ILLUMINATING SHADY GROVE: 
A GENERAL APPROACH TO RESOLVING ERIE PROBLEMS

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JUSTICE OAKLEY concurring.

I concur in the judgment of the Court but write separately because I cannot fully subscribe to either of the learned opinions written in support of that judgment by Justice Scalia and Justice Stevens, and because I wish to highlight my disagreement with the misbegotten precedent of Gasperini v. Center for Humanities, Inc.1 upon which Justice Ginsburg and her fellow dissenters principally rely.

I.

In Erie Railroad Co. v. Tompkins2 this Court repudiated both the holding and jurisprudential assumptions of Swift v. Tyson3. Erie was a remarkable case in many respects. Swift had held sway for nearly a century. Neither party to Erie had challenged its authority as opposed to its application in the case then before the Court. And this precedent-shattering decision went virtually unnoticed until Chief Justice Stone prodded the legal editor of the New York Times.4

These quirky circumstances of its surprising conception and unremarked birth should not distract us from the truly remarkable status of Erie in the legal and intellectual history of the United States. The philosophical structure of Erie was outlined in the writings of Justice Holmes.5 But while Holmes “embrace[d] the exhilarating opportunity of anticipating a doctrine . . . in the womb of time,” its “birth was distant.”6 Justice Holmes died three years before Erie was decided. It fell to Justice Brandeis to complete what Holmes had sketched: a thoroughly positivistic conception of the relationship between law and sov-

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2. 304 U.S. 64 (1938).
3. 41 U.S. 1 (1842).
5. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 & n.23 (1938) (“The fallacy underlying the rule declared in Swift v. Tyson is made clear by Mr. Justice Holmes.”).
6. Spector Motor Serv. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1943) (Hand, J., dissenting).
ereignty, such that common law is based on local sovereignty rather than ethereal principle.

The case we decide today presents what I would classify, in rough but practical terms, as an "Erie problem." Some would object that this classification is inapplicable to a case in which a Federal Rule of Civil Procedure is at play. I shall seek to demonstrate that it is useful to conceive of "Erie problems" more macroscopically. An "Erie problem," in my view, is presented when a federal court, exercising jurisdiction over a claim for relief based on state rather than federal law (i.e., exercising either diversity or supplemental jurisdiction), is confronted with a divergence between state and federal "practice." I use the term "practice" artfully. By it I mean the way things are done in the ordinary operation of a court, state or federal, when the presiding judge has no need to attend to any state/federal jurisdictional complications. Matters of "practice," in the umbrella-like sense in which I use this term, embrace matters within and on either side of the often ill-defined boundary between substance and procedure.

Although Erie claimed to be a reconsideration of the proper construction of the Rules of Decision Act ("RDA"), it was driven not by any announced theory of how statutes should properly be construed, but rather by the perception that Swift's construction of the RDA had invited federal courts to act unconstitutionally. Justice Brandeis declared that under Swift the federal courts had been doing what even the Congress could not do: promiscuously displacing state law with federally-declared "substantive rules of common law." 8

As generations of scholars have later observed, irony ran rampant along Erie's rails. Erie involved the duties of care of an interstate railroad towards dichotomous classes of persons—invitees and trespassers—who might trod upon its right-of-way. And of course, Congress could regulate the possessory rights of interstate railroads as landowners under its interstate-commerce power. But, in principle, Justice Brandeis made a valid point: the enumerated powers of the federal government are, by definition, limited. Some point must exist where federal power ends, and only state power can govern. The "federal general common law" sanctioned by Swift until condemned by Erie unconstitutionally overstepped this boundary. 9

I suspect what bears investigation: that Erie is among the most significant opinions this Court ever decided by a bare five-member majority. Only eight members of the Court participated in the decision, given Justice Cardozo's illness. Four Justices joined Justice

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8. See Erie, 304 U.S. at 79.
9. See id. at 78 ("There is no federal general common law.").
Brandeis in his opinion of the Court. Two dissented on the ground that the unconstitutionality of *Swift*’s broad construction of the RDA was rendered moot by the obvious contributory negligence of respondent Tompkins under whatever liability rule was to be applied. And, in one of the most prescient concurrences in the history of this Court, Justice Reed joined “the reasoning of the majority opinion” in all but one respect: “in so far as it relies upon the unconstitutionality of the ‘course pursued’ by the federal courts.” He pointed out that even Justice Holmes, in the so-called *Taxicab* case, had not declared *Swift*’s reading of the RDA to be unconstitutional, and added: “If the [majority’s] opinion commits this Court to the position that Congress is without power to declare what rules of substantive law shall govern the federal courts, that conclusion also seems questionable. The line between procedural and substantive law is hazy but no one doubts federal power over procedure.”

In referencing the “hazy” line between substance and procedure, Justice Reed knew whereof he spoke. *Erie* was decided on April 25, 1938, little more than four months before the newly-minted Federal Rules of Civil Procedure were scheduled to take effect on September 1, 1938. The Rules Enabling Act (“REA”) had been enacted in 1934, pursuant to which this Court appointed a drafting committee chaired by then-Dean Charles Clark to conceive and deliver uniform rules of federal civil procedure. Did these new Rules, from their inception, violate the Enabling Act’s prohibition of abridging, modifying, or enlarging any substantive right? I think not, nor, seemingly, did Justice Reed.

So there we had it. Two lines drawn in the sand of the law, both effective in 1938 but derived from intellectual developments long predating that benchmark year.

II.

Were there no “federal power over procedure,” independent of the federal power over substantive law in diversity cases disavowed in *Erie*, the analysis of an “*Erie* problem” would be much more simple. Federal procedure would necessarily conform to state procedure, indeed would mimic it, because there would be no alternatives. To have a federal forum would be to have access to a federal courthouse, no

10. See id. at 90 (Reed, J., concurring in part).
more: to a federal building, staffed with federal judges and supporting personnel, functioning as "only another court of the State."\footnote{Guar. Trust Co. N.Y. v. York, 326 U.S. 99, 108 (1945).}

This is an imaginary world, whose thrall has too long confused some federal judges—and Justices. Even if federal courts applying state substantive law did try in every diversity case\footnote{I’ll leave aside here the even greater problems of utter conformity to state practice in federal cases in which the adjudication of the state claim is based on supplemental jurisdiction, over a state-law claim that is part of the same constitutional case as the jurisdiction-conferring federal claim, because it will often be impossible for the adjudication of the federal claim according to federal practice not to stain the parallel adjudication of the related state claim.} to act precisely in the adjudicatory fashion of a state court—to follow state "practice" in every respect—points of novelty and interpretation would arrive, and (because federal courts cannot be subjected to state-court review without violating Article III’s "case or controversy" bar on advisory opinions) only federal appellate courts and ultimately the Supreme Court could decide whether the practical point had been properly resolved. Some divergence would be inevitable, and incurable. But constitutional fact even more strongly condemns a devotion to this imaginary world. There unquestionably is "federal power over procedure," and it has consistently been exercised by both the Judicial and the Legislative branches of the federal government.

In my view this Court’s canon of \textit{Erie} jurisprudence is both settled and correct, with the exception of the shaky reasoning of a closely-divided Court in \textit{Gasperini}. This view has long led me to recommend the following five-step approach to resolving \textit{Erie} problems. This approach proceeds through a series of yes/no questions that function as steps in a decision-tree model. Analysis proceeds to the next step only if the problem is not resolved by the previous step.

\textit{First}, we should ask whether the issue, that is, the difference in practice between state and federal courts, is clearly and inarguably one of substantive law. If so, assuming there has been no amendment of the Constitution’s division of power between states and the federal government, state law must control and federal practice must conform to state practice. This analysis deploys the reasoning of \textit{Hanna v. Plumer}\footnote{380 U.S. 460, 472 (1965).} that while the classification between substance and procedure may be hazy, congressional power under the Constitution "includes a power to regulate matters [arising within the federal court system] which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."\footnote{Here in full is the relevant passage from \textit{Hanna}:}
Second, if we have found the issue not so unquestionably substantive in nature that Congress lacks the power to regulate it as an arguably procedural aspect of federal practice, we must proceed to ask whether Congress has indeed regulated the practice in question. Such regulation might occasionally result from an express federal statute, but far more frequently the question is whether the federal practice in question has been specified by an express Federal Rule, adopted by this Court pursuant to the regulatory power delegated to us by the REA. Although we have sometimes found that a legislatively-specified federal practice (i.e., specified by a statute or an express Federal Rule) does not, when closely examined, conflict with contrary state practice, in cases of actual conflict we have always upheld a legislatively specified federal practice if we have determined under the Hanna test that the practice is at least arguably procedural in nature.

Once we have determined (1) that federal practice is arguably procedural and (2) that it is not legislatively specified, but is rather merely a customary feature of judicially-fashioned federal practice, we must resolve a further series of complicated and subtle questions in order to determine in three more steps whether such a federal judicial practice must defer to state practice on Erie grounds.

In this case, this complicated process has been made even more difficult by the suggestion that an apparently express Federal Rule may not really be legislatively specified because it violates the prohibition of the REA that Federal Rules “shall not abridge, enlarge or modify any substantive right.” Were this true—that some express

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We are reminded by the Erie opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law. But the opinion in Erie, which involved no Federal Rule and dealt with a question which was "substantive" in every traditional sense (whether the railroad owed a duty of care to Tompkins as a trespasser or a licensee), surely neither said nor implied that measures like [former Federal] Rule [of Civil Procedure] 4(d)(1) [dealing with substituted service of process issued by a federal district court] are unconstitutional. For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either. Cf. M'Culloch v. State of Maryland, 4 Wheat. [17 U.S.] 316, 421, 4 L. Ed. 579. Neither York nor the cases following it ever suggested that the rule there laid down for coping with situations where no Federal Rule applies is coextensive with the limitation on Congress to which Erie had adverted.


18. 28 U.S.C. § 2072. It is a moot point in this case whether a legislatively-prescribed rule can be arguably procedural, and hence constitutional, yet be invalid under
Federal Rule was found to lack legislative pedigree because its incidental effect on substantive rights made it invalid under the REA—this would not mean that the federal judicial practice invalidly specified by the rule would vanish. *Erie* problems aside, federal courts would continue to function in the same way. It would mean only that the federal judicial practice in question—permitting, say, class actions in federal court provided certain conditions are met—could no longer be specially justified as an exercise of federal legislative power to regulate arguably procedural matters of practice in federal courts. It would remain a judicially-created rule to regulate arguably procedural matters of practice in federal courts, and would require the same sort of further analysis in the *Erie* context as any other judicially-created, arguably procedural rule of federal practice that had never claimed a legislative pedigree.

The complexity and subtlety of the further analysis required of an *Erie* problem after the “not arguably procedural” and “express Federal Rule” questions have received negative answers are a product of this Court’s repeated reformulation of the standards that govern *Erie* problems. At present, even after this case, but largely obscured by its volley of opinions, three further steps of analysis remain.

Third, in the immediate aftermath of *Erie*, the Court sought to apply a simple substance/procedure dichotomy to *Erie* problems. But in *Guaranty Trust Co. of New York v. York* the Court abandoned that dichotomy as incoherent or at least impossible of coherent application, given that it was applied in different ways in different departments of law. The *York* reformulation of *Erie* was grounded in effect the REA because it has some incidental substantive impact that amounts to abridgement, modification, or enlargement of the substantive rights of one or more parties. I agree with the plurality opinion of Justice Scalia that Rule 23 as applied in this case meets the historic test for validity under the REA: Rule 23 “really regulates procedure.” *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1 (1941). But in my view this test is just the other side of the *Hanna* coin, and “really regulates procedure” is just another way of say “arguably procedural.” I do not think Congress held back any of its regulatory power in delegating rule-making power to this Court in the REA. Were I wrong, in general or in this case, Rule 23 would still have to be analyzed as an arguably procedural rule of judicial practice, albeit not a legislatively-specified one, and that analysis would proceed through the third, fourth, and fifth of my steps for resolving “*Erie* problems.”


20. *York* itself featured the pre-eminent example of that variation in usage, a state statute of limitations that under state practice applied by its terms to actions both at law and in equity. Federal practice in equity was to apply the more flexible doctrine of “laches,” whereby issues of diligence and prejudice were material. The court of appeals in *York* had held that an equitable action, time-barred according to New York state practice, should nonetheless be permitted to proceed in a federal court (exercising diversity jurisdiction) by application of the federal laches doctrine. The reasoning of the court of appeals was wholly consistent with the substance/procedure dichotomy previously followed under *Erie*, and with the holding of *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941) that *Erie* requires federal courts in diversity cases to follow the choice-
on outcome: "does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" But York's reformulation of Erie was reformulated again in Byrd v. Blue Ridge Rural Electric Cooperative, which substituted an ex ante purpose or function test for York's post hoc outcome-determination test as the first level of inquiry when state and federal practice diverge. If state practice—the way things are done in state court when adjudicating a particular issue—is "bound up with" or "an integral part of" the way in which "state-created rights and obligations" were defined by state courts then Erie obligates federal courts to follow such "bound up" features of state practice when adjudicating claims arising from state-created rights and obligations. This step recognizes that some Erie problems, although turning on a disparity in state and federal practice involving an arguably procedural issue that could be but has not been addressed by formal federal legislation (i.e., a statute or Federal Rule), might still be so intrinsically tied to state substantive policy that Erie requires federal courts to defer to state practice.

Fourth, when an Erie problem has been found to involve a disparity in state and federal practice, that is (1) not at least arguably procedural; (2) not governed by an express Federal Rule or statute; and (3) not "bound up with" or an "integral part of" the definition of the underlying state-created right or obligation at issue, analysis turns to whether the expectation that a federal court will follow federal practice notwithstanding its disparity with state practice is likely to influence litigants in choosing or resisting the choice of a federal

of-law doctrine of the states in which they sit. Limitations issues are deemed "procedural" for choice-of-law purposes, and hence controlled by forum law, even in a forum constrained to apply the "substantive" law of some other state. See Ferens v. John Deere Co., 494 U.S. 516 (1990) (in an action arising from tort in Pennsylvania that was filed in U.S. District Court in Mississippi and transferred under 28 U.S.C. § 1404 to a district court in Pennsylvania, transferee court must follow Mississippi choice-of-law rules so as to apply Pennsylvania substantive tort law but Mississippi statute of limitations); Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (Constitution permits a state to choose to apply its own statute of limitations to claims governed by substantive law of another state). Rather than declare statutes of limitations "substantive" for Erie purposes even though "procedural" for choice-of-law purposes, York replaced the substance/procedure dichotomy with what came to be known as the "outcome-determinative" test, and under that test reversed the court below for failing to apply the same statute of limitations as would a New York state court. Cf. Hanna, 380 U.S. at 466-67 (attributing "[o]utcome-determination' analysis" to York but declaring that "it was never intended to serve as a talisman").

forum. In this respect, York's reformulation of Erie was in turn reformulated by Hanna, albeit in dicta. Some disparities in procedure will impact outcome, but only in an after-the-fact manner that would not likely affect ex ante choice of forum—such as the federal practice of permitting substituted service of process on a cohabitant of the defendant, in a case in which state practice would demand personal service of process "in-hand" upon the defendant himself. This sort of impact on outcome from following federal rather than state practice is irrelevant for Erie purposes, because it implicates neither of the "twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."27

Fifth, when the disparity between state and federal practice involves an issue that is (1) at least arguably procedural; (2) not legislatively-specified; (3) not "bound up with" or an "integral part" of the definition of the state-created right or obligation being litigated; and (4) arguably a foreseeable influence on the choice between a federal or state forum in a way antithetical to the "twin aims" of Erie, Byrd requires that the degree of likely impact on outcome (reconceived by Hanna as the degree of likely impact on ex ante choice of a federal rather than a state forum in contravention of the "twin aims" of Erie) be balanced against "affirmative countervailing considerations" involving the "essential characteristic[s]" of the constitutionally-ordained "federal system [as] an independent system for administering justice to litigants who properly invoke its jurisdiction."28 This so-called "Byrd-balancing" test continues to live out its life on the margins of our Erie case-law; never overruled, never seriously invoked. But until overruled, it remains governing law, and in my eyes, properly and soundly so.

It remains to apply this analytical scheme to the case before us.

First, is Federal Rule of Civil Procedure 23, insofar as it authorizes the joinder device of a class action in a case in which state law

25. See Hanna, 380 U.S. at 466-69 (explaining why, as stated id. at 466, "it is doubtful that, even if there were no Federal Rule" governing the issue, "the Erie rule would have obligated the District Court" to follow state practice).

26. Id. at 462, 466. State practice in Hanna also permitted the defendant, the executor of an estate, to be served by "acceptance" of process, i.e., waiver of service of process, or by the filing of the claim in probate court against the estate represented by the executor. Id. at 462 n.1. Neither alternative was relevant to whether the substituted service authorized by former Federal Rule 4(d)(1) sufficed notwithstanding the personal service required by state law, absent recourse to either of the alternative modes of service authorized by state law.

27. Id. at 468.


would disallow such joinder, at least arguably procedural? Of course. Indeed, this is not a close question, as Rule 23 expressly addresses only the procedural issue of the scope of joinder of parties, and does not even remotely deal with issues of who is liable for what as a matter of substantive law.

Second, does Rule 23 expressly authorize the joinder of class members’ individual claims for the statutory penalty at issue in this case? Yes. Rule 23 is facially trans substantive. Rules 23.1 and 23.2 provide specially for derivative actions and actions relating to unincorporated associations. Neither implied exception to the trans substantive scope of Rule 23 is applicable here. In my view, analysis of this Erie problem should stop here.

In the main, this aligns me with Justice Scalia’s plurality opinion. But Justice Scalia goes on to opine that only an express Federal Rule (or otherwise legislatively-specified rule) can displace state practice when an Erie problem arises in an arguably-procedural context, and declares it “unacceptable” for “judge-made rules” to have like effect. While I agree that this case should be decided at the second step of my five-step analysis, I do not agree that the remaining three steps are invalid.

Justice Stevens in his concurrence conflates my second and third steps. He would subject a formal Federal Rule, despite its legislated status, to the “bound up” analysis of Byrd and my third step, under the guise of determining the Federal Rule’s validity under the REA. Hanna affirmed “the goal of uniformity of federal procedure” as a desideratum to be guarded when Erie problems arise. As I read Hanna, this goal both supports Hanna’s accord of preemptive effect to an arguably procedural, formal Federal Rule, and serves as a background “affirmative countervailing consideration” of federal judicial policy whenever analysis proceeds to my fifth step. The approach of Justice Stevens would thus also conflate my second and fifth steps, by conditioning the preemptive effect of a formal Federal Rule on a balancing of the interest in federal procedural uniformity against its impact on quasi-substantive state policy, such as the limitation of the aggregate liability threatened by a state statutory penalty of the sort

31. Shady Grove, 130 S. Ct. at 1447.
32. Id. at 1450.
33. Id. at 1451.
34. Hanna, 380 U.S. at 463.
35. Byrd, 356 U.S. at 537.
at issue in this case.\textsuperscript{36} I agree with Justice Scalia that Justice Stevens's "approach [would] present hundreds of hard questions, forcing federal courts to assess the substantive or procedural character of countless state rules that may conflict with a single Federal Rule."\textsuperscript{37} Like Justice Scalia, I reject such a destabilizing approach to determining the validity of a Federal Rule of Civil Procedure.

Justice Ginsburg and her fellow dissenters, like Justice Stevens, conflate the second and third steps of my analysis. But unlike Justice Stevens, Justice Ginsburg would hold Rule 23 inapplicable in this case in order to avoid undue intrusion on the quasi-substantive policy of the State of New York.\textsuperscript{38} Justice Ginsburg relies principally on the reasoning of her opinion for the Court in \textit{Gasperini}.\textsuperscript{39} In my view that case, decided by a narrowly divided Court, made nonsense of most of the \textit{Erie} jurisprudence that preceded it. The analysis in \textit{Gasperini} should have stopped at the point of recognition that New York's policy of appellate review of whether a jury verdict for damages "deviates materially from what would be reasonable compensation"\textsuperscript{40} conflicted directly with both the Seventh Amendment and Federal Rule of Civil Procedure 59. Had I been the Court when \textit{Gasperini} was decided, I would have joined Justice Scalia's dissent, perhaps adding a stronger concurrence of my own. Were I able to make sense of the Court's opinion in \textit{Gasperini}, I would of course be swayed by its precedential effect. But since I find its reasoning unfathomable, I am happy to suggest that it is overruled \textit{de facto} by today's cluster of opinions giving effect to Rule 23—despite that Rule's quasi-substantive conflict with the twists and turns of New York law—and look forward to \textit{Gasperini}'s eventual overruling \textit{de jure}.

\textsuperscript{36} See \textit{Shady Grove}, 130 S. Ct. at 1451-55 (Stevens, J., concurring in part and concurring in the judgment).

\textsuperscript{37} See \textit{id.} at 1447 (Scalia, J.) (plurality opinion).

\textsuperscript{38} See \textit{id.} at 1465 (Ginsburg, J., dissenting).

\textsuperscript{39} See, e.g., \textit{id.} at 1463 ("We were similarly attentive to a State's regulatory policy in \textit{Gasperini}.")

\textsuperscript{40} \textit{Gasperini v. Ctr. for Humanities, Inc.}, 518 U.S. 415, 423 (1996) (quoting N.Y. C.P.L.R. 5501(c)).