>235</sup>

Following *Shady Grove*, one might well ask how a state should proceed when it wishes to protect its industries from the possibility of crushing aggregate penalties while still providing remedies that will induce individual enforcement. One solution may be to insert cumbersome amendments into each and every penalty statute in the state code that make clear that aggregate liability is unavailable. The majority opinion, however, leaves some doubt as to whether even that step would be sufficient to withstand the overwhelming force that it ascribes to Rule 23's language that a class action "may be maintained"

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<sup>234</sup> Thus, insofar as courts have found that section 901(b) prohibits recovery under the TCPA, we should understand that result to rest upon an assessment of the limits of classwide penalty liability under New York law, rather than the failure of the TCPA to include its own express authorization for classwide relief—a subtle but important distinction.

<sup>235</sup> The New York legislature could decide—or have imputed to it the decision—that it will employ a precautionary principle in classwide out-of-state penalty actions, declining to make the courts of New York available for their enforcement unless the relevant legislature, like the New York legislature, has explicitly provided that classwide penalty liability is permissible. Given the potential for the class action to magnify penalty liability to a crippling degree, see Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Classwide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1882-88 (2006) (discussing the potential distortions of liability policy the class action introduces in penalty cases under the label "the addition effect"), such a precautionary principle would not be irrational or improper, provided that it operated as a forum non conveniens doctrine and did not purport to entail preclusive consequences. Cf. *Loucks v. Standard Oil Co. of New York*, 120 N.E. 198, 200-02 (N.Y. 1918) (Cardozo, J.) (framing the public-policy exception in choice of law as a matter of "declining jurisdiction" over a transitory cause of action that could still be enforced elsewhere). The New York Civil Practice Law and Rules does sometimes employ devices that do this kind of double duty, as the Supreme Court of the United States has recognized. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 418, 426 (1996) (noting that section 5501(c) of the New York Civil Practice Law and Rules, which allows state appeals courts "to review the size of jury verdicts," is both "substantive" and "procedural"). Still, there is no evidence of which we are aware that the New York legislature had such a dual purpose in mind in this instance.

if the prerequisites of the Rule are satisfied.<sup>236</sup> As Justice Ginsburg observed, the majority opinion might be read to suggest that a statute prescribing that “no more than \$1,000,000 may be recovered in a class action” might be both sufficient and necessary to achieve this goal, since it is formally presented as a cap on damages, rather than a statement about what class actions “may be maintained.”<sup>237</sup> If so, then *Shady Grove* will stand as a monument to the collateral damage that results when single-minded formalism crowds out sensible pragmatism.<sup>238</sup>

### CONCLUSION

There is no reason to believe that the drafters and promulgators of the 1966 revisions to Rule 23 anticipated the potentially destructive relationship between the damages class action and the creation of statutory penalties. The New York legislature had the benefit of almost ten years of practice under the newly unleashed power of the Federal Rule 23(b)(3) class action when they decided to circumscribe New York’s statutory scheme of penalty and statutory-damages liability as a condition of adopting that tool in their own courts.<sup>239</sup> Having opted to pursue class action reform on a transsubstantive basis, but armed with knowledge of its dangers, the New York legislature enacted an

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<sup>236</sup> FED. R. CIV. P. 23(b); see also *Gasperini*, 518 U.S. at 464-65, 468 n.12 (Scalia, J., dissenting) (valorizing the formal distinction between a “rule of law” and a “rule of review” in arguing that Rule 59 should displace the underlying law in determining when a jury award is excessive).

<sup>237</sup> *Shady Grove*, 130 S. Ct. at 1466-67 (Ginsburg, J., dissenting).

<sup>238</sup> See also Wolff, *supra* note 203 (discussing the perverse impact that misplaced textualism had upon the law of original federal jurisdiction in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997)).

<sup>239</sup> Writing in the same year that the New York legislature enacted section 901(b), Professor Cover noted that truth-in-lending cases were “the single significant exception” to the failure of federal courts to “analyze[] class action cases as presenting problematic questions of substantive law.” Cover, *supra* note 147, at 734. Moreover, having suggested as a cause the fact that “the \$100 minimum recovery per violation can be and has been read as inconsistent with the multiplier effect of 23(b)(3) class actions,” Cover referred to “the significant opinions of Judge Marvin Frankel in *Ratner v. Chemical Bank N.Y. Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972).” *Id.* at 734 n.43. In that case, Judge Frankel denied certification, concluding that “allowance of this as a class action is essentially inconsistent with the specific remedy supplied by Congress and employed by plaintiff in this case.” *Ratner*, 54 F.R.D. at 416. It is no surprise that *Ratner* was invoked by those seeking to bar the use of class actions to recover penalties in New York. See Memorandum from Sanford H. Bolz, Gen. Counsel, Empire State Chamber of Commerce (Feb. 14, 1975) (on file with authors) (“Penalties and class actions simply do not mix. This was proved in *Ratner v. Chemical Bank*, a case under the Federal Rules, where the combination caused a potential liability of \$130,000,000 although the actual damages to individual plaintiffs were zero!”).

equilibrating provision that sought to prevent harm in categories of cases where it could be anticipated. We should neither expect prescience from the drafters of the Federal Rules nor adopt an interpretive methodology that treats open-ended text like a fractal that somehow already contains endless levels of determinate meaning when unanticipated problems first arise.<sup>240</sup> Rather, we should build upon the insight of Professor Cover, which sadly has lain largely dormant since he first offered it:

[T]here is a way of reading the Enabling Act which neither renders it a dead letter, as courts have tended to do, nor construes it as a bulwark against change. Such a reading would start with the premise . . . that absent a trans-substantive structure of rules, courts must often justify decisions about procedure with a combination of substantive and procedural objectives and values. The Rules Enabling Act might then be read to mean that the courts, in applying the Federal Rules of Civil Procedure or any subsequently enacted similar body of rules, may not forsake their responsibility to justify substantive impact in terms of substantive values. It would not be enough to point to Rule 23; one would have to justify invoking it.<sup>241</sup>

Cover's wise counsel applies with equal force in cases where trans-substantive rules cannot meaningfully be said to embody any prospective choice at all concerning the situations to which they must be applied. This interpretive dilemma might occur when a new adjudicatory problem arises that was entirely unforeseen by the rule drafters, or when the realities of litigation and civil law enforcement have evolved to such an extent that our understanding of what it means to have legal rights must necessarily change. In such cases, the Federal Rules require a more nuanced form of analysis than has previously been applied—one that (i) recognizes the capacity of the Federal Rules to catalyze innovation in liability policy, (ii) acknowledges the proper role of the judiciary in developing interstitial procedures when the Rules mark out a terrain without providing clear guideposts, and nonetheless (iii) always keeps clearly in sight the source of the underlying substantive law and the limits that *Erie* and the federal common law process impose on the federal courts in departing from its controlling precepts.

Justice Ginsburg noted the irony of the *Shady Grove* decision, considering that it came in a case where federal subject matter jurisdic-

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<sup>240</sup> "I think [Professor Moore] will agree that the Federal Rules of Civil Procedure, themselves, ought never to become the categories to which substance must bend." Cover, *supra* note 147, at 740.

<sup>241</sup> *Id.* at 734-35.

tion depended upon the Class Action Fairness Act of 2005 (CAFA).<sup>242</sup> After all, many of CAFA's proponents sought to curb perceived over-enforcement of state law by expanding federal diversity jurisdiction to include virtually all economically significant class actions, which an increasingly conservative Rule 23 jurisprudence could then govern.<sup>243</sup> Despite CAFA's underlying jurisdictional commitment to combating perverse overenforcement of state liability, *Shady Grove* subverted New York's shield against the overenforcement of state law penalties or minimum damages. But that irony should not obscure the underlying similarity between CAFA and *Shady Grove*. Both developments have deprived the states of power to pursue visions of the class action that differ from the federal vision. CAFA was a product of the democratic process, however protracted and messy. *Shady Grove* was not. We are thus reminded once again of the Supreme Court's powerful incentive to impute the Enabling Act's limitations to the false idol of federalism values, rather than giving effect to the Act's purpose as a guardian of the separation of powers. Only the latter approach offers the promise of consistent and faithful attention to the intended limits on the Court's rulemaking authority.

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<sup>242</sup> See *Shady Grove*, 130 S. Ct. at 1473 (Ginsburg, J., dissenting) (noting that the Class Action Fairness Act of 2005 was intended to decrease the number of class actions overall).

<sup>243</sup> See Burbank, *supra* note 23, at 1441-47, 1507-09.