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The Irrepressible Influence of Byrd

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I. INTRODUCTION

Byrd v. Blue Ridge Rural Electric Cooperative, Inc.[1] is the Rodney Dangerfield of the *Erie* doctrine.[2] The case was decided in 1958 and has never gotten its due. In *Hanna v. Plumer*[3] it was relegated to a perfunctory citation without discussion. Worse, *Hanna* provided an alternative analysis – the "modified outcome" or "twin aims of *Erie*" test[4] – to which the Supreme Court of the United States appears devoted.[5] By contrast, the Court has discussed *Byrd* only once. That discussion, in *Gasperini v. Center for Humanities, Inc.*,[6] by the lights of many, was confused and confusing,[7] and did not leave *Byrd* on firm footing.[8]

Now the Supreme Court re-enters the thicket in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[9] Typically, *Byrd* merits only a fleeting citation in the concurring opinion of a single

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1. 356 U.S. 525 (1958).

2. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). By "*Erie* doctrine," we refer generically to vertical choice of law – both the REA and RDA prongs.

3. 380 U.S. 460 (1965).

4. Hanna v. Plumer, 380 U.S. 460, 468 (1965). This test asks whether a federal court's failure to apply a state requirement would be so likely to affect the outcome of the case that (1) a plaintiff would select the federal forum or (2) result in inequitable administration of the laws. Commentators have noted that what the Court calls twin aims appears to be one aim. Specifically, if a federal court's refusal to follow a state provision would lead to forum-shopping, *ipso facto* there will be inequitable administration of the laws, because local citizens cannot forum shop – they cannot invoke diversity of citizenship jurisdiction. RICHARD D. FREER, CIVIL PROCEDURE 504-06 (2d ed. 2009).

5. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 428 (1996); Chambers v. NASCO, Inc., 501 U.S. 32, 52-53 (1991); Walker v. Armco Steel Corp., 446 U.S. 740, 753 (1980).

6. 518 U.S. 415 (1996).

7. *See, e.g.*, C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 BYU L. REV. 267; Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on* Erie *and* Gasperini, 46 U. KAN. L. REV. 751 (1998).

8. Richard D. Freer, *The State of* Erie *After* Gasperini, 76 TEX. L. REV. 1637, 1654 (1998) ("It is difficult to imagine an issue [the standard of review for setting aside a verdict] better calculated to incline the Court to address *Byrd*. Surprisingly, however, the Court never mentions *Byrd* on this point.").

9. 130 S. Ct. 1431 (2010).

justice.[10] Nonetheless, *Byrd* remains the Court's most comprehensive and cogent effort in vertical choice of law, and actually explains the results in cases in which the Court did not cite it. Indeed, at the end of the day, though it gets no respect, the stamp of *Byrd* is clear. Each of the three opinions in *Shady Grove* reflects its influence, if not its command.[11]

We set forth four interrelated theses in this article. First, *Byrd* is the only Supreme Court case since *Erie* itself to discuss all three of the core interests balanced, expressly or not, in every vertical choice of law case. Second, because *Hanna*'s "twin aims" test ignores two of these three core interests, it cannot adequately serve as the standard for cases under the Rules of Decision Act[12] ("RDA"). This fact is evidenced by the Court's eschewing the twin aims test in cases, like *Gasperini*,[13] where state and federal interests must be accommodated. Third, as all three opinions in *Shady Grove* demonstrate, the three interests indentified in *Byrd* are also present in cases governed by the Rules Enabling Act[14] ("REA"). Our final thesis is that the Supreme Court should expressly recognize the applicability of the core interests embraced by *Byrd* to all *Erie* doctrine cases and incorporate them into the legal tests for resolving them.

II. THE *BYRD* CONTRIBUTIONS

The Court decided *Byrd* before it made clear in *Hanna* that there are two prongs of analysis in vertical choice of law. First, if there is a federal directive on point, that directive will control the issue, so long as it is valid. That directive may be a Federal Rule of Civil Procedure, the validity of which will be tested in part by the REA. We call this the "REA prong" of the analysis. If there is no federal directive on point, the question is whether *Erie* itself, including the RDA, compels the application of state law. We call this the "RDA prong" of the analysis.

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10. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1448 (2010) (Stevens, J., concurring).

11. In *Byrd,* the Court used this phrase – that the allocation of authority between judge and jury should be considered under the "influence-if not the command- of the Seventh Amendment." Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958) (footnote omitted). Though *Byrd* has not commanded much in subsequent Supreme Court cases, our position is that it has been influential, and today shapes much of vertical choice of law analysis.

12. 28 U.S.C. § 1652 (2006).

13. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 436-37 (1996) ("In the case before us . . . the principal state and federal interests can be accommodated.").

14. 28 U.S.C. § 2072 (2006).

Byrd was an RDA case because there was no federal directive.[15] Still, the case introduced two fundamental principles that animate the whole of vertical choice of law. First is a *functional* definition of those aspects of state law that a federal court must honor. Second is the recognition of the core interests that underlie judicial federalism.

As to the first point, Justice Brennan's majority opinion started with the most obvious of *Erie* statements: absent a federal directive, a federal judge "must respect the definition of state-created rights and obligations by the state courts."[16] On matters of what might be called "pure substance" – for instance, the elements of a claim or defense – *Erie,* the RDA, and the Constitution command the federal diversity court to apply state law. But Justice Brennan's next sentence warrants careful attention: "We must, therefore, first examine the [state] rule . . . to determine whether it is *bound up* with these rights and obligations in such a way that its application in the federal court is required."[17] The *Erie* prescription applies, then, not just to matters of pure substance, but to ancillary rules so closely related as to constitute part of the state's definition of "rights and obligations."

The Court has never defined "bound up." But the idea seems rather clear. Justice Brennan cited *Cities Service Oil Co. v. Dunlap*[18] as authority for the "bound up" principle.[19] That case required federal diversity courts to apply the state-law burden of proof at trial. (Later, in *Palmer v. Hoffman,*[20] the Court confirmed this holding.) While allocating the burden of proof does not define when a party is liable to another, it is closely related – it determines the winner when no proof is introduced, or when the evidence is in equipoise. This tie-breaking function seems integral to the definition of rights and obligations.

There are other fairly obvious candidates for "bound up." Choice-of-law rules do not decree the elements necessary to establish liability, but prescribe which state's law will make that decree. Thus, the holding in *Klaxon Co. v. Stentor Electric Manufacturing Co.*[21] is consistent with finding choice of law rules "bound up" with pure substance. Sim-

15. At least the Court decided the case as if there were none, even though the result ultimately turned on the federal interest in the distribution of "trial functions between judge and jury" and of, "under the influence – if not the command – of the Seventh Amendment, [the assignment] of decisions of disputed questions of fact to the jury." *Byrd*, 356 U.S. at 537 (footnote omitted). In a footnote to this statement, the Court made clear that it was not relying on the Seventh Amendment's "command." *Id.* at 537 n.10 ("Our conclusion makes unnecessary the consideration of – and we intimate no view upon – the Seventh Amendment's command in the case").

16. *Id.* at 535.

17. *Id.* (emphasis added).

18. 308 U.S. 208 (1939).

19. *Byrd*, 356 U.S. at 535.

20. 318 U.S. 109 (1913).

21. 313 U.S. 487 (1941).

ilarly, a statute of limitations does not define the elements of a claim, but gives those elements a lifespan. Accordingly, the Court's holding in *Guaranty Trust Co. of New York v. York*[22] is consistent with a finding that that lifespan is "bound up" with the rights and obligations created by state law.[23]

The *Byrd* concept of "bound up" – though never defined in so many words and ignored in subsequent cases – thus explains several holdings. No one doubts that procedures may be designed – for substantive policy reasons – to make it easier in a close case for one side to prevail. Indeed, we are familiar with examples of federal provisions that, while not defining liability, are close enough to be mandatory. One is the requirement in public-official and public-figure defamation cases that the plaintiff demonstrate by clear and convincing evidence that the defamatory statement was malicious.[24] The Supreme Court required the showing of malice to ensure that defamation suits not chill freedom of expression on matters of public concern. Not satisfied merely with adding a new element to the claim, the Court provided *procedural* protection for free expression by requiring that the new element be proved by clear and convincing evidence. As a result, public figures will win few defamation cases, and the threat of damages will be less likely to chill public discussion. The special procedural requirement has a substantive function.[25]

The second major contribution of *Byrd* is its recognition of the core interests in judicial federalism. The first of these, clearly, is the state's interest in having its substantive policies – judge-made and positive alike – respected by federal courts in diversity cases.[26] This

22. 326 U.S. 99 (1945).

23. We recognize that the statute of limitations applied will be that of the forum state, not the state that creates and defines the elements of the claim. The point for present purposes is that the issue is one for regulation by state, as opposed to federal, law. When one state's courts enforce another state's claims, the enforcing state in a sense adopts the law of the state that created the claim, but as modified by the enforcing state's statute of limitations. This is necessary to protect the enforcing state's own substantive policy of repose.

24. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (public officials); Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) (public figures).

25. Another example from federal law is the requirement that state courts follow federal law as to the availability of a jury in FELA cases, inasmuch as the right to a jury is "part and parcel of the remedy afforded" by the statute. Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 363 (1952) (citation omitted). The Court has also held that state courts in FELA case must apply federal standards concerning the burden of proof of contributory negligence, *Central Vermont Railway v. White*, 238 U.S. 507 (1915), and sufficiency of evidence to sustain a verdict, *Brady v. Southern Railway*, 320 U.S. 476 (1943). *See generally* Anthony Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947 (2001).

26. *Erie*, 304 U.S. at 73-74 cited the famous example of *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928), as a notorious example of the frustration of state policies under *Swift v. Tyson*, 41 U.S. 1 (1842). In *Black & White*, a

interest, of course, is at the heart of the constitutional teaching of *Erie*.[27] It is reflected in the *Byrd* injunction that federal courts apply not only state rights and obligations, but ancillary state laws "bound up" with those rights and obligations.

The second interest is a state's citizens' interest in not being subjected to vertical disuniformity. In *Byrd,* the Court explained that if state law was not substantive or "bound up," it would be a matter of "form and mode" (which might be a way of saying "procedure"). Here, the court assesses whether the matter is outcome determinative. If so, the federal court should apply the state law unless doing so would harm a countervailing federal systemic interest.[28] The Court was careful to explain that state hegemony here is not *commanded* by the Constitution or RDA. Rather, it is *counseled* by the "broader policy"[29] of *Erie*. That policy is that "the federal courts should conform as near as may be – in the absence of other considerations – to state rules even of form and mode"[30] that are outcome determinative.

This "broader policy" of "uniform enforcement of state-created rights and obligations"[31] avoids the dislocation experienced under the *Swift v. Tyson*[32] analysis. Under that case, when federal courts were free to fashion general federal common law, the citizens of a particular state might have to cope with different rules of law – one applied in federal court and one in state court. Under *Swift* itself, a New York citizen was at a loss when determining whether discharge of a debt

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federal court in diversity had declined to enforce Kentucky's policy against a contract by which a railroad gave one competing taxi company the exclusive privilege of serving one of its stations. *Black & White,* 276 U.S. at 529-30.

27. "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state," whether "declared by its Legislature in a statute or by its highest court in a decision . . . ." *Erie*, 304 U.S. at 78. "Congress has no power to declare substantive rules of common law applicable in a State . . . [a]nd no clause in the Constitution purports to confer such a power upon the federal courts." *Id.*

28. There is a problem, of course, with how many lower courts have applied the "outcome determinative" principle. The Court introduced the notion in *Guaranty Trust*. Courts missed the nuance in Justice Frankfurter's discussion of the issue and came to apply a wooden version of the test. Under that version, federal courts would apply state law whenever failing to do so might lead to a different outcome. The wooden approach to *Guaranty Trust* was unfortunate but ubiquitous, and led to concern that the federal courts would be conscripted into applying all manner of state rules. As many have noted, at some point any rule – even one concerning the length of paper on which pleadings should be filed – will be outcome determinative. *Byrd* dealt with this by directing courts to balance the likelihood of an altered outcome against the federal courts' interest in following their own procedure. *Hanna* took a different tack by modifying the outcome determinative standard: federal courts are to look at the choice between federal and state court *ex ante*, through the "twin aims" test. *See supra* note 4.

29. *Byrd*, 356 U.S. at 536.

30. *Id.* at 536-37.

31. *Id.* at 537-38.

32. 41 U.S. 1 (1842).

constituted valid consideration for a contract. In state court, it did not. In federal court, under general federal common law, it did.[33] The broader policy of *Erie* instructed federal courts to avoid such dislocation by generally applying state law – even as to matters of form and mode. This, in turn, reduced uncertainty by ensuring that like cases are treated alike, regardless of forum, and removed the unfairness caused when out-of-state citizens can select favorable law by invoking diversity of citizenship jurisdiction.

But, *Byrd* noted, this broader policy is not absolute. It is tempered by the third core interest – the interest of the federal judicial system as an "independent system for administering justice to litigants who properly invoke its jurisdiction."[34] Thus, under *Byrd,* outcome-determinative state law of form and mode is followed "in the absence of other considerations."[35] Such "other considerations" include the federal interest in keeping the "essential characteristic[s]"[36] of the federal court system free from interference by state law. In *Byrd,* the federal interest in allocating authority between judge and jury was such a characteristic. Later, in *Gasperini,* the federal systemic interest in allocating responsibilities between trial and appellate courts required that the federal courts not follow state law.[37]

Byrd is the only Supreme Court case that counsels consideration of all three interests. Even *Erie* – which so clearly explicates the state sovereignty and uniformity interests – fails to mention the federal interest in maintaining the integrity of the federal courts as an independent judicial system.[38] *Gasperini* cites *Byrd* for the permissibility of balancing the federal interest against the others, but fails to make

33. In most cases, of course, the failure to follow state substantive law will also violate this "uniformity policy." So in almost all cases the core interests of respecting state substantive lawmaking and avoiding disuniformity of outcomes within a state reinforce each other.

34. *Byrd*, 356 U.S. at 537.

35. *Id.* at 536.

36. *Id.* at 537.

37. Gasperini v. Ctr. for Humanities, 518 U.S. 415, 431-39 (1996).

38. Justice Reed in his concurrence did raise this issue: "no one doubts federal power over procedure." *Erie*, 304 U.S. at 92 (Reed, J., concurring). In fairness to the *Erie* majority, the case involved a question of pure substance and presented no occasion to consider questions of federal versus state procedures. Justice Frankfurter's opinion in *Guaranty Trust* also alluded to the federal procedural interest: "When . . . a [state-created] right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic." Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 108 (1945). With this in mind he later stated that the result in federal and state courts "should be *substantially* the same, *so far as legal rules* determine the outcome of a litigation . . . ." *Id.* at 109 (emphasis added). In *Guaranty Trust*, of course, the issue was not whether to apply a specific federal or state procedure, but rather to follow the state statute of limitations, which is a legal rule which must be pled as an affirmative defense.

clear just what test is being applied.[39] In the main, though, the Court's modern RDA efforts rely on *Hanna*'s "twin aims" approach.[40]

III. THE THIN REED OF TWIN AIMS

But the twin aims test is too narrow to carry the burden. It addresses only the vertical disuniformity problem, and ignores the other two interests of judicial federalism. As Justice Harlan pointed out in his concurrence in *Hanna*, *Erie* implicates far more than the evils of forum shopping or even the inequitable administration of the law. *Erie* goes to the heart of the division of sovereignty in the American Constitution. Even with the tremendous increase in the lawmaking powers of the federal government in the twentieth century, states retain authority to make their own laws in areas that are not preempted by federal legislation.[41] The undisputed holding of *Erie* – that state law governs substantive matters such as the duty of care owed to Mr. Tompkins – proves the point. The states' constitutional lawmaking authority cannot be thwarted, period. *Byrd* and *Hanna* emphasize the federal procedural interest, which also comes ultimately from the Constitution. Any vertical choice of law theory that fails to account for these core interests is like a performance of *Hamlet* without the prince.

Moreover, the twin aims mantra sometimes masks what the Court actually does. In the RDA portion of *Gasperini* – in which the Court held that federal courts must follow the New York standard for ordering a new trial[42] – the Court purported to engage the twin aims test. Close analysis reveals, however, that Justice Ginsburg employed twin aims only *after* concluding that the issue was substantive. Stating the question as whether ignoring the New York standard would "be likely to cause a plaintiff to choose the federal court,"[43] Justice

39. FREER, *supra* note 4, at 516-18.

40. *Id.* at 509. The Court's use of the twin aims test has not been consistent. Sometimes the Court asks whether a hypothetical plaintiff would be led to forum-shop if the federal court ignored state law. *See, e.g.*, *Hanna*, 380 U.S. at 468 n.9 (whether the choice "would be likely to cause a plaintiff to choose the federal court."). Sometimes, in contrast, it has focused on whether the particular plaintiff actually engaged in forum shopping. *See, e.g.*, *Walker*, 446 U.S. at 753 n.15 ("There is no indication that when petitioner filed his suit in federal court he had any reason to believe that he would be unable to comply with [state law] . . . .").

41. *See* Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 14-15 (1985) (despite twentieth century expansion of Congress's legislative power, "[w]ith respect to judicial power, [*Erie*'s] federalism principle still has force").

42. As part of tort reform legislation, New York permits an order of new trial for excessive or inadequate damages if the verdict in a case "deviates materially" from those in like cases. The federal courts would grant a new trial on these bases only if the verdict "shocked the conscience." The New York law clearly made it relatively easier for judges to set aside verdicts in affected cases.

43. *Gasperini*, 518 U.S. at 428 n.8 (quoting *Hanna*, 380 U.S. at 468 n.9).

Ginsburg then ignored it. She shifted to "a point the parties do not debate" – that a statutory cap on damages would be substantive under *Erie*.[44] Because the New York standard for a new trial was the functional equivalent of a statutory cap, the Court concluded, the "State's objective is manifestly substantive."[45] Then the Court circled back to twin aims and said "[i]t *thus appears*" that there would be cause for forum shopping.[46] In reality, the Court used twin aims not to reason to a conclusion, but to justify a conclusion already reached – and reached, arguably, after an analysis of whether the state law was "bound up" with a substantive obligation.

Byrd also explains the Court's result in *Walker v. Armco Steel Corp.*[47] There, having concluded that Federal Rule of Civil Procedure 3 does not govern the issue of whether a statute of limitations was tolled, the Court held under the RDA that federal courts must follow state law. With *Guaranty Trust* requiring application of state statutes of limitations, it is hard to see how the rules for tolling would not also be bound up with the rights and obligations being vindicated.[48]

IV. THE RELEVANCE OF *BYRD* IN REA CASES

The Court's obsession with twin aims is difficult to square, then, with what the Court has actually done. More basically, focusing only on the problem of vertical disuniformity, without an appreciation for the context in which it arises, is myopic. Indeed, this is *Hanna*'s central message in its discussion of REA cases. Every time a federal directive applies in the face of a different state rule, there will be some degree of vertical disuniformity.[49] So after *Hanna,* in certain cases against decedents' representatives, substituted service of process can be used in federal court but not in Massachusetts state courts. After *Shady Grove,* class actions for recovery of statutory penalties may go forward in federal court, but not in New York state courts.

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44. *Id.* at 428-29.

45. *Id.* at 429. That the conclusion is based upon the substantive nature of the state provision is demonstrated by other language in the opinion. *See, e.g., id.* at 430-31 ("Just as the *Erie* principle precludes a federal court from giving a state-created claim 'longer life . . . than [the claim] would have had in the state court,' *Ragan*, so *Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court." (internal citation omitted)).

46. *Id.* at 429 (emphasis added).

47. 446 U.S. 740 (1980).

48. *Walker* did not use the phrase "bound up," but referred to "state service statute [which] was held to be an integral part of the statute of limitations . . . ." Walker v. Armco Steel Corp., 446 U.S. 740, 748 (1980). This seems to us to be another way of saying "bound up."

49. *Hanna*, 380 U.S. at 468-69

The simple fact of vertical disuniformity does not mean the same thing here, however, that it does in RDA analysis. Here, there is a valid federal procedural enactment. The federal system's right to promulgate such directives is rooted in the Constitution. As the Court said in *Hanna,* "[t]o hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act."[50] So the starting point in an REA case is "pro-federal" – a strong presumption exists in favor of the federal directive.

This parallels the "pro-state" starting point of RDA analysis, which is appropriate in those cases because there is no federal directive on point. Of course, if the state law is substantive, it *must* govern, under the Constitution and the RDA. Even if it is not, however, we start with the *presumption* that state law will govern. But the pro-state bent of the RDA can be tempered by considering a federal systemic interest, such as the rare case that an important federal judge-made procedure conflicts with the uniformity principle, as it did in *Byrd* itself.

And just as the RDA pro-state starting point is not absolute, neither does the federal directive always prevail in the REA line. There are checks to ensure that the federal directive does not run roughshod over state prerogatives. Even in the case of procedures arguably mandated by the Constitution (for instance, the Seventh Amendment or a statute), courts must consider whether the federal provision truly conflicts with and thus preempts the state provision. That, of course, can often be a difficult issue, and courts have substantial leeway to read federal provisions narrowly to protect the state substantive and uniformity interests, just as they sometimes read substantive directives in federal statutes narrowly rather than preempt state law. This check comes into play whenever courts seek to answer the initial inquiry: do the federal and state provisions really conflict?

The second check is the REA, which, on its face, imposes two requirements that constrain Congress's delegation of rulemaking authority. First, under § 2072(a), the rule must be one "of practice and procedure." Second, under § 2072(b), the rule must "not abridge, enlarge or modify any substantive right." Both sections, and especially

50. *Id.* at 473-74 (footnote omitted).

§ 2072(b), protect the state substantive interests and only incidentally serve to prevent vertical disuniformity.[51]

Byrd's relevance to *Erie* analysis is thus not limited to RDA cases. Its three core interests are also basic to REA cases and the initial decision as to which prong should be applied. While the Court has not acknowledged this fact, these interests animate its decisions.

V. THE ANTECEDENT QUESTION

The starting point in vertical choice of law analysis is whether a federal directive applies. The decision on this point determines which regime – pro-federal or pro-state – will apply. If the federal directive is on point, the court embarks upon the pro-federal REA prong analysis. If it is not on point, the court undertakes the pro-state RDA prong analysis. Through the years, the Court has been anything but consistent in its approach to the important funneling function of assessing the breadth of a Federal Rule.

In four cases before *Shady Grove*, the Court found that a Federal Rule was on point – in *Sibbach v. Wilson & Co.*,[52] *Mississippi Publishing Corp. v. Murphree*,[53] *Burlington Northern Railroad v. Woods*,[54] and *Hanna*.[55] At least six times, the Court has found that a Federal Rule did not apply – in *Cohen v. Beneficial Industrial Loan Corp.*,[56] *Palmer*,[57] *Ragan v. Merchants Transfer & Warehouse Co.*,[58] *Walker*,[59] *Semtek International v. Lockheed Martin Corp.*,[60] and *Gasperini*.[61] In two of these – *Sibbach* and *Hanna* – there was no question that the Federal Rule was on point. In *Sibbach*, Federal Rule of Civil Procedure 35 permitted an order of medical examination, and in *Hanna* Federal Rule of Civil Procedure 4 permitted substituted service of process. In three more – *Cohen, Palmer, and Ragan* – the Court engaged in no meaningful discussion of the breadth of the Federal Rule. This is not surprising, because it did not become clear until *Hanna* that this was the first step in the analysis.

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51. These sections also protect Congress's interest in being the sole source of substantive federal law. Indeed, there is evidence that this was the primary interest § 2072(b) was enacted to protect. *See* Stephen Burbank, *The Rules Enabling Act of 1934,* 130 U. PA. L. REV. 1015 (1982).

52. 312 U.S. 1 (1941) (discussing FED. R. CIV. P. 35, 37).

53. 326 U.S. 438 (1946) (discussing FED R. CIV. P. 4(f), now found at 4(k)(1)).

54. 480 U.S. 1 (1987) (discussing FED. R. APP. P. 38).

55. 380 U.S. 460 (1965) (discussing FED. R. CIV. P. 4(e)(2)).

56. 337 U.S. 541 (1949) (discussing FED R. CIV. P. 23.1).

57. 318 U.S. 109 (1943) (discussing FED R. CIV. P. 8(c)).

58. 337 U.S. 530 (1949) (discussing FED R. CIV. P. 3).

59. 446 U.S. 740 (1980) (discussing FED R. CIV. P. 3) (reaffirming *Ragan*).

60. 531 U.S. 497 (2001) (discussing FED R. CIV. P. 41(b)).

61. 518 U.S. 415 (1996) (discussing FED. R. CIV. P. 59).

Indeed, *Hanna* offered the Court's *ex post* analysis of what it had ostensibly done in *Cohen, Palmer,* and *Ragan.* In each, the Court explained, the arguably applicable Federal Rule was not broad enough to cover the issue presented.[62] Thus, in *Palmer,* Federal Rule of Civil Procedure 8(c) addressed only the pleading of affirmative defenses, and did not supplant state law on who had the burden of proof at trial.[63] And in *Cohen,* Federal Rule of Civil Procedure 23.1, though prescribing various requirements for a shareholder derivative suit, did not address the requirement of a bond.[64] Rule 23.1 was so narrow that it could exist alongside the New York requirement that the plaintiff post security.

Even with the *Hanna* explanation, Justice Harlan remained unconvinced about *Ragan.* He did not see how that case could have survived *Hanna.*[65] It was not until the Court decided *Walker* that it explained: Federal Rule of Civil Procedure 3, which provides that a case is commenced when filed, governs only timing of various events in federal court, and does not concern whether a case was "commenced" for purposes of tolling the statute of limitations.[66] This is a rather pinched interpretation of Rule 3. Nonetheless, a parsimonious interpretation seems appropriate to avoid stepping on state toes. After *Guaranty Trust* required federal diversity courts to apply state statutes of limitations, an interpretation of Rule 3 affecting the tolling of those statutes might "abridge, enlarge, or modify" a "substantive right," which would run afoul of the REA. To avoid the possibility – and in the interest of comity and avoidance of vertical disuniformity generally – the pinched *Walker* interpretation was appropriate.[67]

But the Court in *Walker* insisted that it was not straining to read Rule 3 narrowly. It instructed the lower courts to look to the "plain meaning" of each Rule. Whatever the Rule said, the Rule said – let the chips fall where they may.[68] Of course, "plain meaning" is often not a helpful injunction. The Court went on to prove that "plain meaning" is in the eye of the beholder by finding that Rule 3 has two plain meanings. In diversity cases, its provision that a case is com-

62. *Hanna*, 380 U.S. at 470 ("[T]he holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law.").

63. *Id.* at 470.

64. *Id.* at 471 n.12.

65. *Id.* at 476-78 (Harlan, J., concurring).

66. *Walker*, 446 U.S. at 745-47.

67. *See, e.g.,* Freer, *supra* note 8, at 1642 ("[T]he Court read Rule 3 quite narrowly in *Walker* to avoid creating a direct conflict between state law and federal rules.").

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

menced when filed does not implicate tolling of the statute of limitations. Somehow, though, in federal question cases, exactly the same language does address tolling.[69] So even though unwilling to own up to it, the Court pretty clearly applied a substantive canon of construction: if possible, read Federal Rules narrowly to avoid trenching on state substantive interests and thus avoid raising serious issues under § 2072(b).

In *Semtek,* the Court again appeared to interpret a Rule narrowly, by holding that Federal Rule of Civil Procedure 41 governs the effect of an involuntary dismissal on subsequent federal, but not state, litigation.[70] In that case, however, it conceded the relevance of the competing state substantive interest incorporated in § 2072(b). In his opinion for the majority, Justice Scalia expressed concern that a broader interpretation of Rule 41(b) (one that would bar re-filing of a claim in state court) might run afoul of the REA by modifying a substantive right.[71] He cited a class action case in which, as he characterized it, the Court adopted a limited interpretation of a Federal Rule to minimize possible conflict with the REA.

The only Federal Rules case[72] that seems inconsistent is *Burlington Northern,* in which the Court concluded that Rule 38 of the Federal Rules of Appellate Procedure, which permits the imposition of double costs for a frivolous appeal, applied to trump a state law that mandated a fine in certain instances for the loser on an appeal.[73] Why those two rules could not co-exist (like Rule 23.1 and the state bond requirement in the derivative litigation in *Cohen*) is not explained, probably because the Court had not by that time conceded that it was reading rules with a sensitivity to the other two *Byrd* interests.

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69. West v. Conrail, 481 U.S. 35, 39 (1987) (Rule 3 governs tolling statute of limitations in federal question cases).

70. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 506-09 (2001).

71. Justice Scalia opined that an interpretation of Rule 41 that would ascribe a preclusive effect to involuntary dismissals in the face of contrary state law "would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules 'shall not abridge, enlarge or modify any substantive right.'" *Semtek*, 531 U.S. at 503 (citing 28 U.S.C. § 2072(b)).

72. A more questionable broad interpretation of a federal directive was in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). There, the Court held that the general federal transfer of venue statute, 28 U.S.C. § 1404(a), embodied the enforcement of forum selection clauses. Because *Stewart* involved a federal statute, it did not implicate the REA. So we put it to the side, though noting that we think it read federal law in an indefensibly broad way. *See, e.g.*, FREER, *supra* note 4, at 513 (characterizing *Stewart* as "[t]he best example of the danger of overzealous use of *Hanna*. . . ."); Richard D. Freer, Erie's *Mid-Life Crisis*, 63 TULANE L. REV. 1087 (1989) (criticizing vertical disuniformity caused by *Stewart*).

73. Burlington N. R.R. v. Woods, 480 U.S. 1, 4-8 (1987).

Nevertheless, the Court's decision in *Burlington Northern* not to read Rule 38 narrowly is consistent with a *Byrd*-like balancing of the core interests. The Court reasonably could have concluded that the Alabama provision was neither pure substance nor bound up with substance. After all, it applied in *all* appeals of money judgments and its manifest purpose was to discourage appeals in frivolous and doubtful cases, an aim that is more procedural than substantive. At the same time, the Court may have considered Rule 38's discretionary approach to serve the traditional federal interest of allowing one appeal of right, subject to sanctions for frivolous (as opposed to merely unsuccessful) appeals. If so, the only interest militating toward following the state procedure would be the desire to avoid disuniformity. The Court may well have believed that this interest was too slight to outweigh the federal interest in permitting one appeal as of right, and perhaps also the federal interest in a uniform system of federal appellate rules. Because it had no reason to read Rule 38 narrowly, the Court was happy to find the two rules in conflict, which meant that federal courts could continue to follow their own rule.

Through all this, the official line continued to be that courts look for the "plain meaning" of the federal provision. This changed in *Gasperini*, in which Justice Ginsburg's majority opinion admitted that "[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies."[74] With the exception of *Burlington Northern,* this statement seems consistent with what the Court had actually done in cases such as *Ragan, Cohen, Walker* and *Semtek,* notwithstanding the stated search for "plain meaning."

Beyond this, though, *Gasperini* did not provide much guidance.[75] Still, it was heralded as bringing an appropriate sensitivity to the antecedent question.[76] One might call it a "sneak a peek" approach. In assessing whether a Federal Rule is on point, the court may take a quick look to see whether a broad reading of the Rule would have a deleterious effect on state law. The late Professor Charles Alan

74. *Gasperini*, 518 U.S. at 427 n.7.

75. In part, this is because it involved a rather strange provision. Rule 59(a) permits an order of new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." One of those grounds is excessiveness in adequacy of damages. Though the federal courts apply a "shocks the conscience" test for this, that test is not stated in Rule 59(a). So Rule 59(a) was clearly on point, but it failed to prescribe a standard. Another problem with *Gasperini* on this score is that the majority opinion's discussion of whether Rule 59(a) applied was buried in a footnote, which was clearly responding to Justice Scalia's assertion that Rule 59(a) provided a standard.

76. *See, e.g.*, Freer, *supra* note 8, at 1641-44; Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in Its* Erie-Hanna *Jurisprudence*?, 73 NOTRE DAME L. REV. 963 (1998).

Wright long championed this approach as reflecting the concern embodied in the "substantive rights" limitation of the REA.[77]

VI. *SHADY GROVE*

Shady Grove features three opinions. Justice Scalia is joined by the Chief Justice and Justices Thomas and Sotomayor. Justice Stevens concurs with him, to create a majority, in concluding that Federal Rule of Civil Procedure 23 covers the issue in dispute and that it is valid under the REA. Justice Stevens disagreed with Justice Scalia, however, on how to assess the validity of a Rule under the REA. Justice Ginsburg is joined in dissent by Justices Kennedy, Breyer, and Alito, and concludes that Rule 23 does not cover the issue in dispute. To the dissenters, the case is not governed by the REA, but by the RDA. Under *Erie,* Justice Ginsburg finds that New York law governs and thus that the case cannot be maintained as a class action.

At first blush, a 4-1-4 split would seem to give little hope of forging a sensible approach to things. But each of the opinions offers something important to the discussion and, together, they energize the themes seen in *Byrd.*

Justice Scalia insists that the question of whether Rule 23 applies is easy. He is unwilling to sneak a peek at state law to see whether a narrow read of the Federal Rule would be appropriate. On the other hand, he does say that Federal Rules generally should be read narrowly to avoid possible conflicts with state provisions, so long as the text poses the choice of a broad or narrow reading. The problem in *Shady Grove,* he says, is that Rule 23 cannot be read not to apply. In this regard, the case is like *Hanna* – the Rule applies, period. Justice Stevens agrees on this point, which gives Justice Scalia the majority.[78]

Why would Justice Scalia admit, however, that he would adopt a narrower view of a Federal Rule if he could? Though he seems adamant in not admitting it here, the reason (which he noted in *Semtek*) is to avoid the possibility of treading too broadly on state substantive interests.[79]

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77. 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H.COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4510 (3d ed. Supp. 2010).

78. And the conclusion seems right. This is not like Rule 23.1, which imposes some non-exclusive requirements on derivative suits, and which might co-exist with a state bond requirement. And this is not like Rule 59(a), which allows an order of new trial but gives no standard for the order. *Shady Grove* is like *Hanna,* in which service was either good under Rule 4 or it was not. Here, either the case meets the requirements and "may" proceed as a class action or it does not.

79. Justice Scalia's approach in *Shady Grove* is not as solicitous of state substantive interests and the uniformity principle as the dissent's approach, of course, but this

The problem with Justice Scalia's approach arises when he applies the REA. The disconnect between Justices Scalia and Stevens on this score is striking. To the former, the REA consists only of § 2072(a). As long as the Federal Rule is a rule "of practice and procedure," it is valid. To him, *Sibbach* provides the only relevant test. As long as the rule can arguably be seen as procedural, it passes muster. This approach allows Justice Scalia to apply the REA without looking at the state law. One need only look at the federal provision to determine whether it relates to procedure. Rule 23 certainly relates to procedure, since it concerns aggregation of claims.

Justice Scalia's view is too dismissive of states' interests. If a court is not going to sneak a peek in addressing the antecedent question, *Byrd* seems clearly to counsel that it take the character of the state law into account in applying the REA. Otherwise, there is no counterbalance to the federal interest. There is no analogous moderating influence to the *Byrd* recognition of federal systemic interests in applying the pro-state RDA.

The majority of justices in *Shady Grove* embrace the (*Byrd*-based) position just espoused. Justice Stevens and the dissenters agree that the federal court must assess the impact of ignoring state law on state substantive policies. The analyses are remarkably similar and hearken back to another aspect of *Byrd* – the notion of a rule being "bound up" with matters of pure substance.

Indeed, Justice Stevens is the first justice ever to engage in assessing whether state procedural rules – or rules of "form and mode" – are "bound up" with the state's definition of rights and obligations. Though citing *Byrd* only in passing, his analysis of statutes of limitations, burdens of proof, and sanctions on appeal[80] is consistent with our analyses of *Guaranty Trust, Palmer,* and *Burlington Northern* above.[81] Each of those procedural provisions is so integrally related with the definition of a claim or defense as to require application of state law.

Moreover, Justice Ginsburg's opinion does the same, though without reference to "bound up." Her functional analysis of the New York statute[82] includes discussion of why federal courts are required to apply state statutes of limitations and rules regarding burden of proof. She looks to whether a state rule rationally characterized as procedural might be part of the state's definition of when one is liable to an-

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does not belie the fact that it is based on a balance between the three *Byrd* interests. Scalia simply strikes a different balance than the dissenters do.

80. *Shady Grove*, 130 S. Ct. at 1452-54 (Stevens, J., concurring).

81. *See supra* text accompanying notes 18-23 (discussing *Palmer* and *Guaranty Trust*) and 72-74 (discussing *Burlington Northern*).

82. *Shady Grove*, 130 S. Ct. at 1460-65 (Ginsburg, J., dissenting).

other.[83] (Or, as Justice Harlan explained, might affect primary activity.[84])

In sum, then, five justices are willing to engage in the "bound up" analysis suggested by *Byrd.* Importantly, though, they do so at different times and for different purposes. To Justice Ginsburg, the assessment is part of determining whether the Federal Rule is on point. And because she concludes that Rule 23 does not address the issue before the court, she then rides this analysis to her conclusion that state law must be followed. In other words, Justice Ginsburg seems to engage in functional analysis of state law in both the REA prong (to decide the Federal Rule does not apply) and the RDA prong (to decide that it is worthy of obeisance). Interestingly, the Court has never engaged in this sort of RDA analysis before. Even Justice Ginsburg's RDA analysis in *Gasperini* never paused to consider the possibility that the New York "deviates materially" standard – which applied to specific substantive claims only – might be "bound up" with that state's definition of rights and obligations.[85]

Justice Stevens, in contrast, engages the "bound up" analysis in applying § 2072(b). To him, functional analysis of state law is relevant after one determines that a Federal Rule proposes to supplant it. If the state law is "bound up," then presumably, it embodies a "substantive right." If that is so, § 2072(b) would declare the Rule invalid.

In contrast, *Byrd* itself envisioned the "bound up" inquiry as part of the characterization of whether state law must be obeyed under the RDA, in the absence of a federal directive. Thus, *Shady Grove* appears to us to validate the *Byrd* "bound up" assessment and recognition of the central interests of vertical choice of law more broadly than the justices admit. Five justices engage in this reasoning.

Why, then, do the two camps – Justices Stevens and Ginsburg – reach different conclusions on the bottom line? The answer lies in context. Justice Stevens looks at the function of the state law after finding that there is a federal directive on-point. Thus, he does so in the "pro-federal" context of the REA, when the Federal Rule will prevail unless it modifies a substantive right. In this context, Justice Stevens recognizes, the burden on the party opposing application of the Federal Rule is "high."[86]

Justice Ginsburg, to us, makes too little of the federal interest by using a functional analysis of state law to find that the federal law

83. *Id.*

84. *Hanna,* 380 U.S. at 475 (substantive rules "affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation").

85. Instead, the Court mentioned the twin aims test, which it deemed satisfied after analogizing the New York standard to a cap on damages. *See supra* notes 42-46.

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

does not apply. In this regard, one can find something attractive about Justice Scalia's rigid conclusion that Rule 23 can only be read one way, and that it applies. If one does this, however, it seems incumbent on him to follow with a meaningful assessment of the state law at some point in the equation. To our minds, Justice Stevens does this by incorporating it in the assessment of validity under § 2072(b), with the presumption that the federal directive will be upheld.

VII. CONCLUSION

Byrd, alone among *Erie* cases, sets out the core policies that must be balanced, at least implicitly, in every vertical choice of law case. As a result, only *Byrd*'s analysis can account for the results in RDA cases, like *Walker,* where *Hanna*'s modified outcome/twin aims test fails to capture state substantive interests, and like *Gasperini*, where competing federal procedural interests, also left out of the *Hanna* test, are threatened. The competing *Byrd* factors are also relevant to the key decision whether federal directives directly conflict with state law and thus invoke the REA prong of the *Erie* analysis. Finally, the "bound up" concept enunciated in *Byrd* is highly relevant to the appropriate construction of § 2072(b)'s limitation on the federal rulemaking power, as Justice Stevens argues in his separate opinion in *Shady Grove*.

Yet *Byrd* is hardly mentioned by the Court in RDA cases, and never in REA cases, at least before *Shady Grove*. Perhaps this is because of *Byrd*'s supposed shortcomings as a legal test. As multiple commentators have pointed out,[87] *Byrd* does not teach how to weight the competing interests, nor does it define and thus delimit the "bound up" concept.[88] But this is true of all new tests requiring the balancing of competing interests and, as we have seen, there are competing interests in every difficult *Erie* case. The better course is to admit the complexity of the problem, forthrightly balance the interests and, hopefully, refine and clarify the analysis over time. This process could have started in *Hanna* itself. The twin aims dictum, while inadequate

87. *See, e.g.*, CHARLES ALAN WRIGHT & MARY KAY KANE, THE LAW OF FEDERAL COURTS 404 (6th ed. 2002) (characterizing *Byrd* as "the most Delphic of the Supreme Court's major *Erie*-doctrine decisions.").

88. As Professor Redish points out, there is also doubt whether *Byrd* requires a two-step approach, in which the court first ascertains whether the state provision is "pure substance," i.e., defines a state-created right or remedy, or bound up with that definition, and, if not, then goes on to weigh the potential disuniformity of not following the state provision versus the cost to federal procedural interests if the state provision is followed, or just a single step of balancing the three interests. MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 218-19 & nn.61-62 (2d ed. 1990) (collecting cases). Professor Redish also questions the wisdom of using the bound up concept as a test for when the use of state law is constitutionally required. *Id.* at 218.

as a legal rule, prescribes a workable means of weighting the uniformity interest:[89] if in a particular case the disuniformity from not following state law would not be likely to induce forum shopping or perceptions of unfair treatment of litigants, then the interest in uniformity of results is not a weighty one in that case.[90] In the more than fifty years since *Byrd* was decided many more *Erie* issues have been resolved by the federal courts, and for the most part resolved satisfactorily. Thus there is now a substantial body of precedent that sheds light on proper balance of the core *Erie* interests. From these materials the Supreme Court and lower courts could refine the *Byrd* analysis to craft more workable and transparent legal rules for all three *Erie* inquiries.

89. *Byrd* itself refined the wooden outcome analysis that courts had misread *Guaranty Trust* to require, by emphasizing the need to assess how likely a different outcome would result from not following state law, rather than assuming that any possible outcome determinative effect mandated use of state law. *Byrd*, 356 U.S. at 539-40.

90. Indeed, some lower courts incorporated the twin aims analysis into the *Byrd* test, using it as suggested in the text. One well-known early example is *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60, 64-67 (4th Cir. 1965).