RULES ARE MADE TO BE ... RE-EXAMINED: AN ALTERNATIVE APPROACH TO THE RULES ENABLING ACT AND ITS SUBSEQUENT EFFECT ON FEDERAL RULE 15(C)

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I. INTRODUCTION

First-year law students often bemoan the so-called "Erie doctrine." Though the doctrine might lead to sleepless nights for those students, it also leads them to ask fundamental questions about our government: Who has the authority to make law, and where does that authority come from? Congress has the authority to make procedural rules for federal courts but delegated that authority to the Supreme Court by enacting the Rules Enabling Act (REA). Throughout the Court’s complicated history with the REA, an issue of interpretation has arisen. The REA’s second sentence prohibits rules that would affect substantive rights. And so the question that must be answered is this: When does a rule affect substantive rights? This Comment purports to answer that question.

1 Juris Doctor Candidate, December 2012, Mississippi College School of Law.
Part II traces the Supreme Court’s complicated history with the Erie doctrine and the REA. Out of that history, two approaches have developed which answer the substantive right question. The first approach answers the question by determining whether the rule is facially procedural or substantive. If the rule is substantive, it does not apply. This Court has favored this approach. The second, more nuanced approach, seeks to determine whether the rule has a substantive effect—even though it may be facially procedural. This approach has yet to gain majority support.

Part III advocates for this second approach. Part III-A addresses interpretive problems that exist with the first approach. It also explains how the second approach solves these problems. Part III-B examines how Erie and its canon—which represented a fundamental shift in federalism jurisprudence—necessitate use of the second approach. Part III-C addresses other issues that the Court has grappled with in choosing an approach, and how adopting the more nuanced analysis of the REA can solve these issues.

Part IV revisits Supreme Court cases to determine whether this second approach would have changed these cases’ outcomes. Part V applies the approach to Federal Rule of Civil Procedure 15(c). Finally, Part VI sums up the practical affect this approach might have.

II. HISTORY AND BACKGROUND

In 1934, Congress passed the Rules Enabling Act (REA). The law authorized the Supreme Court to promulgate rules that would provide a uniform system of practice and procedure for federal courts. Implemented in 1938, these Federal Rules of Civil Procedure apply to every federal action. But federal courts sitting in diversity are often faced with a dilemma. State laws, which generally govern in diversity proceedings, may interfere with this

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uniform federal system.\textsuperscript{5} The REA helps resolve this dilemma by designating whether the
federal or state rule applies. The REA states:

(a) The Supreme Court shall have the power to prescribe general rules of
practice and procedure and rules of evidence for cases in the United States
district courts (including proceedings before magistrate judges thereof) and
courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All
laws in conflict with such rules shall be of no further force or effect after such
rules have taken effect.\textsuperscript{6}

Federal courts sitting in diversity thus conduct a three-prong analysis to determine which rule
governs:

1. Is the scope of the Federal Rule, when given its plain meaning, sufficiently
broad to control the issue before the court?
2. If so, is the Federal Rule within the scope of the Rules Enabling Act?
3. If so, is the Rule also within a constitutional grant of power, such as that to be
found in Article III of the Constitution, providing for the establishment of the
federal courts, as implemented by Article I, \textsection 8, especially the Necessary and
Proper Clause?\textsuperscript{7}

In conducting this analysis, courts usually never consider the second or third prong of the
analysis. The first prong usually disposes of the controversy; courts generally interpret federal
rules to allow the federal and state rule to operate simultaneously, avoiding any conflict.\textsuperscript{8}

Nevertheless, it is occasionally necessary to make an analysis of the second step. The Supreme
Court’s approach to the second step has evolved significantly over the years, so a review of the
Erie doctrine case history is necessary.

\textsuperscript{4} \textit{Fed. R. Civ. P. 1.}
\textsuperscript{5} When federal courts decide federal questions, the substantive law is federal. Thus, this dilemma does
not exist in federal question jurisdiction cases.
\textsuperscript{6} \textit{Supra} at n.2.
\textsuperscript{7} \textit{Boggs v. Blue Diamond Coal Co.}, 497 F. Supp. 1105, 1109 (E.D. Ky. 1980).
\textsuperscript{8} \textit{Shady Grove Orthopedics Assocs., P.A. v. Allstate Ins. Co.}, 130 S. Ct. 1431, 1462 (2010) (Ginsburg,
J., dissenting).
After Congress enacted the REA, but before the rules went into effect, the Court handed down *Erie Railroad Co. v. Tompkins*. In the opinion, the Court overturns a long-standing interpretation of the Rules of Decision Act. The Act reads:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Before 1938, the Court had interpreted this statute to mean that in diversity actions, federal courts could apply federal common law in the absence of written-down state law. At an earlier point in America’s jurisprudence, many believed that there was a “natural” law that existed even without statutory authority. *Erie* majority author Justice Louis Brandeis explained it thusly: “The statute . . . is merely declarative of the rule which would exist in the absence of a statute.” Based on this legal theory, the Court had determined in *Swift v. Tyson* that federal judges could essentially apply whatever substantive law they deemed appropriate in the absence of either a state statute that controlled the issue or some other “strictly local” law. In Brandeis’s opinion, this interpretation of the RDA caused a number of problems. First, many litigants determined their forum for a lawsuit based on the substantive differences between federal and state common law. If the federal law better supported their claim, they

9 304 U.S. 64 (1938).
10 *Id.* at 69, 75.
13 See *id.* at 823.
14 *Id.* at 72.
15 *Id.* The Court in *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 101 (1945) later explains the pre-*Erie* legal landscape thusly: “Law was conceived as a ‘brooding omnipresence of Reason,’ of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore Law, required wholly independent of authoritatively declared State law, even in cases where a legal right as the basis for relief was created by State authority and could not be created by federal authority and the case got into a federal court merely because it was ‘between Citizens of different States’ under Art. III.”
16 *Id.* at 73.
17 *Id.* at 73-74.
filed suit in federal court; if the state court was more advantageous, they chose state court. Second, this “forum-shopping” led to an “inequitable administration of justice”; defendants were subject to one set of substantive laws if they were sued in state court and another set of laws if sued in federal court.

This was the very situation in *Erie*. One of Erie’s freight trains passed by Tompkins, who was walking closely alongside a railroad track at night. When the train passed, one of its car doors hung open and struck Tompkins, injuring him. Erie’s liability for the accident depended on the duty it owed Tompkins. Under Pennsylvania law, Erie breached its duty to Tompkins only if the company’s actions were wanton and willful. But under federal law, Tompkins could prevail by proving ordinary negligence, a lower standard. Had Tompkins, a Pennsylvania resident, sued Erie in a Pennsylvania court, he would have had to prove breach of the higher duty and may have lost the suit. Therefore, Tompkins filed suit in federal court and argued that Pennsylvania had no statute that governed the railroad’s duty. He believed the RDA applied; the court was free to apply a federal common law duty of care against ordinary negligence.

The Court disagreed. According to Brandeis, neither Congress nor the federal courts have the constitutional authority to make substantive law for the states. Brandeis also stated that the foundation for Swift’s holding is invalid: there is no transcendental body of “law” that

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18 *Id.*
20 *Id.* at 70.
21 *Id.*
22 *Id.*
23 *Id.*
24 *Erie R.R. Co.*, 304 U.S. at 70.
25 *Id.*
26 *Id.* at 78.
exists without any authority behind it. Quoting Oliver Wendell Holmes, Brandeis explained, "'The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or its Supreme Court) should utter the last word.'" The majority thus held that in diversity actions, it is the state law, whether statutory or common law, that governs the case.

The same year the Court decided Erie, the Federal Rules of Civil Procedure went into effect. Soon after, the Court addressed how to determine a Rule’s validity under the REA. In 1941, the Court explained the framework for testing the validity of a federal rule when the federal rule controls an issue and leaves no room for a state rule to operate. In Sibbach v. Wilson, a majority of the Court held valid Rules 35 and 37. The majority explained that Congress has power over federal court practice and procedure and has delegated such power to the Supreme Court through the REA. The only limitation that Congress placed on such rules is that they not “abridge, enlarge, or modify any substantive right.”

Sibbach had already admitted that both these rules were procedural, satisfying the REA’s first provision. But to get around this admission, Sibbach argued that the REA’s limitation on “substantive” rights means that the REA limits the Rules’ effect on “important” rights. Included in these “important” rights is the right to be free in one’s person, which Sibbach claimed Rules 35 and 37 altered. Sibbach wrote in his brief, “The criterion to apply in deciding whether or not a matter is within the rule-making power is to determine ‘whether the

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27 Id. at 79.
28 Id.
29 Erie R.R. Co., 304 U.S. at 80.
30 312 U.S. 1 (1941).
31 Id. at 11.
32 Id. at 9.
33 Id.
34 Id. at 11.
35 Sibbach, 312 U.S. at 11.
rule creates a non-procedural policy’ that can only be legitimately created by legislatures.”36 In short, Sibbach argued that a “non-procedural policy”—the important right to be free in one’s person—was altered.37 According to Sibbach, changing such a policy is left to the legislature.38

The court rejected Sibbach’s criterion: “The test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”39 Under this criterion, both rules passed muster.40

Four years later, the Court again addressed the “Erie problem.” In Guaranty Trust Co. of New York v. York, the Court determined whether a litigant could bring her suit in a federal court sitting in diversity if her claim would have been time-barred if brought in a state court.41 In so doing, the Court answered a question of whether statutes of limitation are procedural or substantive for choosing the applicable rule.42

Justice Frankfurter explained that a state’s characterization of a statute of limitation as substantive or procedural was irrelevant.43 The Court never intended Erie to define substance and procedure, but to express a “policy that touches vitally the proper distribution of judicial power between State and federal courts.”44 Under that policy, a federal court sitting in

36 Brief for Petitioner at 5-6, Sibbach v. Wilson, 312 U.S. 1, (1941) (No. 28) 1910 WL 21009.
37 Id.
38 Id. at 6.
39 Sibbach, 312 U.S. at 426.
40 Id.
41 Id. at 107-08.
42 Id. (“The Court phrased the issue thusly: “Is the outlawry, according to State law, of a claim created by the States a matter of ‘substantive rights’ to be respected by a federal court of equity when that court’s jurisdiction is dependent on the fact that there is a State-created right, or is such statute of ‘a mere remedial character,’ which a federal court may disregard?”)
43 Id. at 109.
44 Id.
diversity is, “in effect, only another court of the state.”\textsuperscript{45} Frankfurter concluded that the outcome of the suit in federal court should not differ from the outcome in state court.\textsuperscript{46}

The issue, then, is not whether a statute of limitation is procedural. Instead, the issue is “whether such a statute concerns merely the manner and the means by which a right to recover… is enforced,” or whether such a statute “significantly affect[s] the result of a litigation.”\textsuperscript{47} If the statute has “consequence[s] that so intimately affect recovery or non-recovery,” the statute is outcome-determinative and “a federal court in a diversity case should follow State law.”\textsuperscript{48}

In 1949, the Court reinforced its faith in the outcome-determinative test. The Court issued three opinions that highlighted the difficulty in making the substance/procedure distinction. In \textit{Ragan v. Merchants Transfer & Warehouse},\textsuperscript{49} the Court declined to apply Rule 3\textsuperscript{50} over a Kansas law that tolled the statute only after summons was served.\textsuperscript{51} Ragan filed his claim within the Kansas two-year limitation but issued the summons outside the time limit.\textsuperscript{52} Ragan argued that Rule 3 should apply.\textsuperscript{53} The majority rejected that argument:

Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in federal court as in the state court. It accrues and comes to an end when local law so declares. Where local law qualifies or abridges it, the federal law must follow suit.\textsuperscript{54}

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\textsuperscript{45} Id. at 108-09.  \\
\textsuperscript{47} Id.  \\
\textsuperscript{48} Id.  \\
\textsuperscript{49} 337 U.S. 530 (1949).  \\
\textsuperscript{50} \textit{FED. R. CIV. P. 3. Rule 3 tolls the applicable statutes of limitation by filing a complaint.}  \\
\textsuperscript{51} \textit{Ragan}, 337 U.S. at 534.  \\
\textsuperscript{52} Id. at 531.  \\
\textsuperscript{53} Id. at 532-33.  \\
\textsuperscript{54} Id. at 533.
\end{flushright}
Justice Douglas applied the *Guaranty Trust* outcome-determinative test to replicate the state tribunal.55 Because the action would have been time-barred were it brought in a Kansas court, Douglas stated that it must also be time-barred in the federal court.56 “Otherwise…the principle of *Erie R.R. Co. v. Tompkins* is transgressed.”57

In *Woods v. Interstate Realty Co.*,58 the Court dismissed an action to recover a broker’s commission on a real estate transaction.59 The district court had dismissed the case with prejudice because Interstate was not qualified to do business in Mississippi, which required a foreign corporation to designate an agent upon which to serve process.60 Without such an agent, a suit could not be maintained.61 The Court of Appeals reversed, stating that the contract, though void, was only unenforceable in Mississippi courts.62 By negative implication, the contract could thus be enforced in federal courts.

The Supreme Court reversed.63 It emphasized the outcome-determinative test, and that the federal court is only another court of the state.64 Because the contract was unenforceable in Mississippi courts, it was equally unenforceable in federal courts:

WHEREIN

Where in such cases one is barred from recovery in the state court, he should likewise be barred in federal court. The contrary result would create discriminations against the citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that *Erie R. Co. v. Tompkins* was designed to eliminate.65

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55 Id.
56 *Id.* at 534.
57 *Id.* at 533.
59 *Id.* at 536, 538.
60 *Id.* at 536.
61 *Id.* at n.1.
62 *Id.* at 536.
63 *Id.* at 538.
64 *Id.* at 538.
65 *Id.*
In *Cohen v. Beneficial Industrial Loan Corp.*,\(^{66}\) the Court upheld use of a New Jersey statute over Rule 23, which governs criteria for maintaining a class action.\(^{67}\) The New Jersey statute required the plaintiff to indemnify the corporation for its expenses in case the plaintiff lost the suit.\(^{68}\) Otherwise, the suit could not be maintained.\(^{69}\) Though the state rule was cast in procedural terms, it had a substantive effect.\(^{70}\) The majority explained that “[r]ules which lawyers call procedural do not always exhaust their effect by regulating procedure.”\(^{71}\) This state statute was one of those rules.\(^{72}\) On its face, the statute was procedural; it created a procedure “by which the liability is insured by entitling the corporate defendant to a bond of indemnity before the outlay is incurred.”\(^{73}\) But in so doing, the statute “create[d] a new liability where none existed before.”\(^{74}\) Therefore, the majority held that the state law had a substantive effect and applied it to the case.\(^{75}\)

Almost 10 years later, the Court again tinkered with how to answer the Erie problem. In *Byrd v. Blue Ridge Electric Cooperative, Inc.*,\(^{76}\) the Court modified the outcome-determinative test to include a balancing of federal and state interests.\(^{77}\) Byrd was an electrical line worker who was injured connecting electrical lines to a Blue Ridge substation in rural South Carolina.\(^{78}\) Under South Carolina law, an employee must accept, as her exclusive remedy, the state’s workers compensation benefits.\(^{79}\) The South Carolina Supreme Court previously held

\(^{66}\) 337 U.S. 541 (1949).
\(^{67}\) Id. at 557.
\(^{68}\) Id. at 545.
\(^{69}\) Id.
\(^{70}\) Id. at 556.
\(^{71}\) *Cohen*, 337 U.S. at 556.
\(^{72}\) Id.
\(^{73}\) Id.
\(^{74}\) Id. at 555.
\(^{75}\) Id. at 556.
\(^{76}\) 357 U.S. 933 (1958).
\(^{77}\) Id. at 538.
\(^{78}\) Id. at 526-27.
\(^{79}\) Id. at 527.
that a judge must make a factual inquiry to determine whether a person is a statutory employee according to the state worker’s compensation act. But federal courts left factual determinations to the jury.

Justice Brennan explained in his majority opinion that the state rule was merely procedural. He then acknowledged that under Guaranty’s outcome-determinative test, state law might have applied. But he stated that, to determine applicable law, a court must evaluate other considerations. These “countervailing considerations” include the “essential characteristics” of the federal court system. Brennan explained that the essential characteristic endangered in the case was the “judge-jury relationship in the federal courts.” This relationship could not be upset by state law: “[S]tate laws cannot alter the essential character of function of a federal court” because that function “is not in any sense a local matter.” Therefore, the majority required use of the federal law.

The Court further limited the chances of invalidating a federal rule in Hanna v. Plumer. The majority applied the REA to uphold the validity of Rule 4 over a conflicting Massachusetts statute that governed service of process. First, the Court explained that the

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80 Id. at 534.
81 U.S. CONST. amend. VII.
82 Guaranty Trust Co. of New York, 357 U.S. at 536 (“We find nothing to suggest that this rule was announced as an integral part of the special relationship created by the statute. Thus the requirement appears to be merely a form and mode of enforcing the immunity… and not a rule intended to be bound up with the definition of the rights and obligations of the parties.”).
83 Id. at 537 (“It may well be in the instant personal-injury case the outcome would be substantially affected by whether the issue of immunity is decided by judge or jury.”).
84 Id.
85 Id.
86 Id. at 538.
87 Guaranty Trust Co. of New York, 357 U.S. at 539 (quoting Herron v. Southern Pacific Co., 283 U.S. 91, 94 (1931)).
88 Id. at 538.
90 Id. at 470-71.
REA, not the RDA, is used when a rule directly collides with a contrary state rule. “The 
*Erie* rule has never been invoked to avoid a Federal Rule.” Only if the federal rule does not 
cover the issue at hand should a court make an *Erie* analysis and apply the Rules of Decision 
Act. If the rule does cover the issue, the court “has been instructed to apply the Federal Rule 
and can refuse to do so only if the Advisory Committee, [the] 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.” The majority noted that the Court had 
previously applied state laws to cases in which litigants argued that the Federal Rules 
governed. But the majority also explained that the Court did so only for cases in which the rule was construed to avoid a direct conflict.

The majority found a direct collision between the Massachusetts statute and the Rule 4 “unavoidable.” The state rule required in-hand service of process, whereas the federal rule 
did not. Therefore, the Court rejected Hanna’s claim that *Erie* applied. Instead, the 
majority applied the test articulated in *Sibbach*—whether a rule “really regulates procedure.”
The majority, without any explanation of the Rule’s characterization, held that Rule 4 governs 
practice and procedure and is thus valid under the REA.

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91 *See supra* note 9 and accompanying text.  
92 *Id.* at 470.  
93 *Id.*  
94 *Id.*  
95 *Hanna* , 380 U.S. at 470.  
96 *Id.*  
97 *Id.*  
98 *Id.* at 470-71 (“Here, of course the clash is unavoidable; Rule 4 (d)(1) says—implicitly, but with 
unmistakable clarity—that in-hand service is not required in federal courts). The Massachusetts statute, 
however, required in-hand service of process.  
100 *Id.*  
101 *Id.* at 470, 474.  
102 *Id.* at 474.
Justice Harlan’s concurrence cast additional light on interpreting the Federal Rules. He explained that *Erie* recognized an important principle: Absent any explicit authorization to the contrary, the Constitution allocates power over substantive law to the states.\(^{103}\) And no matter its characterization, any law that would “substantially affect those primary decisions respecting human conduct” must be left to the choice of the state “even in the face of a conflicting federal rule.”\(^{104}\)

In addition to recognizing the States’ power over substantive laws, Harlan then cautioned that the majority’s holding would give courts too much power to supplant these state laws with their federal counterparts.\(^{105}\) A federal rule could be valid as long as it could be rationally characterized as procedural.\(^{106}\) Courts could apply the rule “no matter how seriously it frustrated a State’s substantive regulation of the primary conduct and affairs of regulation of the primary conduct and affairs of its citizens.”\(^{107}\) Harlan thus rejected the “arguably procedural, ergo constitutional” mandate the majority implied.\(^{108}\)

Ultimately, Harlan saw no frustration of substantive rights in the case.\(^{109}\) But he did provide some threshold to indicate how much of an effect on substantive rights a federal rule must have to be declared invalid: “[T]his does not seem enough to give rise to any real *impingement on the vitality of the state policy* which the [state] rule is intended to serve.”\(^{110}\) Therefore, Harlan concurred with the majority in applying the federal rule.\(^{111}\)

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\(^{103}\) *Hanna*, 380 U.S. at 475 (Harlan, J., concurring).

\(^{104}\) *Id.*

\(^{105}\) *Id.* at 476.

\(^{106}\) *Id.*

\(^{107}\) *Id.*

\(^{108}\) *Hanna*, 380 U.S. at 476. (Harlan, J., concurring).

\(^{109}\) *Id.* at 478.

\(^{110}\) *Id.* (emphasis added).

\(^{111}\) *Id.* at 478.
In 1965, the majority noted in *Hannah* that the Court had applied state law when federal and state laws were construed to avoid a direct conflict. Thirty-one years later, the Court gave an example about how to avoid such a conflict. In *Gasperini v. Center for Humanities, Inc.*, the Court vacated an appellate court’s denial of a new trial for damages when it required application of a New York law that allowed jury damage awards to be reviewed. Gasperini, a journalist, loaned a number of photograph transparencies to the Center for Humanities. The Center later misplaced these transparencies. It also admitted its liability for the lost property, and the district court conducted a trial to determine Gasperini’s damages. The jury awarded Gasperini $1,500 for each transparency. The Center claimed this was excessive and motioned for a new trial, which the district court denied.

The issue before the Court was whether the results of the jury trial were reviewable. The Seventh Amendment says no: “ ‘[T]he right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.’ ” New York law allowed an appellate court to review the jury award if it “deviate[d] materially from what would be reasonable compensation.”

The Center argued that this law allowing an appellate court review of a jury award was a substantive matter: by allowing an appellate court to dial back damages awarded, the

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113 *Id.* at 439.
114 *Id.* at 419.
115 *Id.*
116 *Id.* at 419-20.
117 *Gasperini*, 518 U.S. at 419-20.
118 *Id.*
119 *Id.* at 422.
120 *Id.* at 418.
121 *Id.*
legislature had essentially instituted a cap on damages.\textsuperscript{122} Thus, the Seventh Amendment would not apply.\textsuperscript{123} Gasperini countered that New York’s allowing of appellate review merely allocated the damages determination to the judge instead of the jury and was thus procedural.

The Court disagreed.\textsuperscript{124} The New York law, Ginsburg said, was substantive. She stated that the law was analogous to a statutory cap on damages, which would be substantive for Erie purposes.\textsuperscript{125} Therefore, though the rule “contains a procedural instruction,” “the State’s objective [was] manifestly substantive.”\textsuperscript{126}

Though Gasperini showed how a law could be facially procedural and yet embody a “non-procedural policy” for Erie purposes, the Court never addressed the REA. Thus, despite Gasperini’s deference to state law on substantive matters, Hanna’s rule still governed direct collisions between federal and state rules. All hope seemed lost for the state substantive concerns that could be imbedded in procedural rules. But in 2009, the court re-opened the door to the “non-procedural policy” determination that Sibbach initially argued for.

In \textit{Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.},\textsuperscript{127} the Court again addressed the analysis for claims of REA violations.\textsuperscript{128} A majority of the Court agreed that both Rule 23 and a similar New York statute governed the maintenance of a class action and thus directly conflicted.\textsuperscript{129} The majority also agreed that Rule 23 controlled.\textsuperscript{130} But

\begin{footnotes}
\item[122] Ginsburg notes that this cap is a common law one: “New York state courts look to awards approved in similar cases.”\textit{Gasperini v. Ctr. for Humanities, Inc.}, 518 U.S. 415, 425 (1996).
\item[123] \textit{Gasperini}, 518 U.S. at 426. The Seventh Amendment applies only in federal court.
\item[124] \textit{Id.} at 429.
\item[125] \textit{Id.}
\item[126] \textit{Id.}
\item[127] 130 S. Ct. 1431 (2010).
\item[128] \textit{Id.} at 1437.
\item[129] \textit{Id.} at 1448.
\item[130] \textit{Id.} at 1145.
\end{footnotes}
Justices Scalia and Stevens disagreed sharply on the proper analysis for determining whether a federal rule controls.\footnote{Id.}

Justice Scalia affirmed the Sibbach approach. He stated that the test is not “whether the rule affects a litigant’s substantive rights; most procedural rules do.”\footnote{Id.} Rather, the test is whether the rule “really regulates procedure.”\footnote{Id.} If the rule does not and instead “alters the rules of decision by which the court will adjudicate those rights,” then the rule is invalid.\footnote{Id.} This Sibbach test has been precedent for nearly 70 years.\footnote{Id. at 1446.} It cannot be overturned merely because of Justice Stevens’ belief that the rule is incorrect.\footnote{Id.} But even more than that, the difficulty in making a determination that is dependent on state law would be difficult and costly.\footnote{Shady Grove, 130 S. Ct. at 1447.}

Justice Stevens, however, advocated for a substantive policy approach to the REA. In this approach, a court must first look to the state law and the characterization its courts have given the law.\footnote{Id. at 1449 (Stevens, J., concurring).} Then, if the law has some substantive purpose or effect that would be impinged by the federal rule’s application, a court must apply the state rule.

Like Harlan before him, Stevens explained that the REA limits the Federal Rules. Though Congress has the constitutional power to enact procedural rules that frustrate substantive rights, it chose not to give all that power to the Supreme Court.\footnote{Shady Grove, 130 S. Ct. at 1447.} Instead, Congress limited the Court to promulgating rules that do not “abridge, enlarge, or modify a

\begin{footnotes}
\footnote{Id.}
\footnote{Id.}
\footnote{Shady Grove, 130 S. Ct. at 1442.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id. at 1446.}
\footnote{Id.}
\footnote{Id. at 1447.}
\footnote{Id. at 1449 (Stevens, J., concurring).}
\footnote{Id.}
\end{footnotes}
And while that limitation “cannot displace state policy judgments” it does prevent the federal rules from displacing “a State’s definition of its own rights or remedies.”

Therefore, “federal rules must be interpreted with some degree of sensitivity to important state and regulatory policies.”

A rule’s validity cannot be determined by “whether the state law at issue takes the form . . . substantive or procedural.” Many laws traditionally cast as “procedural” also have a substantive effect. A rule’s validity, then, must be determined by whether the state law “is part of a State’s framework of substantive rights or remedies.” If a facially procedural rule defines “the scope of substantive rights or remedies, federal courts must recognize and respect that choice.”

_Sibbach_, said Stevens, never addressed substantive rights or remedies:

The matter at issue in _Sibbach_ reflected competing federal and state judgments about privacy interests. Those privacy concerns may have been weighty and in some sense substantive; but they did not pertain to the scope of any state right or remedy in the litigation.

Stevens also rejected Scalia’s concerns with the difficulty in making such an as-applied analysis. Though “there are costs involved in attempting to discover the true nature of a state procedural rule,” this does not mean courts should avoid thoroughly exploring the question.

Finally, Stevens minimized Scalia’s fears that this analysis would ultimately lead to chaos.

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140 _Id._
141 _Id._
142 _Shady Grove_, 130 S. Ct. at 1449 (Stevens, J., concurring) (quoting _Gasperini v. Center for Humanities_, 518 U.S. 415, 427 n.7 (1996)) (internal quotations omitted).
143 _Id._ Also, “The plurality’s test is no test at all-in a sense, it is little more than the statement that a matter is procedural if, by revelation, it is procedural.” _Id._ at n.10.
144 _Id._
145 _Id._ at 1450.
146 _Shady Grove_, 130 S. Ct. at 1455.
147 _See id._ at 1457.
noting that a federal rule that is violative of the REA is a rare occurrence.\textsuperscript{149} Justice Ginsberg never reached this analysis. Ginsburg explained that the Court has avoided interpreting the federal rules in such a way that “would trench on state prerogatives without serving any countervailing federal interest.”\textsuperscript{150} In short, the Court has “interpre[ted] the federal rules to avoid conflict with important state regulatory policies.”\textsuperscript{151} Justice Ginsberg, following the Court’s guideline, found no direct conflict between Rule 23 and the state law.\textsuperscript{152} She interpreted the two rules so that they both could operate; the RDA and \textit{Erie} thus controlled.\textsuperscript{153}

Finally, Ginsburg chided the majority for not doing the same: “Had the Court reflected on the respect for state regulatory interests endorsed in our decisions, it would have found no cause to interpret Rule 23 so woodenly-and every reason not to do so.”\textsuperscript{154} The Court then would not have “unwisely and unnecessarily retreat[ed] from the federalism principles undergirding \textit{Erie}.”\textsuperscript{155}

\section*{III. ANALYSIS}

Congress has granted the Supreme Court power to promulgate rule of practice and procedure.\textsuperscript{156} This power is embodied in the first sentence of the REA.\textsuperscript{157} But it is the second

\begin{itemize}
  \item \textsuperscript{149} Id. at 1446 n.13. Stevens also noted that Scalia’s analysis would be no simpler than Stevens’ analysis: “Although [Scalia’s interpretation] avoids courts’ having to evaluate state law, it tasks them with figuring out whether a federal rule is really ‘procedural.’ It is hard to know the answer to that question.”
  \item \textsuperscript{150} Id. at 1461 (Ginsburg, J., dissenting) (“Like the Supreme Court, most lower federal courts have not decided many \textit{Erie} issues with reference to the Rules Enabling Act’s substantive rights provision.”).
  \item \textsuperscript{151} Id. at 1456.
  \item \textsuperscript{152} \textit{Shady Grove}, 130 S. Ct. at 1468 (Ginsburg, J., dissenting).
  \item \textsuperscript{153} Id. at 1472.
  \item \textsuperscript{154} Id. at 1468-69.
  \item \textsuperscript{155} Id. at 1468.
  \item \textsuperscript{156} 28 U.S.C. § 2072(a) (West 2011).
  \item \textsuperscript{157} Id.
\end{itemize}
sentence of the REA that leads to the two different approaches. To recap, the *Sibbach* approach determines whether the federal rule is procedural or substantive. If it is procedural, the court applies it. If it is substantive, the court does not. The substantive policy approach looks to the characterization of the state law. If applying the federal law would frustrate the state’s substantive policies, then it cannot be applied. On the one hand, the *Sibbach* test is a statutory construction in which the “Act delegate[s] rulemaking authority coextensive with Congress’ constitutional rulemaking authority…” On the other hand, the substantive policy approach is a statutory construction in which the “‘substantive rights’ provision confine[s] the Supreme Court’s rulemaking authority within narrower bounds than Congress’ constitutional authority, prohibiting regulation by Court-promulgated rule of . . . matters within that uncertain area between substance and procedure.”

A. Interpretation issues

The *Sibbach* test is deficient in a number of ways. First, the approach effectively ignores Congress’ express limitation of any substantive effects the rules might have. A fundamental principle of the Constitution is the concept of separation of powers—the allocation of Constitutional authority among the legislative, executive, and judicial branches of government. This separation protects the citizenry from tyranny that would result from one branch of government having too much power. In separating the powers, the Constitution

158 28 U.S.C. § 2072(b) (West 2011) (“Such rules shall not abridge, enlarge or modify any substantive right.”).
160 Id.
161 Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The Shady Grove Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041, 1063 (2011) (“A reading of *Sibbach* that would eviscerate or substantially curtail that limitations places the judiciary in the position of enhancing its own power in the face of a congressionally imposed mandate to the contrary.”).
163 Id.
explicitly allocates rulemaking power to Congress. But within Congress’ other explicit power—the creation of federal courts—is Congress’ implied power to govern how those federal courts operate—in essence, procedural rulemaking power. Congress may choose to delegate some of this power and has done so through the REA. Through the REA, Congress gave the Supreme Court power to make rules over the courts’ practice and procedure, the results of which are the Federal Rules. When Congress first considered granting this power to the Court, it had little reason to consider the impact the rules would have on state substantive law when applied by federal courts sitting in diversity. In 1842, the Court ruled in Swift v. Tyson that judges could apply federal common law in diversity cases. Federal substantive law, not state substantive law, would be the rules of decision for adjudicating these claims. Swift was still the law of the land in 1934 when Congress enacted the REA. Erie, which would reverse Swift, would not be written for another four years. Thus Congress’ concern with allocating rule-making power was the distribution of that power between itself and the Supreme Court—two co-equal branches of the federal government.

164 U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States…”).
165 Hanna, 380 U.S at 472 (“[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts.”); Paul D. Carrington, “Substance” and “Procedure” in the Rules Enabling Act, 1989 D.U.L.J. 281, 285 (1989) (“Congress’ power over the federal courts’ rules of procedure “is implied from its Article III powers to create such courts.”).
167 Id.
168 41 U.S. 1 (1842).
169 Id. at 9.
170 Id.
171 The REA was enacted in 1934. Erie was handed down in 1938.
172 Stephen B. Burnank and Tobias Barrington Wolff, Redeeming the Missed Opportunities of Shady Grove, 159 U. PA. L. REV. 17. 27 (2010) (“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.”).
In allocating such power, Congress did not grant the Court power over substantive law.\textsuperscript{173} In fact, Congress explicitly placed a limitation on the Court’s power with the REA’s second sentence.\textsuperscript{174} Thus, if a rule is substantive, it is not within the Supreme Court’s power to promulgate. After all, “the Court cannot promulgate rules creating rights bearing on behavior external to it without fully taking leave of its assigned functions in the constitutional scheme.”\textsuperscript{175} Opponents of the REA were keenly aware of this.\textsuperscript{176} Thus, they advocated for the REA’s second provision, which would foreclose the possibility that the delegable Art. III power usurps Congress’ Art. I legislative power.\textsuperscript{177} But if the drafters wanted it in there, they must have thought the sentence was necessary, as they believed that the first sentence may have been outside the Court’s power.\textsuperscript{178} Thus, the sentence must not be mere a mere surplus.

The Sibbach approach to the REA does not consider 2072(b) as limiting language. It recognizes that the Federal Rules should be confined to govern procedure: “Hence we conclude that the [REA] was purposely restricted in its operations to matters of pleading and court practice and procedure.”\textsuperscript{179} This limitation on the REA to matters of procedure is addressed in the first sentence. In essence, the court said that “anything that relates to process, writs, pleadings, motions, or to practice and procedure generally, is authorized; anything else is not.”\textsuperscript{180}

\begin{flushleft}
\textsuperscript{173} Sibbach, 312 U.S. at 10 (“[Congress] never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution. On the contrary it has enacted that the state law shall be the rule of decision in the federal courts.”).
\textsuperscript{174} U.S.C.A. §2072 (b) (West 2011).
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{173} Sibbach, 312 U.S. at 10.
\end{flushleft}
This interpretation, however, oversimplifies the substance-procedure distinction. The simplified view that procedure and substance are mutually exclusive simply is no longer correct in modern legal thought.\textsuperscript{181} Many rules have both substantive and procedural effects.\textsuperscript{182} \textit{Sibbach} failed to recognize this important principle:

[D]espite the fact that it was precisely the situation to which the Act’s draftsmen were addressing themselves in the second sentence, the possibility that a Rule could fairly be labeled procedural and at the same time abridge, enlarge, or modify substantive rights was one the Court was not willing to accept; by its lights, either a Rule was procedural or it affected substantive rights.\textsuperscript{183}

But the Court itself has acknowledged that there is little mutual exclusivity in the substance/procedure distinction, saying that the “Court's rulemaking under the enabling Acts has been substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants.”\textsuperscript{184} Therefore, by forcing rules into either characterization, the Court ignores its own assertion that procedural rules have substantive effects. And those effects change as the contexts change, invalidating Scalia’s assertion that a rule is valid in some circumstances and invalid in others.\textsuperscript{185}

Justice Stevens’ approach, however, recognizes the REA’s second sentence as more than a reinforcement of the first sentence. In Stevens’ approach, a federal rule may be, by its


\textsuperscript{182}Id. (“Procedural rules often have dramatic impact on the citizenry's planning of their primary behavior.”); Shady Grove at n.9 (“There are many ways in which seemingly procedural rules may displace a State's formulation of its substantive law. For example, statutes of limitations, although in some sense procedural rules, can also be understood as a temporal limitation on legally created rights; if this Court were to promulgate a federal limitations period, federal courts would still, in some instances, be required to apply state limitations periods. Similarly, if the federal rules altered the burden of proof in a case, this could eviscerate a critical aspect-albeit one that deals with how a right is enforced-of a State's framework of rights and remedies. Or if a federal rule about appellate review displaced a state rule about how damages are reviewed on appeal, the federal rule might be preempting a state damages cap.”).


\textsuperscript{185}Shady Grove Orthopedics, 130 S. Ct. at 1444.
terms, procedural yet have a substantive effect as applied.\textsuperscript{186} Whereas the \textit{Sibbach} approach ends the inquiry after determining whether a rule is procedural or substantive, the substantive policy approach goes further, and looks at the “character of the state provision that enforcement of the Federal Rule in question will supplant, in particular to whether the state provision embodies a substantive policy or represents only a procedural disagreement with the federal rule makers respecting the fairest and most efficient way of conducting litigation.”\textsuperscript{187} If the state provision is part of a state’s substantive policy, then it should apply, a conflicting federal rule notwithstanding.\textsuperscript{188}

This approach recognizes that some rules, though procedural, can have a substantive effect. A number of Rules that potentially fall within this realm. For example, Rule 3 governs when an action is commenced.\textsuperscript{189} Specifically, the Rule states that actions are commenced at the time of filing, a procedural action that perfects jurisdiction over a defendant.\textsuperscript{190} Yet when a state rule deems an action commenced by service of summons, potential problems might ensue. If the action is commenced outside the statute of limitation, then the claim is barred; a plaintiff no longer has a remedy. Additionally, Rule 15(c), as discussed below, potentially enlarges the effective limitation on a claim. The \textit{Sibbach} rule has no way to account for these substantive effects that traditionally procedural rules have. The substantive-policy approach, however, recognizes these dual-character rules and their potential inapplicability.

Justice Scalia did note that, under the \textit{Sibbach} test, a law might have “incidental” substantive effects and yet be effectively procedural.\textsuperscript{191} But even accepting \textit{arguendo} that the

\begin{footnotesize}
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\item \textsuperscript{186} Id.
\item \textsuperscript{188} \textit{Shady Grove}, 130 S. Ct. at 1452 (Stevens, J., concurring).
\item \textsuperscript{189} FED. R. CIV. P. 3.
\item \textsuperscript{190} Id.
\item \textsuperscript{191} \textit{Shady Grove}, 130 S.Ct. at 1435.
\end{itemize}
\end{footnotesize}
Sibbach test does account for the substantive effects of otherwise procedural rules, how can the Sibbach test determine when the substantive effects are more than incidental? Scalia recognized the difficulty:

It is possible to understand how it can be determined whether a Federal Rule “enlarges” substantive rights without consulting State law: If the Rule creates a substantive right, even one that duplicates some state-created rights, it establishes a new federal right. But it is hard to understand how it can be determined whether a Federal Rule “abridges” or “modifies” substantive rights without knowing what state-created rights would obtain if the Federal Rule did not exist. Sibbach’s exclusive focus on the challenged Federal Rule . . . is hard to square with § 2072(b)’s terms.\textsuperscript{192}

The Advisory Committee originally charged with drafting the Rules of Civil Procedure “did not articulate any clear standard for differentiating between substance and procedure.”\textsuperscript{193} Additionally, “[t]he Sibbach inquiry . . . offers no real standard by which lower courts can examine the validity of the federal rules.”\textsuperscript{194} Without any actual threshold to know when a rule has more than incidental substantive effects, a “facially valid Federal Rule may effectively abridge, enlarge, or modify a substantive right as applied without running afoul of §2072(b).”\textsuperscript{195} In practice, Justice Harlan said that, in applying this approach, “the Court attributes such overriding force to the Federal Rules that it is hard to think of a case where a conflicting state rule would be allowed to operate, even though the state rule reflected policy considerations which, under Erie, would lie within the realm of state legislative authority.”\textsuperscript{196}

The Court, however, has a possible standard for addressing when such substantive effects cross a threshold that renders a federal rule invalid pursuant to § 2072(b). First, a court

\textsuperscript{192} Id. at 1445-46.
\textsuperscript{193} Id.
\textsuperscript{196} Hanna, 380 U.S. at 478 (Harlan, J., concurring).
must examine the purpose of the conflicting state rule, as Scalia himself even suggests doing. Commentators are also persuaded by this approach: “If sovereigns create rules of law, then we cannot know whether a particular rule is substantive or procedural without considering its purpose, and only the sovereign establishing the rule can define that.” Then, if that state substantive law is part of a State’s framework of substantive rights or remedies or affects “the primary stages of private activity from which torts arise,” and more than “the most minimal effect on behavior following the commission of the tort,” the federal rule will not be applied. This effect must be more than incidental. And though the Sibbach approach recognizes these incidental effects and their negligible impact on a Rule’s validity, the approach sets too high a bar. The Sibbach approach tests a Rule’s facial validity, but ignores as-applied situations where a rule would be invalid under the REA. Thus, the approach necessarily leaves out possible substantive effects that Stevens’ as-applied challenges would account for.

**B. Erie’s effect**

In addition to dividing power among the three branches of the federal government, the Constitution also allocates power between federal and state governments. This principle of federalism is reflected in the Tenth Amendment: “The powers not delegated to the United

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197 *Shady Grove Orthopedics*, 130 S. Ct. at 1452 (Stevens, J., concurring).
198 See id. at 1446.
200 See *Shady Grove*, 130 S. Ct. at 1452 n 9 (Stevens, J., concurring).
201 *Hanna*, 380 U.S. at 477.
202 *Shady Grove*, 130 S. Ct. at 1444.
203 Though an admittedly lower threshold than the Sibbach approach, Stevens’ substantive policy approach still sets a very high standard for invalidating a Rule: “In my view, however, the bar for finding an Enabling Act problem is a high one. The mere fact that a state law is designed as a procedural rule suggests it reflects a judgment about how state courts ought to operate and not a judgment about the scope of state-created rights and remedies. And for the purposes of operating a federal court system, there are costs involved in attempting to discover the true nature of a state procedural rule and allowing such a rule to operate alongside a federal rule that appears to govern the same question. The mere possibility that a federal rule would alter a state-created right is not sufficient. There must be little doubt.” *Shady Grove*, 130 S. Ct. at 1457.
States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Suppose Where the Constitution has not explicitly granted power to one of the federal branches, States hold the power. Courts sitting in diversity must apply these state substantive laws. They are free, however, to apply federal procedural rules. And sometimes these rules conflict such that applying the federal rule will supplant the state substantive law: “When matters of state substantive law are at issue, principles of federalism-which command that substantial deference be given to the ways in which the states have seen fit to structure social relationships in areas of state competence-also are implicated.” Then, the courts have a question to answer that goes to the basis of federalism principles: Does the federal or state government have the power to make the rule in this dispute?

That the Court had little reason to consider federalism issues when deciding Sibbach does not necessarily mean that principles of federalism should be ignored when evaluating Sibbach today. In fact, quite the opposite is true. Erie brought federalist principles front and center to the choice of law forum. Yet the Sibbach approach to the REA ignores federalism concerns when it “ignores the balance that Congress struck between uniform rules of federal procedure and respect for a State’s construction of its own rights and remedies.” The Sibbach approach is no balance at all. Rather, it ignores states’ sovereignty in favor of vibrant, uniform Rules:

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204 U.S. CONST. amend. X.
205 Id.
206 Gasperini, 518 U.S. at 427.
207 Id.
209 Andrew J. Kazakes, Relatively Unguided: Examining the Precedential Value of the Plurality Decision in Shady Grove Orthopedic Associates v. Allstate Insurance Co., and Its Effects on Class Action Litigation, 44 LOY. L.A. L. REV. 1049, 1052-53 (2011) (“At its core, Erie established a strong federalism principle: to uphold the constitutional division of power between the state and federal legal systems, federal courts were bound to apply the states’ own definitions of litigants’ substantive rights when sitting in diversity.”).
210 Shady Grove Orthopedics, 130 S. Ct. at 1453.
The uniformity of the Federal Rules is an important value, and a simplified approach to measuring the validity of those rules surely advances that value, but not without costs. In the context of diversity cases, a strict application of the uniformity value, which occurs under Justice Scalia’s model, and which renders state substantive law irrelevant, fails to account for the prerogatives and nuances of state law, both of which reflect important federal policy concerns.\textsuperscript{211}

This interest in promoting the Rules also has another consequence: it encourages forum shopping,\textsuperscript{212} which is the very thing Justice Brandeis set out to eliminate in *Erie*.\textsuperscript{213}

The substantive policy approach, though, restores the balance that the *Sibbach* upset:

\begin{quote}
“The added complexity...generated by enforcing §2072(b) according to its text provides a limited but useful safety valve in service of legitimate federal policy interests (i.e. federalism and separation of powers) that may occasionally conflict with and override the uniformity principle.”\textsuperscript{214}
\end{quote}

This is *Erie*’s command; that federal courts refrain from impacting a state’s policy determinations on substantive matters.\textsuperscript{215} Stevens’ approach follows that command:

In our federalist system, Congress has not mandated that federal courts dictate to state legislatures the form that their substantive law must take. And were federal courts to ignore those portions of substantive state law that operate as procedural devices, it could in many instances limit the ways that sovereign States may define their rights and remedies. When a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice.\textsuperscript{216}

\section*{C. Other issues}

Finally, the substantive policy interpretation does not turn back the Federal Rules too much. In *Hanna*, the court explained that under *Guaranty*’s outcome determinative test, almost

\begin{footnotes}
\item[212] Shady Grove Orthopedics, 130 S. Ct. at 1448.
\item[213] *Erie R.R. Co.*, 304 U.S. at 76.
\item[215] *Erie R.R. Co.*, 304 U.S. at 79.
\item[216] Shady Grove Orthopedic, 130 S. Ct. at 1450 (Stevens, J., concurring).
\end{footnotes}
every procedural rule would be invalid. But as Justice Harlan explained, the *Sibbach* rule swings the pendulum too far the other way:

In turning from the ‘outcome’ test of York back to the unadorned forum-shopping rationale of Erie, however, the Court falls prey to like oversimplification, for a simple forum-shopping rule also proves too much: litigants often choose a federal forum merely to obtain what they consider the advantages of the Federal Rules of Civil Procedure or to try their cases before a supposedly more favorable judge. To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether ‘substantive’ or ‘procedural,’ is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation. If so, Erie and the Constitution require that the state rule prevail, even in the face of a conflicting federal rule.

Furthermore, Scalia’s concern that the substantive policy approach would be “chaos” is unfounded. The number of instances where this would come up is rare.

### IV. REVISITING ERIE’S PROGENY

Had the Supreme Court originally adopted the substantive policy approach, would its decisions have been different? First, consider *Sibbach*. The issue was whether the court should extend the REA’s second provision to cover Rules 35 and 37. These rules, which govern mental and physical examinations in discovery, were admittedly procedural. But

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217 Hanna, 380 U.S. at 468 (“The difference between the conclusion that the Massachusetts rule is applicable, and the conclusion that it is not, is of course at this point ‘outcome-determinative’ in the sense that if we hold the state rule to apply, respondent prevails, whereas if we hold that Rule 4(d)(1) governs, the litigation will continue. But in this sense every procedural variation is ‘outcome-determinative.’”).

218 Id. at 475.

219 *Shady Grove Orthopedics*, 130 S. Ct. at 1446.

220 Id. at 1454 n.10.

221 Justices Harlan and Stevens both used a substantive policy approach in *Hanna* and *Shady Grove*, respectively. Thus, it is unnecessary to speculate on how the majorities in those cases might have ruled had they considered the substantive policy approach.

222 *Sibbach*, 312 U.S. at 11.

223 Id. at 14.
Sibbach also argued that they had a substantive effect; they interfered with the right personal privacy, specifically of someone to be free in her person.\textsuperscript{224}

One commentator has suggested that, had the Court used a substantive-policy approach, the result would have been the same.\textsuperscript{225} Sibbach did not cross the street knowing that, if an approaching vehicle struck her, she would be shielded by the state law that governs submissions to physical or mental examinations.\textsuperscript{226} The Rule likely did not affect her behavior before the auto accident, nor did it likely affect her behavior after the accident. Thus, the \textit{Sibbach} result would have likely been the same even if the Court had taken a substantive-policy approach to testing the Rules’ validity.

\textit{Cohen v. Beneficial Industrial Loan Corp.}\textsuperscript{227} is another example of the Court’s use of the substantive policy approach to invalidate a federal rule. In \textit{Cohen}, the Court upheld over Rule 23 a New Jersey statute that shifts costs and fees to the plaintiff if she is unsuccessful in a stockholder’s derivative action.\textsuperscript{228} The court explained that the statute was cast in procedural terms.\textsuperscript{229} Yet in its application, the statute created an entirely new liability that affected a plaintiff’s non-litigation behavior.\textsuperscript{230} Thus, the application of the rule had a substantive effect, and the rule could not be applied.\textsuperscript{231}

The Court’s rationale makes sense in light of the primary private activity threshold for the substantive policy approach. Before commencing an action, a plaintiff would have to collect monies to cover the liability. Thus, the statute “intends to control behavior antecedent to

\begin{itemize}
  \item \textsuperscript{224} Brief for Petitioner at 5-6, \textit{Sibbach v. Wilson}, 312 U.S. 1, (1941) (No. 28) 1910 WL 21009.
  \item \textsuperscript{226} Id.
  \item \textsuperscript{227} 337 U.S. 541 (1949).
  \item \textsuperscript{228} Id. at 557.
  \item \textsuperscript{229} See id. at 555.
  \item \textsuperscript{230} Id.
  \item \textsuperscript{231} Id. at 555, 557.
\end{itemize}
the commencement and conduct of the litigation itself.”232 This control over behavior is the very substantive effect that Justice Harlan had in mind in his concurrence in Hanna.233 One commentator has said that it is “doubtful the state legislature enacted the bond requirement to encourage or facilitate mismanagement by corporate fiduciaries.”234 He went on to explain that the corporation’s management probably did not base its conduct on proposition that this cost indemnity statute would discourage suits from shareholders.235 Contrariwise, “it is not hard to see the purpose of the requirement as an attempt to regulate stockholder’s behavior by discouraging groundless actions undertaken in order to extort settlements not supported by the merits and benefiting only the individual plaintiff and counsel.”236 Under a substantive policy approach, then, the outcome would likely be the same. Looking at these two cases, it becomes apparent that the substantive policy approach might invalidate a rule when the Sibbach approach would save it, but the bar is still high.

V: AN APPLICATION OF THE SUBSTANTIVE POLICY APPROACH TO RULE 15(c)

Does this substantive policy approach to the REA make a practical difference? In Shady Grove, it did not. Though the threshold for invalidating a federal rule might be lower under this approach than it would be under the Sibbach approach, the threshold for invalidation is still high.237 Critics have cast doubt on the validity of a numbers of rules, including Rule 15(c).238

233 Hanna, 380 U.S. at 477-78.
235 Id.
236 Id.
237 Shady Grove, 130 S. Ct. at 1457 (Stevens, J., concurring) (“The mere possibility that a federal rule would alter a state-created right is not sufficient. There must be little doubt.”).
238 ???
Rule 15 governs the procedure for amending pleadings in the federal court. Subsection C governs the relation back of pleadings to the date of their original filing. The rule allows claims to be amended even though the statute of limitations has run. The rule states:

An amended pleading relates back when:
(A) the law that provides the applicable statute of limitations allows relation back;
(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or
(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
(i) received such notice of the action that it will not be prejudiced in defending on the merits; and
(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

The Supreme Court has yet to address whether Rule 15(c) is valid under either approach. But a number of lower courts have addressed the issue. Generally, courts have applied Rule 15(c) when it allowed for more liberal relation back. When the Rule has been more restrictive, however, courts have applied the state rule. As explained by the court in Santana v. Holiday Inns, Inc., application of the federal rule does not alter the protections of statutes of limitation. Statutes of limitation protect defendants by giving them the certainty that a "transaction or occurrence" no longer has the ability to affect their lives. Once a defendant has

241 Id.
242 See e.g. Morel v. DaimlerChrysler AG, 565 F.3d 20 (1st Cir. 2009) (applied Rule 15(c) over a Puerto Rico relation back statute which would not have allowed relation back; Britt v. Arvanitis M.D., 590 F.2d 57 (applied Rule 15(c) to relate back an amended claim that substituted a "John Doe" for the intended defendant).
244 686 F.2d 736 (9th Cir. 1982).
245 Id. at 739.
already been dragged into court by an original complaint, an amended complaint would do her no worse: she is already certain that she must defend her actions in the same claim. Consider:

Once the defendant is in court on a claim arising out of a particular transaction or set of facts, he is not prejudiced if another claim, arising out of the same facts, is added. It is the 'conduct, transaction, or occurrence' test of Rule 15(c) which assures that the relation back doctrine does not deprive the defendant of the protections of the statute of limitations.

But this theory addresses only what the federal rule itself does, as Justice Scalia required in Shady Grove. This theory does not address unusual situations in which the rule as-applied might have such substantive effects that the rule cannot be applied.

In Davis v. Piper Aircraft Corp., the court held that Rule 15(c) controlled over a contrary state law. In Davis, the defendant moved to dismiss Davis’ wrongful death claim on the grounds that the court had not approved Davis’ being personal representative of the deceased’s estate. After being appointed by the state court as a qualified administrator, Davis moved to amend his complaint, which would then reflect his newly acquired capacity. But the amended complaint fell outside the statutory limitation. North Carolina courts disallowed relation back for “entirely new causes of action.” This new claim, the court said, fell into such a category. The court then stated that the federal rule is sufficiently broad in scope as the conflicting state rule. It explained (in a footnote) that the federal rule “operate[d] to cure by relation back an initial infirmity in the tolling act required by state law.” Thus, the court

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246 Id.
247 Shady Grove Orthopedics, 130 S. Ct. at 1444.
248 615 F.2d 606 (4th Cir. 1980).
249 Id. at 608-09.
250 Id. at 609.
251 Id.
252 Id. at 608.
253 Davis, 615 F.2d at 610.
254 Id.
255 Id.
256 Id. at 609.
applied the federal rule.\footnote{Id. at 611.} In fact, the court never even considered the \textit{Sibbach} test; it applied the rule without any consideration to its procedural or substantive character.\footnote{\textit{Davis}, 615 F.2d at 611-12 (“There has been no suggestion that Rule 15(c) is not valid under the Rules Enabling Act or under the Constitution and we therefore hold it controlling it here”).}

Under the \textit{Sibbach} approach, this case likely prevents no problems. Relation-back really regulates procedure because it cures procedural missteps. Here, the plaintiff had yet to satisfy the requirements for standing by not going through the procedure to gain capacity as an estate administrator.\footnote{Id. at 609.} Once he did, the misstep—lack of standing—was cured.

The substantive policy approach also presents no problems. The Fourth Circuit court explained that the state’s interest in requiring capacity is purely procedural.\footnote{Id. at 612.} In other cases, North Carolina “readily validates other types of action taken by person prior to their official qualification when they are subsequently appointed as personal representatives.”\footnote{\textit{Hanna}, 380 U.S. at 476 (Harlan, J., concurring).}

Additionally, it is unlikely that allowing relation-back here would have had any effect on either party’s primary private activity, as Harlan suggested.\footnote{508 F.2d 39 (1st Cir. 1974).} It is absurd—and incredibly morbid—to think that Piper Aircraft allowed a potentially fatal flight to take place on the basis that it could avoid liability because the deceased’s administrator was not qualified to administer the estate.

In \textit{Marshall v. Mulrenin},\footnote{Id. at 74-75.} the First Circuit disallowed a Rule 15(c) relation-back.\footnote{Id. at 74-75.} The majority reasoned that the Court in \textit{Hanna} did not intend for the federal rules to be interpreted so broadly that “every state statute which, by some process of construction, could be

\begin{footnotesize}
\textsuperscript{257} \textit{Id.} at 611.  
\textsuperscript{258} \textit{Davis}, 615 F.2d at 611-12 (“There has been no suggestion that Rule 15(c) is not valid under the Rules Enabling Act or under the Constitution and we therefore hold it controlling it here”).  
\textsuperscript{259} \textit{Id.} at 609.  
\textsuperscript{260} \textit{Id.} at 612.  
\textsuperscript{261} \textit{Hanna}, 380 U.S. at 476 (Harlan, J., concurring).  
\textsuperscript{262} 508 F.2d 39 (1st Cir. 1974).  
\textsuperscript{263} \textit{Id.} at 74-75.  
\end{footnotesize}
thought to conflict therewith could not survive, regardless of its substance. "265 Rather, the
analysis proclaimed in Hanna resolved a conflict between two “strictly procedural rules." 266
When substantive effects enter into the analysis, those effects must be considered. 267 The court
felt that “[s]uch a construction does not render Federal Rules inoperative in their procedural
aspects. It merely means that a rule is not applied to the extent, if any, that it would defeat
rights arising from state substantive law as distinguished from state procedure." 268

Upon examination, the court found that the two rules directly conflicted. 269 The state
law included more stringent notice requirements than the Federal Rule. 270 The court went on to
show that this state law, though cast in procedural terms, had a substantive effect. 271 The state
law that governed commencement of an action by creditors on an estate had a two-fold
purpose, one of which included service of process. 272 Though service of process is generally
procedural and is governed by federal law, the court explained that this section had a direct
substantive effect. 273 The Massachusetts legislature wanted to ensure that an executor could
distribute funds from an estate to creditors as soon as possible. 274 Therefore, it “afforded him
the protection of affirmative personal notice and specified means of notification, so as to leave
no room for dispute." 275 Having found this substantive effect, the court declined relation
back. 276

265 Id. at 43.
266 Id. at 44.
267 Id.
268 Marshall, 508 F.2d at 44.
269 Id.
270 Id. at 42-43.
271 Id. at 44.
272 Id. at 42.
273 Marshall, 508 F.2d at 42.
274 Id.
275 Id. at 42-43.
276 Id. at 44-45.
The *Sibbach* approach would likely have produced a different outcome. As the court explained, service of process is generally procedural and governed by federal law.\(^{277}\) Thus, the notice requirement of Rule 15(c) is also procedural and applies under the *Sibbach* approach.

Fortunately, *Marshall* applied the substantive policy approach, so the approach’s application is clear here. The more stringent notice requirements are a state substantive policy that will affect behavior.\(^{278}\) The requirement of personal service of process on executors allows for estates to be settled quickly.\(^{279}\) Once opened, an estate—usually in an *ex parte* proceeding—is only open for a finite amount of time. And unless the executor has reason to know of any additional creditors the, estate will close without paying those creditors. In Massachusetts, the legislature mitigated this problem by requiring actual notice.\(^{280}\) The legislature enacted a law “to protect from personal responsibility executors and administrators who had made distribution of assets of estates in their hands for the payment of claims of which they have had no notice, which have been kept alive by actions begun just before the end of the year but which are not returnable until after the assets of the estates have been distributed.”\(^{281}\)

In *Covel v. Safetech Inc.*\(^{282}\) the court applied a Massachusetts relation-back rule over Rule 15(c).\(^{283}\) The plaintiff crashed his motorcycle and experienced severe injuries that left him a quadriplegic.\(^{284}\) He then filed an action against defendant, Covel’s helmet manufacturer, for negligence and breach of warranty.\(^{285}\) After discovering new evidence after the statute of limitation had run, Covel attempted to amend his complaint to add a number of new

\(^{277}\) *Id.* at 42.

\(^{278}\) *Id.*

\(^{279}\) *Id.*

\(^{280}\) *Marshall*, 508 F. 2d at 43.


\(^{283}\) *Id.* at 429.

\(^{284}\) *Id.* at 428.

\(^{285}\) *Id.*
defendants. Through discovery, he had uncovered new evidence pertaining to his case
“concerning ‘the crucial role of the proposed new defendants’ in the design and selection of
materials used in plaintiff’s helmet.” One new defendant objected on the grounds that Rule
15(c), which was more restrictive than its state counterpart, applied. That defendant further
argued that, since the plaintiff did not meet the rule’s requirements, the amended complaint was
time-barred.

The majority explained as an initial matter that the Massachusetts rule did not “merely
regulat[e] ‘procedure’ in the Erie-related sense.” Rather, “the Massachusetts relation-back
rule [was] a firm declaration of substantive policy” that was an “‘integral part’ of
Massachusetts limitation doctrine.” And allowing the more restrictive federal rule would
frustrate both the state and federal interest in deciding cases on the merits. The majority also
explained that the rule stated only an affirmative position that if the rule’s conditions were met,
the claim would relate back. But the rule does not state that if the conditions are not met, the
rule does not relate back. Thus, the majority concluded that Rule 15(c) did not “preclude a
more liberal relation-back principle found in the otherwise applicable” statute of limitation.
Thus, the court construed the rule to avoid a direct collision and applied the Erie analysis
instead. Then, the court applied the state rule.

286 Id.
287 Covel, 90 F.R.D. at 428.
288 Id. at 428-29.
289 Id. at 429.
290 Id.
291 Id.
292 Covel, 90 F.R.D. at 432.
293 Id. at 429.
294 Id. at 433.
295 Id.
296 Id.
This reading of Rule 15(c) is strained. Not allowing relation back under the federal rule is exactly what would happen if the rule’s conditions were not satisfied. It is difficult to say that the court’s interpretation of the rule was by its “plain meaning.” Thus, though the court’s ruling is that there is no conflict, the practical effect is that there is such a conflict: The federal rule would not allow relation back when the state rule would.

Under this reading, the Sibbach approach likely saves Rule 15(c). As discussed above, Rule 15(c) governs procedure. But under the substantive policy approach, Rule 15(c) is likely doomed. As the court explained, the rule, though procedural, is bound up with the statute of limitations so as to be an integral part of that substantive law.297 Additionally, the court recognized that precluding relation-back would frustrate the state’s interest in liberal relation-back laws.298 Therefore, this application of Rule 15(c), properly construed, likely fails.

VI: CONCLUSION

Looking back at the Court’s history, substantive effects play an important role in application of the Federal Rules. The Sibbach approach simply cannot adequately account for these effects. And though the bar is very high for invalidating a federal rule, it is not impossible. The substantive policy approach respects states’ substantive rights and still preserves the uniform procedural system. And in the Rule 15(c) context, it saves states’ judgments on providing different limitation protections for its citizens.

297 Id.
298 Id.