SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A. V. ALLSTATE INSURANCE CO.: JUSTICE WHITTEN, NAGGING IN PART AND DECLARING A POX ON ALL HOUSES

RALPH U. WHITTEN†

JUSTICE WHITTEN, dissenting.

I.

The doctrine known as the "Erie doctrine" does not often garner attention from the mass media—it does not, so to speak, raise "Hollywood Constitutional Law" issues of the sort that produce banner headlines or hysterical and ill-informed op-ed columns and letters to the editor that are the staple of modern print and electronic journalism. Perhaps this is why this Court's recent decisions under the doctrine have demonstrated such a remarkable lack of attention to precedent, craftsmanship, and professionalism. In the collective minds of the members of this Court, there is seemingly no profit in writing carefully researched or reasoned opinions that are not destined to gain their authors the praise or outrage of society's opinion makers.

This is unfortunate, because the Erie doctrine, in all its parts, goes to the heart of the proper relationship between our state and federal systems and is a staple of practice in diversity actions in the federal courts. Our past decisions under the doctrine have produced a residue of serious ambiguity, which has, in turn, left the lower federal courts, and practitioners in those courts, at sea about the proper administration of the doctrine. Indeed, the only sensible reason for granting certiorari in a case like this is to clarify the operation of the doctrine for those who must grapple with it on a daily basis. Far from achieving that admirable end, today's decision by the Court, and the opinions written in support and against the decision by the other members of the Court, contribute further to the confusion over the scope and administration of the doctrine. Worse, the plurality-majority opinion elevates the Federal Rules of Civil Procedure to the level of Holy Scripture, unchallengeable no matter how seriously those rules impact state "substantive" prerogatives.

† Senator Allen A. Sekt Professor of Law, Creighton University School of Law.
In my judgment, the Court today errs in two ways. First, it disregards precedent that would, unless overruled or distinguished, dictate that Federal Rule of Civil Procedure 23 does not apply to this case and that New York law, being the only law left to apply, provides the rule of decision in this federal diversity action. Second, even assuming that the Court is correct to interpret Rule 23 as applicable to the case before us, the rule should be held invalid as applied under the Rules Enabling Act, 28 U.S.C. § 2072 (2006). A third problem is that the various opinions of members of the Court—majority, plurality, and dissent—demonstrate massive confusion about how cases should be decided under the Rules Enabling Act and the Rules of Decision Act, 28 U.S.C. § 1652 (2006), branches of the Erie doctrine. This opinion will address each of these problems.

II.

This Court’s prior decisions, particularly the case of Hanna v. Plumer, have observed that there are two branches to what we call “the Erie doctrine.” To determine which branch of the doctrine is involved in a case, the first inquiry must be whether a Federal Rule of Civil Procedure controls the issue in the case. If so, and if the rule conflicts with a state law, the courts must determine whether the Federal Rule in question “abridges, enlarges, or modifies” the substantive rights of any litigant within the meaning of the Rules Enabling Act, under which this Court creates rules of practice and procedure for the lower federal courts. If abridgement, enlargement, or modification is found, the Federal Rule may not be validly applied to the case. On the other hand, if no Federal Rule of Civil Procedure applies to the case, then the courts are faced with a question under the Rules of Decision Act, which was involved in Erie itself. Under the Rules of Decision Act, as Hanna observed, there is also a question of whether the state law is “substantive or procedural,” but the test for whether a state law may be disregarded under the Rules of Decision Act as “procedural” is different than under the Rules Enabling Act. The differences in the

1. My criticism is limited to those Justices on the Court prior to July 2010. This excludes Justice Kagan, who took Justice Stevens’s place in August of 2010, and all the other Justices writing today who, like myself, were added to the Court by the Court Packing and Judicial Improvements Act of 2010 in September of 2010 and whose nominations, like mine, were unanimously shouted through the Senate.


tests under the two acts reflect the different functions that they serve in our federal system.

Under the Rules Enabling Act, this Court’s prior decisions have left a number of questions open, though our decisions do not reflect that the Court’s members are aware that these open questions exist. One such important question is how the lower federal courts should interpret Federal Rules of Civil Procedure to determine whether they cover the issue posed by a case. As Hanna established, the answer to this question determines which branch of the Erie doctrine is involved in a case and fixes the applicable standard with which to decide whether state law may be disregarded in the action. This makes the method by which the federal courts interpret Federal Rules of Civil Procedure pivotal in administering the doctrine. Despite the obvious importance of a consistent interpretive method to the administration of the Erie doctrine, however, the Court has never articulated even rudimentary principles for determining whether Federal Rules of Civil Procedure are broad enough to cover a case. Instead, the Court has sometimes interpreted Federal Rules broadly, holding that those rules cover ground also occupied by state law, even though, in some instances, the Federal Rule in question appeared inapplicable on its face to the case before the Court. At other times, the Court has confronted Federal Rules that are silent on the question dealt with by a state law and concluded that the rules were not broad enough to cover the case before it, thus eliminating the potential conflict between state and federal law. In still other cases, the Court has tortured the Federal Rule involved in the case beyond recognition to avoid what it perceives as abridgement of substantive rights under the Enabling Act. Nowhere in its opinions, however, has the Court attempted to reconcile these different interpretive approaches.

In cases in which the Court has found Federal Rules applicable, it has often given summary treatment to whether the rules are valid under the Enabling Act. Our previous decision in Burlington Northern Railroad Co. v. Woods appeared to establish an outline of the

---

Act and Rules Enabling Act); see also Justice Borchers’s dissenting opinion, 44 CREIGHTON L. REV. 29, 29 (discussing Erie).
7. See infra Part III(A) (discussing the Court’s decision in Burlington Northern Railroad v. Woods, 480 U.S. 1 (1987)); see also Justice Borchers’s dissent, 44 CREIGHTON L. REV. 29, 34-37 (discussing the Court’s prior history of Federal Rule interpretation).
10. See TEPLY & WHITTEN, supra note 6, at 481-83, 484, 494-85 (discussing the Court’s summary treatment of the Enabling Act’s limitations).
Enabling Act's limitations on our rule-making authority that offered some hope of preserving state substantive law-making prerogatives. However, today's opinion by a plurality of the Court retreats to the older standard of *Sibbach v. Wilson & Co.*, which essentially renders meaningless the substantive rights restriction of the Enabling Act and thus casts substantial doubt on the future of the *Burlington Northern* standard.

In cases under the Rules of Decision Act, the Court has articulated somewhat meatier standards for determining when state law may be disregarded in diversity actions, but even under that branch of *Erie*, the Court has not provided guidance on significant questions left open under the Rules of Decision Act that are important to the day-to-day administration of state and federal law in diversity cases. In addition, the Court has, as in the Enabling Act area, ignored certain aspects of its prior decisions bearing on the respect due to state substantive prerogatives, leaving the status of those doctrines in substantial doubt. Today's dissenting opinion by Justice Ginsburg creates further problems with the Rules of Decision Act doctrine, suggesting that some members of the Court do not have a clear grasp of the Rules of Decision Act analysis.

III.

A.

The problem with the Court's Federal Rule interpretive methodology, as well as its failure to reconcile its past cases with its interpretation of Federal Rule of Civil Procedure 23 in this case, may be illustrated by three of its past decisions. The first is the Court's most recent past decision in *Semtek International v. Lockheed Martin Corp.* In *Semtek*, the Court had to decide whether a dismissal by a California federal court on statute of limitations grounds should be given a claim preclusive effect under Federal Rule of Civil Procedure 41(b) in a subsequent action in a Maryland state court. The issue was raised because the language of Rule 41(b) states that unless an order

---

12. See infra Part III(B) of this opinion, (discussing *Burlington Northern* and other decisions).
13. 312 U.S. 1 (1941).
14. See infra Part III(B) (discussing *Sibbach*).
15. See infra Part IV(A) (discussing those questions).
16. See infra Part IV(B) (discussing those questions).
18. See *Shady Grove*, 130 S. Ct. at 1469. See infra Part IV(B) (criticizing the concurring and dissenting opinions).
of dismissal states otherwise, “a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.”20 Because the phrase “on the merits” has traditionally meant “claim preclusive,” and because when a dismissal is claim preclusive, it is ordinarily claim preclusive everywhere,21 a straightforward interpretation of Rule 41(b) would have made the California federal judgment preclusive in the Maryland action. This was so even though California clearly would not have made a limitations dismissal claim preclusive in a subsequent action in another state under that other state’s longer limitations period.22 Nevertheless, this Court recognized that the expression “on the merits” originally applied only to judgments that passed on the “substantive” merits of the claim, but then concluded that the expression “on the merits” had evolved to apply to some judgments that do not pass on the substantive merits.23 From this the Court concluded that some judgments on the merits do not produce a claim preclusive effect.24

Unfortunately, the Court had things exactly backwards. Some matters that were formerly not claim preclusive, such as dismissals on the pleadings, are today, in many jurisdictions, claim preclusive. However, it clearly does not follow from this that “on the merits” does not mean claim preclusive. As two distinguished commentators have explained:

The fact that more matters are today made “on the merits” than in former times does not mean that “on the merits” does not mean claim preclusive. The reason that more dismissals are today considered “on the merits” is a byproduct of the extensive opportunities afforded in modern procedural systems for dealing with dismissals on procedural grounds. If litigants do not avail themselves of those opportunities, but allow dismissals on procedural grounds to become final and do not appeal, there is no reason not to treat the judgment as claim preclusive just because it does not go to a ground that does not go (to use the Court’s words) directly to the substantive merits of the case.25

20. FED. R. CIV. P. 41(b).
21. See TEPLY & WHITTEN, supra note 6, at 497, 989-92, 1055-57.
22. See Justice Borchers’s dissenting opinion, 44 CREIGHTON L. REV. 29, 34 (discussing this aspect of California law).
24. See Semtek, 531 U.S. at 503.
25. See TEPLY & WHITTEN, supra note 6, at 496. It is true that there are a large number of decisions dealing with the doctrine of issue preclusion stating erroneously that the former judgment must be “on the merits.” It is clear, however, that the courts making these statements do not mean what they are saying; for it is clear that the doctrine of issue preclusion applies to dismissals on “procedural” grounds such as lack of
The Court went on to determine that Rule 41(b) made dismissals claim preclusive only in the same court in which the dismissal occurred, not in other courts, thus either turning the doctrine of claim preclusion on its head or confusing claim with issue preclusion. Of more importance to this case is that the Court made its clearly tortured interpretation of Rule 41(b) out of fear that the rule would violate the Enabling Act if given a straightforward interpretation and the judgment held claim preclusive. However, given the plurality's interpretation of the Enabling Act in this case, it is difficult to see how this could be so, since Rule 41(b) by any measure "regulates procedure," the standard that the plurality opines should govern Federal Rule validity in the future. Nowhere in today's plurality-majority opinion does the Court explain why it was necessary to twist Rule 41(b) beyond recognition to avoid an Enabling Act violation under today's interpretation of the Enabling Act. This is made all the worse by the fact that there was a method of conflict avoidance available to personal jurisdiction and venue. Rather, the courts are misleadingly using the "on the merits" phrase as a substitute for one of the real requirements of issue preclusion, such as the requirement that an issue actually have been litigated and determined in a prior action. See id. at 1004-05.

It is clear that the question whether the California statute of limitations had run would have had an issue preclusion effect in the California federal court that dismissed the action, whether the statute was supported by substantive or procedural policies. Indeed, it is clear that it would have had an identical issue preclusion effect in any other court in California, state or federal. See Teply & Whitten, supra note 6, at 1005. Thus, the Court's determination that it was also claim preclusive in the dismissing California federal court was entirely superfluous. This gives rise to the strong inference that the Court was, in fact, confusing claim preclusion with issue preclusion in Semtek. This is because the question in the case was not whether the action would effectively be precluded in California, but whether it would be effectively precluded elsewhere.

See Semtek, 531 U.S. at 503.

See infra Section III(B) (discussing the plurality's interpretation of the Rules Enabling Act).

The Court further cast doubt on its understanding of the Erie doctrine with a statement that interpreting Rule 41(b) to have a claim preclusive effect would violate the federalism principle of Erie Railroad v. Tompkins . . . by engendering "substantial variations in outcomes between state and federal litigation" which would "[i]likely . . . influence the choice of a forum . . . ." With regard to the claim-preclusion issue involved in the present case, for example, the traditional rule is that expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the substantive right, so that dismissal on that ground does not have claim-preclusive effect in other jurisdictions with longer, unexpired limitations periods. . . . Out-of-state defendants sued on stale claims in California and in other States adhering to this traditional rule would systematically remove state-law suits brought against them to federal court—where, unless otherwise specified, a statute-of-limitations dismissal would bar suit everywhere.

Semtek, 531 U.S. at 504. Of course, the central lesson of Hanna v Plumer, 380 U.S. 460 (1965), was that the general Erie policies of avoidance of forum shopping and inequitable administration of the laws are irrelevant in judging the validity of Federal Rules created under the Rules Enabling Act. See Teply & Whitten, supra note 6, at 497-98. Thus, the quoted statement seems to indicate that the entire membership of this Court
the Court in *Semtek* that would have avoided the distortion of Rule 41(b). As two outstanding commentators have observed, the Court might simply have recognized

that Rule 41(b) was not designed to operate in cases involving dismissals under state statutes of limitations, where the conflict-of-laws context of such dismissals does not afford the ordinary procedural protections that attend other kinds of dismissals in federal court. When a federal court dismisses under a state statute of limitations, the plaintiff may, of course, appeal the dismissal if it is thought to be in error and obtain a reversal. If the dismissal is correct, however, the plaintiff cannot remain in the initial forum by resorting to the sorts of procedural devices that are available when the dismissal is on some other ground. For example, it is usually very easy for the plaintiff to state a claim upon which relief can be granted under the federal system of notice pleading embodied in Rule 8(a).30 If the plaintiff’s complaint is dismissed for failure to state a claim, the plaintiff can amend the complaint or appeal if the plaintiff believes that the district court was in error in dismissing. If a plaintiff does not resort to these procedures, but allows a judgment to become final and commences an action in another court, making the judgment claim preclusive under Rule 41(a) would not seem to violate any imaginable proscription of the Rules Enabling Act, because requiring a plaintiff to avail herself of the opportunities given within the federal court system to correct errors should not be considered an abridgement of substantive rights. In comparison, however, if a plaintiff mistakenly sues in a forum in which the limitations period has run, there are no procedural steps the plaintiff can take to correct the mistake other than to file suit in another forum with a longer statute. If this would be permitted under the law of the state providing the shorter limitations period, it is difficult to see how there is any federal interest in providing otherwise in the Federal Rules. Thus, an interpretation of Rule 41(b) that would recognize that the rule only applies to cases in which the ordinary procedural protections afforded by the Federal Rules system can operate would resolve all Rules Enabling Act difficulties. Indeed, the three exceptions to the “on the merits” effect set out in Rule 41(b) exemplify this principle. Dismissals for lack of jurisdiction, improper venue, or failure

at the time of *Semtek* did not understand even the most elemental aspects of the *Erie* doctrine.

to join a party under Rule 19 all represent situations in which the plaintiff will usually have to go to another court to sue if the dismissals are correct. If that is so, the usual procedural avenues for remaining in the court in which the action was originally commenced, such as amendment, are ordinarily of no use. Thus, reading an additional “statute of limitations” dismissal exception into the rule would do little violence to its operation—far less than the Supreme Court’s distorted interpretation of the rule.\(^{31}\)

A second example of unexplained rule interpretation occurred in Burlington Northern Railroad Co. v. Woods,\(^ {32}\) in which the Court, far from its approach in Semtek, construed a Federal Rule excessively broadly, without apparent concern for whether it conflicted with substantive rights conferred by state law. In Burlington Northern, the Court was confronted with a potential conflict between Federal Rule of Appellate Procedure 38 and a state statute providing for an additional ten percent in damages if an unsuccessful appeal was taken in a damages action. The Court found that Rule 38 and the state statute conflicted and sustained the rule under the Enabling Act. However, Rule 38 applied only to “frivolous appeals,” not simply “unsuccessful” ones (to which the state law applied). Nowhere in any of the decisions in Burlington Northern was there any finding that the appeal (by the railroad) was frivolous. Therefore, Rule 38 seems clearly to have been inapplicable to the case. Nevertheless, the Court found Rule 38 applicable, stating that the rule was discretionary in nature and that the discretionary nature of the rule conflicted with the mandatory operation of the state statute.\(^ {33}\) This was clearly incorrect. No discretion exists under Rule 38 in any case unless an appeal is first found to be frivolous. Thus, unless a court of appeals determines an appeal in a case is frivolous, a finding that no court or judge made in Burlington Northern, no conflict can exist between the discretion afforded under Rule 38 and the mandatory operation of the state statute. The Court’s opinion thus appears to mean that if a Federal Rule and a state law

---

\(^{31}\) ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW § 107, 310-311 (5th ed. 2001) [hereinafter FELIX & WHITTEN]. It should be emphasized that a dismissal without prejudice (not on the merits) under the rule would, under the quoted argument, depend further on the dismissing state’s res judicata law. Even if Rule 41(b) does not make a statute of limitations dismissal “on the merits,” if the state limitations period is substantively based and the state makes dismissals under the statute claim preclusive under its own law, the effect of the federal judgment should follow state res judicata law. To do otherwise would be unfaithful to the Klaxon doctrine as well as to the Court’s conclusion in the second part of Semtek that federal diversity judgments should be governed by federal common law that adopts state law unless to do so would undermine important federal interests. See TEPFLY & WHITTEN, supra note 6, at 445-47, 476 (discussing the Klaxon doctrine and the second part of Semtek).


\(^{33}\) See Burlington Northern R.R. Co. v. Woods, 480 U.S. 1, 6-8 (1987).
might conflict in some kind of case other than the one before the Court, the Federal Rule and the state law are in conflict for Enabling Act purposes, even if no actual conflict exists in the case before the Court. How this approach to rule interpretation conforms to the Court’s approach in *Semtek*, or in the other cases in which the Court has stated that it normally interprets Federal Rules created under the Enabling Act “with sensitivity to state interests and regulatory policies,” is inexplicable, and the Court has in no case undertaken to reconcile the decision with its other cases interpreting the Federal Rules.

A final example of the Court’s erratic rule-interpretive method, of particular relevance to this case, is the pre-Hanna decision in *Cohen v. Beneficial Industrial Loan Corp.* In *Cohen*, the Court was faced with a potential conflict between then Federal Rule of Civil Procedure 23 (now Rule 23.1) governing shareholder derivative actions and a New Jersey law. The New Jersey statute made plaintiffs in derivative actions owning less than five percent of the par value, stated value of the aggregate par, or stated value of all the outstanding value of the corporation’s stock liable for all of the defense’s expenses and attorney’s fees if the suit was unsuccessful. In addition, the statute required the plaintiff to post a bond to assure that the expenses and fees would be paid. Failure to provide the bond prevented the action from going forward. Rule 23 contained no such expense or bond requirement. Nevertheless, the Court canvassed the requirements of Rule 23 and held that they did not conflict with the state statute, which the Court held applicable under the Rules of Decision Act.

On its face, the *Cohen* case would seem to control this action. Current Rule 23 does not contain any restriction on class actions in suits for penalties. Under *Cohen*, it would seem logical to conclude that the rule simply does not deal with state restrictions that may be imposed in particular kinds of cases on the remedy that the plaintiff seeks. Yet the Court interprets the rule in a very different manner than it did in *Cohen*. In this case, the Court interprets the rule as conferring a right on a litigant to bring an action as a class action if the litigant meets the requirements of Rule 23, without complying with any separate restrictions that may exist under state law. Of course, if this kind of reasoning had been applied to Rule 23 in *Cohen*, the Court would have held that Rule 23 authorized a derivative action to go forward if the rule’s requirements were met, and the New Jersey state statute would have been disregarded. Incredibly, the plurality-

35. 337 U.S. 541 (1949).
majority does not see fit either to distinguish or to overrule Cohen, thus leaving the legal world to speculate how that case and this one can possibly be reconciled.

Justice Borchers's dissent suggests that we should determine whether federal and state rules collide "if they could not sensibly be part of a single, coherent legal system." In Cohen, the Court seemed to approach this standard in its interpretation of Rule 23 and its determination that no conflict existed with the New Jersey law in the case. The Court stated:

Rule 23 requires the stockholder's complaint to be verified by oath and to show that the plaintiff was a stockholder at the time of the transaction of which he complains or that his share thereafter devolved upon him by operation of law. In other words, the federal court will not permit itself to be used to litigate a purchased grievance or become a party to speculation in wrongs done to corporations. It also requires a showing that an action is not a collusive one to confer jurisdiction and to set forth the facts showing that the plaintiff has endeavored to obtain his remedy through the corporation itself. It further provides that the class action shall not be dismissed or compromised without approval of the court, with notice to the members of the class. The provisions neither create nor exempt from liabilities, but require complete disclosure to the court and notice to the parties in interest. None conflict with the statute in question and all may be ob-

37. See Borchers, J., dissenting, 44 CREIGHTON L. REV. 29, 35. This standard has much to commend it, but it is basically a standard by which to determine whether a conflict exists between a Federal Rule and state law. I am here concerned with how Federal Rules of Civil Procedure should be interpreted to determine whether they cover a case in the first place, and more particularly with the Court's disregard of its prior precedents interpreting Federal Rules for this purpose. One might conceivably employ Justice Borchers's test both for determining the breadth of Federal Rules and for eliminating conflicts between such rules and state law. However, it is not clear to me that conflation of the applicability and conflict tests would work in all cases. For example, Justice Borchers considers Burlington Northern to be a no collision test, as I do. See Borchers, J., dissenting, 44 CREIGHTON L. REV. 29, 36. However, his argument is that the state law and Federal Rule of Appellate Procedure 38 can coexist in the case, a proposition with which I also agree. However, as I have argued above, the only way that this can be so is if the Court's reasoning that the state law interferes with the discretion given by Rule 38 is rejected because Rule 38 was altogether inapplicable, the appeal in the case never having been found frivolous. See supra notes 32 – 34 and accompanying text. This is arguably different from a case in which both state law and a Federal Rule apply to a case, but can still coexist because the purposes of neither rule will be undermined by applying the other. Hanna v. Plumer, 380 U.S. 460 (1965), was, despite the Court's finding of a conflict in that case, arguably such a situation. See TEPLY & WHITEN, supra note 6, at 484. It is not clear to me at this point whether Justice Borchers's test would be serviceable in both kinds of cases over the long haul. In any case, the primary difficulty in my view is that the Court uses no consistent method either of Federal Rule interpretation or conflict avoidance.
served by a federal court, even if not applicable in state court.\textsuperscript{38}

This passage might suggest that \textit{Cohen} can be distinguished from this case on the ground that the New York law in question here would \textit{altogether forbid} this action as being brought as a class action because it is an action for penalties, while in \textit{Cohen} the state statute did not \textit{altogether forbid} the derivative action, but simply required an indemnity bond to be posted for the action to proceed. If this interpretation of \textit{Cohen} were plausible, it might be distinguished from this case by employing Justice Borchers's test for determining when Federal Rules of Civil Procedure and state rules conflict. However, I do not believe that \textit{Cohen}'s interpretation of Rule 23 (today Rule 23.1) and the majority's interpretation of Rule 23 in this case can be reconciled in this fashion. To view the cases as different would disregard the true nature of the New Jersey provision, which the Court recognized in \textit{Cohen} was designed to thwart strike suits by small shareholders.\textsuperscript{39} Thus, as a practical matter, the New Jersey provision effectively \textit{prohibited} shareholder derivative actions by small shareholders, just as effectively as the New York law here prohibits class actions for penalties. As Justice Harlan, concurring in \textit{Hanna}, stated:

\begin{quote}
The proper view of Cohen is in my opinion, that the statute was meant to inhibit small stockholders from instituting "strike suits," and thus it was designed and could be expected to have a substantial impact on private primary activity. Anyone who was at the trial bar during the period when Cohen arose can appreciate the strong state policy reflected in the statute.\textsuperscript{40}
\end{quote}

Because \textit{Cohen} cannot be effectively distinguished from this case, the Court's failure to address \textit{Cohen} as a precedent is unconscionably sloppy. Combined with its failure to establish an appropriate and consistent method for interpreting Federal Rules to determine whether they conflict with state law, the Court leaves the fundamental, threshold question under the \textit{Erie} doctrine in a state of incoherence. The result has and will continue to be chaos in the lower federal courts and among the members of the bar about whether any given case involves a Rules Enabling Act or a Rules of Decision Act problem.\textsuperscript{41} A decent sense of its responsibility to the profession would seem to dictate that if the Court is going to grant certiorari in these kinds of cases, it would do so with the aim of clarifying the details of this important doctrine

\begin{footnotes}
39. \textit{See id.} at 555-56.
41. \textit{See} \textit{TEPLY} \& \textit{WHITTEN}, \textit{supra} note 6, at 505-17 (discussing the \textit{Erie} doctrine in the lower federal courts).
\end{footnotes}
for the benefit of the legal world that must deal with it on a day-to-day basis. Alas, no such sense of responsibility seems to exist.  

Under Cohen, the best result in this case would be to hold that Rule 23 simply makes no statement about the kinds of substantive claims that can be pursued as class actions under state law, unlike the New York statute, which does. Therefore, as did the Second Circuit, I would hold Rule 23 inapplicable to the case. Furthermore, as I discuss below, because the state law in question is bound-up with the substantive rights of the parties to pursue a claim for penalties, it is obligatory under the Rules of Decision Act and federal courts must, under our precedents, apply the state law. However, if, as the majority concludes, Rule 23 is applicable to this case, I believe that the rule must be held invalid as applied under the substantive rights restriction of the Enabling Act. It is to this question that I now turn.

B.

Having found Federal Rule of Civil Procedure 23 applicable to this case, a plurality of the Court goes on to opine that the rule may be validly applied under the Rules Enabling Act without violating the “substantive rights” restriction of that Act. It does so by returning to the 1941 interpretation of the Enabling Act articulated in its ancient opinion in Sibbach v. Wilson & Co., and wholly disregarding its later decision in Burlington Northern Railroad Co. v. Woods, in which the Court had verbalized some independent content to the substantive rights restriction of the Act for the first time. As is the case with its rule interpretive methodology discussed in Part III(A) above, the Court does not bother to explain how the standards articulated in the two cases can be reconciled.

In Sibbach, the Court was confronted with an argument by the plaintiff in a personal injury action that Federal Rule of Civil Procedure 35, providing for physical examinations in federal court, and Fed-

42. I prefer this to the most likely alternative conclusion, which is that the other members of the Court, together with their law clerks, simply do not understand this area.
   Rule 23 does not control the issue of which substantive causes of action may be brought as class actions or which remedies may be sought by class action plaintiffs. . . . Thus, Rule 23 leaves room for the operation of the [New York statute], which is a substantive rule that eliminates statutory penalties under New York law as a remedy for class action plaintiffs.
   Id. at 143. For a criticism of other aspects of the Second Circuit’s opinion, see TEPLY & WHITTEN, supra note 6, at 507-08.
44. See infra Part (IV)(B) (discussing the dissent’s Rules of Decision Act analysis).
45. 312 U.S. 1 (1941).
eral Rule of Civil Procedure 37, providing for sanctions for failure to obey discovery orders, were invalid under the substantive rights restriction of the Enabling Act. The plaintiff's argument was, specifically, that "substantive rights" within the meaning of the Enabling Act meant "important and substantial rights theretofore recognized."47 The Court rejected this argument, stating instead that the test for the validity of a Federal Rule of Civil Procedure under the Enabling Act was whether the "rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress or infraction of them."48

The Sibbach test essentially limits the inquiry into a Federal Rule's validity to the face of the rule.49 Under the "really regulates procedure" test, as long as the rule does not embody a "pure" substantive right, it is valid. This effectively equates the power of this Court to make rules of practice and procedure for the lower federal courts under the Enabling Act with the power of Congress to do so under Article III50 and the Necessary and Proper Clause.51 Such an interpretation contradicts the structure of the Enabling Act, which authorizes this Court in its first paragraph to create rules of practice and procedure for the lower federal courts, and in its second paragraph states that "[s]uch rules shall not abridge, enlarge, or modify any substantive right."52 Therefore, because it is possible for Congress to create federal procedural rules that have an impact on state (or other) substantive rights, so long as such rules are necessary and proper to the regulation of practice and procedure of the federal courts, and because the Enabling Act does not make our powers coextensive with those of Congress, the Sibbach standard is an impermissibly narrow interpretation of the Act.53

Scholars studying the Enabling Act have generally agreed with this conclusion, albeit on different grounds. Some have concluded that Sibbach erroneously equated the power to prescribe rules of practice and procedure with the substantive rights restriction. These commen-

49. See the dissenting opinion of Justice Borchers, 44 CREIGHTON L. REV. 29, 39.
50. U.S. CONST., art. III.
51. U.S. CONSt., art I, § 8, cl. 18. See generally FELIX & WHITTEN, supra note 31, Ch. 7, § 110 (discussing the power of Congress to abridge and enlarge state substantive policies with federal procedural regulations).
53. The plaintiff, Sibbach, in fact argued before this Court that "[i]f rules of 'procedure' could not be construed to involve 'substantive rights,' the second sentence in the Act would be surplusage." Sibbach, 312 U.S. at 3 (argument of petitioner); see also TEPly & WHITTEN, supra note 6, at 480.
tators have argued that the structure of the Enabling Act demands that the second paragraph should be given a different and more limited meaning than the first, thus imposing greater restrictions on our power to make rules than exist on the power of Congress. Others, relying on the legislative history of the Enabling Act, have concluded that Sibbach was correct that the substantive rights restriction of the Act was designed only to emphasize a limitation inherent in the use of the words “practice and procedure” in the first paragraph of the Act. However, even under the latter view, the Enabling Act contains important separation of powers restrictions on this Court’s power to make procedural rules under the Act that encroach on the powers of Congress. For present purposes, it is not necessary to determine which of these approaches is correct. The key fact is that the Sibbach test, later echoed in Hanna, fails to recognize any limits to our rulemaking authority under the Enabling Act that does not also exist on the rulemaking power of Congress.

In Burlington Northern, this Court took a potentially important step in curing the deficiencies of the Sibbach test and moving toward a test that would allow Federal Rules to be judged valid or invalid as applied to particular cases. As described in the preceding subsection, the Court in Burlington Northern confronted what it believed was an irreconcilable conflict between Federal Rule of Appellate Procedure 38 and state law. Although the Court (erroneously) upheld Rule 38 as a valid exercise of power under the Enabling Act, it articulated for the first time standards indicating that our rulemaking power was more limited under the Act than that of Congress under the Constitution. We stated:

54. See Teply & Whitten, supra note 6, at 479-80 (discussing the structure of the Enabling Act). Given the tendency of some members of this Court to rely on literalist interpretations of federal procedural statutes, without regard to legislative history, this would seem to be an attractive approach, but at least some members of the Court who find such “plain meaning” approaches attractive inexplicably do not approach the Enabling Act in this fashion. Cf. Exxon Mobile Corp. v. Allapattah Services, Inc., 545 U.S. 546 (2005) (in which the majority interprets 28 U.S.C. § 1367 (2006) without regard to its legislative history).


57. See id. at 1106.


59. See Teply & Whitten, supra note 6, at 480.

60. See Justice Borchers’s dissent, 44 Creighton L. Rev. 29, 39.

61. See supra notes 32-34 and accompanying text (discussing Burlington Northern).

62. See id.
The constitutional constraints on the exercise of [the] rulemaking authority define a test of reasonableness. Rules regulating matters indisputably procedural are a priori constitutional. Rules regulating matters "which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either," also satisfy this constitutional standard. [Hanna, 380 U.S. at 472.] The Rules Enabling Act, however, contains an additional requirement. The Federal Rule must not "abridge, enlarge or modify any substantive right. . . ." 28 U.S.C. § 2072. The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules.63

From this passage, it thus appears that a Federal Rule promulgated under the Enabling Act would violate the substantive rights restriction if (1) the rule affects substantive rights more than incidentally, or, (2) even if the rule affects substantive rights only incidentally, the rule is not reasonably necessary to maintain the integrity and uniformity of the rest of the Federal Rules of which it is a part. This standard leaves many questions open. Among them are (1) what the Court means by "substantive" rights under the Act; (2) what constitutes an "incidental" as opposed to some other kind of effect; and (3) how one is to determine whether a Federal Rule is reasonably necessary to the integrity and uniform operation of the rest of the Federal Rules.64 Nevertheless, the articulated standard recognized some limits on our rulemaking power under the Enabling Act that do not exist on Congress's power under Article III, and it offered the possibility that this Court would, through clarification of the standard in future cases, create a coherent set of standards by which to accommodate federal procedural rulemaking and state prerogatives when state legislatures choose to engage in regulation through the vehicle of substantively-based procedural rules.65

63. Burlington Northern, 480 U.S. at 5.
64. Compare Teply & Whitten, supra, note 6, at 490 (treating the meaning of "incidental" as "important" or "substantial"), with Martin H. Redish & Dennis Murashko, The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation, 93 Minn. L. Rev. 26, 89-92 (2008) (arguing that "incidental" should not be interpreted to mean "unimportant").
65. It is also arguable that the Court should have declared Rule 38 invalid under the very standard that it articulated in Burlington Northern. See Teply & Whitten, supra note 6, at 489-90 (making such an argument).
66. Although this Court never invalidated a Federal Rule under the Burlington Northern standard, our later cases, until today, generally continued to pay lip service to
Today, the plurality attempts to return to the *Sibbach* standard without explaining how it survived *Burlington Northern*. Technically, the attempt is a failure. *Burlington Northern* was decided by a unanimous Court. A plurality opinion cannot displace the standard that it articulated. Therefore, the *Burlington Northern* test remains the applicable standard, rather than the *Sibbach* test. Nevertheless, it will not pass unnoticed that only one additional Justice of this Court need join with the plurality in the future for the Court to return to the *Sibbach* facial validity test. Thus, added to the other problems that the Court has created, is substantial uncertainty about what the Enabling Act standard will be in the future.

More importantly, in my view it is impermissible to elevate Federal Rules promulgated under the Enabling Act to an unchallengeable status. Whatever the ambiguities of the Rules Enabling Act, Congress clearly did not intend for our power under the Act to be coextensive with its own procedural regulatory authority. The objective of the Enabling Act is the creation of a set of uniform and trans-substantive rules of procedure for the federal courts. Important as this objective is, it should not trump all other values in our system of separation of powers and federalism. Congressional limits on our rulemaking power must be respected, and state authority to regulate substantive matters through procedural rules also deserves substantial regard. This can be achieved by recognizing that while rules like Rule 23 do generally provide a right to maintain an action as a class action without regard to any conflicting state procedural rules, the rule may not be validly applied in cases such as this in which state restrictions on class actions in particular kinds of cases are substantively based. This will concededly undermine both the goal of uniform national federal procedure and the goal that the Federal Rules should be trans-substantive in nature. So be it. The goal of a uniform and trans-substantive system of federal procedural rules is not the *sine quo non* of our legal and constitutional system. Regard for state lawmaking prerogatives is a higher-order value that should trump this goal, however much inconvenience it causes the federal courts in diversity actions. Therefore, I would hold that Rule 23 cannot be validly applied in this case under the substantive rights restriction of the Enabling Act as

---

67. *See* Justice Borchers's dissenting opinion, 44 *CREIGHTON L. REV.* 29, 39 n.11 (drawing the identical conclusion).

68. *See* supra notes 47–53 and accompanying text.

69. *See* TEPLY & WHITTEN, supra note 6, at 36–38.
long as the class action seeks penalties in violation of the state restriction.\textsuperscript{70}

IV.

A.

Justice Stevens, concurring, makes up a majority for the conclusion that Federal Rule of Civil Procedure 23 is applicable to this case and gives a right to bring a class action under Rule 23 if the technical requirements of the rule are met.\textsuperscript{71} However, Justice Stevens avoids the Rules Enabling Act problem by concluding that the New York law restricting use of class actions in suits for penalties is a state procedural law, supported only by procedural policies.\textsuperscript{72} Commendably, Justice Stevens does not agree with the plurality that state law should be ignored in determining whether an Enabling Act violation occurs.\textsuperscript{73} However, he explicitly sets “the bar for finding an Enabling Act problem” high.\textsuperscript{74} In doing so, however, he places a very uncharitable interpretation on the state law. I am not so concerned about the details of Justice Stevens’s arguments about the state law\textsuperscript{75} as I am about the

\textsuperscript{70} In this case, it is clear to me that the state limitation on class actions in penalties should be classified as a “substantive” restriction within the meaning of the Rules Enabling Act. I discuss this point further in the next part of this opinion, in which I comment on the concurring and dissenting opinions. I also recognize that if the claim for penalties is dropped, the action may have to be dismissed for lack of subject-matter jurisdiction, assuming, as is likely, that a class action for compensatory damages will not meet the $5,000,000 jurisdictional amount of the Class Action Fairness Act. See 28 U.S.C. § 1332(d)(2) & (6) (2006); see also the dissenting opinion of Justice Borchers, 44 CREIGHTON L. REV. 29, 40-41 (arguing for the invalidation of Rule 23 as applied in this case).


\textsuperscript{72} See Shady Grove, 130 S. Ct. at 1457–58.

\textsuperscript{73} See id. at 1452–55.

\textsuperscript{74} Id. at 1457.

\textsuperscript{75} Justice Stevens’s opinion makes a number of points in support of his view that the New York law is not clearly substantive. Thus, he argues that the law (1) expressly and unambiguously applies not only to claims based on New York law, but also to claims arising under federal law or the laws of other states, thus indicating (to him) that the law cannot be understood as a procedural rule that serves the functions of defining New York’s rights and remedies; (2) that the legislative history does not “clearly” indicate that the law is designed as a limitation on New York’s statutory damages and thus “bound up” with state substantive rights; (3) some legislative history may indicate that New York may simply have wanted to exclude the class action vehicle when it was inefficient or unnecessary; and (4) that arguments that class certification would enlarge New York’s limited damages remedy are based on “extensive speculation.” See id. at 1457-59. It seems to me irrelevant that New York extends its restriction to claims arising under other states’ laws in determining whether the restriction is “substantive” within the Enabling Act’s meaning. Further, the fact that multiple reasons can be found in the legislative history supporting the restriction does not mean that the part of the history indicating that the restriction is substantive can be disregarded. Legislatures often have multiple reasons for enacting a statute, some substan-
proper method that should be used to interpret state provisions to determine whether they embody "substantive rights" within the meaning of the Enabling Act.

For better or worse, state legislatures often create procedural rules for reasons that have nothing to do with the sort of efficiency policies that normally underpin such rules. Rather, the reasons often embody policies that are directed at limiting the scope of claims, defenses, or remedies available for the violation of primary rights existing under state law. The question that we must answer is how we should interpret such statutes in diversity actions in which state law controls the primary rights of the parties. We could, of course, presume that any law cast in the form of a procedure, is designed only for procedural policy reasons and has no substantive purposes unless a non-procedural policy is explicitly stated in the statutory text or unambiguously found in its legislative history. Although Justice Stevens's approach to interpreting the New York law in this case does not articulate such an approach, it seems to me that his interpretive approach essentially amounts to such a "clear statement" policy. In my view, this is far too stingy an approach to interpreting state law. For example, if such an approach had been employed in the Cohen case, the Court surely would have concluded that the state bond requirement was merely procedural in nature. I believe Justice Harlan's interpretation of Cohen to be preferable. We should not deny the reality that we know to be true about the controversial nature of the class action device and the abuses to which the device has been sub-

tive and some procedural. If any substantive purpose can be found in reliable legislative history, it is sufficient to support an Enabling Act violation, and I do not read Justice Stevens's concurrence to deny that some legislative history supports a "substantive" purpose underlying the statute. See id. at 1457 ("It is true, as the dissent points out, that there is a limited amount of legislative history that can be read to suggest that [New York] wished to create a 'limitation' on New York's 'statutory damages.'"). Furthermore, multiple purposes are not necessarily contradictory purposes. A statute may be enacted both for efficiency reasons linked exclusively to suits in a state's own courts as well as for non-efficiency, or "substantive" reasons. It is, of course, a separate question whether the legislative history of a statute is sufficiently reliable to support reliance on the history for any interpretive purpose.

76. See, e.g., FELIX & WHITTEN, supra note 31, § 110 (discussing inter alia state statutes prohibiting the introduction of evidence of the failure to wear a seat belt as proof of contributory negligence in the context of the power of Congress to regulate the practice and procedure of the federal courts); TEPLY & WHITTEN, supra note 6, at 513 (discussing the same seat belt statutes as prime examples of procedural provisions supported by substantive polices—specifically, the policy of removing failure to wear a seat belt as a ground for establishing contributory negligence).

77. See supra notes 35-44 and accompanying text (discussing Cohen).

78. See supra note 40 and accompanying text (discussing Justice Harlan's interpretation of the purposes of the state statute in Cohen).
ject. Taking this approach, it seems to me that, as the dissenters point out, the New York limitation on class actions was clearly designed, at least in part, to deal with one kind of problem that has arisen in such actions—the prevention of "annihilating punishment" of the defendant in a single suit. This purpose can in no way fit within any of the purposes that support "pure" procedural rules—i.e., purposes pertaining to the "just, speedy, and inexpensive determination" of civil actions, or, as in the case of rules of evidence, the efficient and accurate determination of such actions. Thus, I would interpret the New York law to embody a "substantive" limitation that class action treatment under Rule 23 in a federal diversity action would abridge.

More generally, it is important in administering the Erie doctrine in both its Rules Enabling Act and its Rules of Decision Act branches to keep the core truths of the doctrine always in mind. These were stated most clearly by Justice Frankfurter in *Guaranty Trust Co. of New York v. York*: Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key-words to very different problems. . . . Each implies different variables depending upon the particular problem for which it is used. . . . And the different problems are only distantly related at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to questions pertaining to ex post facto legislation, the impairment of the obligation of contract, the enforcement of federal rights in the State courts, and the multitudinous phases of the conflict of laws.

In essence, Justice Frankfurter's insight is that it is meaningless to ascribe a law as "substantive" or "procedural" without first establishing (1) why it is necessary to categorize the law as one thing or the other and (2) what the policies supporting the law are. In Enabling Act cases, we must categorize state rules as substantive or procedural in order to remain within the boundaries that Congress has placed on our rulemaking power. To stay within those boundaries, we must

---

79. See Teply & Whitten, supra note 6, at 795-804 (discussing contemporary issues in the administration of the class action, including the Class Action Fairness Act).
80. See *Shady Grove*, 130 S. Ct. at 1464 (Ginsburg, J., dissenting).
81. See *Fed. R. Civ. P. 1*.
82. See *Fed. R. Evid. 101, 401-03*.
classify a state rule as substantive any time it is supported by any policy other than the usual efficiency policies underpinning rules such as the Federal Rules of Civil Procedure, even if it is also supported by goals of efficiency or accuracy of determination.

Modern conflict-of-laws theory provides a useful example of how courts should properly categorize state rules. For example, in conflicts cases, rules of evidence, including burden-of-proof rules are normally considered "procedural," and the forum applies its own law to such rules. However, contemporary conflicts analysis recognizes that policies other than the efficient maintenance of litigation can support otherwise procedural rules, such as burden-of-proof rules. For example, such rules can be designed to "affect decision of the issue," that is, to favor or protect one of the litigating parties for policy reasons having nothing to do with efficient litigation concerns. In such cases, modern conflicts theory requires that the forum apply the burden-of-proof rule of the state whose law would be applied to the other "substantive" issues in the case (such as standards of negligence and contributory negligence) because the burden-of-proof rule is designed specifically to support or retard the operation of parts of those laws. It is, thus, inextricably, "bound up" with the policy judgments made by the state's lawmakers about the proper operation of its liability laws.

The New York law restricting class actions in penalty cases is clearly a law of this same sort, "designed to affect the decision of the issue" of remedy and thus should be considered "substantive" for purposes of the Enabling Act. The New York law is clearly intertwined with the ability of plaintiffs to obtain judgments for penalties and restricts the amount of such judgments in order, not to achieve judicial efficiency, which would be achieved much more effectively by a class action, but to protect the defendant from ruinous judgments in a single proceeding. There can be no doubt, also, that the effect of the rule will be to deter some plaintiffs from bringing suit for penalties at

85. See, e.g., Restatement (Second) of Conflict of Laws §§ 122, 135 (1971).
86. See id. § 133, ill. 4.
87. Of course, a substantively-based state procedural rule, such as a rule of evidentiary privilege, may conceivably not be linked to the laws defining the claims or defenses in the case. In such instances, the substantively-based procedural rule at issue may be decoupled from the liability question and disregarded if appropriate. In other words, it is not "bound up" with the rights and liabilities defined by the state's law. See Felix & Whitten, supra note 31, Ch. 5, § 65 at 196, 200-01.
88. In determining the policies of the New York law, we cannot ignore the reality that the class-action procedure has produced. Much criticism of the procedure has focused on the ease with which plaintiffs can bring frivolous class proceedings and the tendency of such actions to produce an inclination to settle by defendants rather than to incur the enormous litigation costs and disproportionate risks that class actions pose for them. Teply & Whitten, supra note 6, at 785-87.
all, if the amount of their claims does not justify the litigation expense that will otherwise result in a non-class proceeding. The application of Rule 23 to these cases would seriously undermine this policy and thus "abridge" the rights of the defendant.

The examples given above are sufficient to refute Justice Stevens's view that the New York law is simply a procedural rule supported by procedural policies. However, the examples are also suggestive of another aid to interpreting state law that we might usefully employ in Enabling Act cases. Although Hanna established that the standards under the Rules of Decision Act (discussed in the next subsection) are not to be employed in determining the validity of a Federal Rule of Civil Procedure under the Enabling Act, no reason exists why the analysis under the Rules of Decision Act cannot inform our determination of the nature of the state law involved in an Enabling Act case when the considerations under both statutes overlap. In particular, as I will discuss in the next subsection of this opinion, when a rule would be classified as a "rule bound up" with the definition of state rights and obligations for Rules of Decision Act purposes, any Federal Rule of Civil Procedure that conflicts with it should have to give way.

B.

Although I agree with Justice Ginsburg's dissent regarding the proper general approach to the interpretation of both Federal Rule of Civil Procedure 23 and state law, I cannot agree with her approach to the Rules of Decision Act in that opinion. I agree that it is not appropriate to ignore the character of a state law in interpreting the Federal Rules. I also believe, as in the Cohen case, that when a Federal Rule does not address an issue dealt with by a substantively-based state procedural law, it should ordinarily be interpreted as not in conflict with the state law, even when the result is to limit the operation of the Federal Rule. However, I believe that the dissent's discussion of the Rules of Decision Act analysis that should be applied after concluding that no conflict exists between a Federal Rule and state law poses a grave danger of confusion in future cases. In addition, I think the dissent omits an important consideration about the nature of the state law here that would materially simplify the Rules of Decision Act analysis in this and many other cases.

As discussed earlier, one of the most important distinctions to be drawn in our cases was this Court's observation in Hanna that cases in which Federal Rules conflict are governed by the substantive

89. See supra note 6 and accompanying text; infra subpart (B).
90. See supra notes 2-6 and accompanying text.
rights restriction of the Enabling Act, while cases in which no Federal Rule is applicable are to be governed by the analysis developed in our cases under the Rules of Decision Act. Moreover, when the Rules of Decision Act governs a question, the “outcome determinative” test, first articulated in this Court’s decision in Guaranty Trust Co. of New York v. York, governs the issue before the Court. As indicated, while the York test was “never intended to serve as a talisman,” when courts apply the test they usually inquire into whether the refusal to apply state law would cause one or both of the litigants to “forum shop” for a federal court. This is ultimately the inquiry made by the dissenters today, and I believe it is quite inappropriate in a case like this.

It is important to recognize that the dissent first finds Rule 23 inapplicable to the case before us by reading Rule 23 and the New York rule together in order to avoid a collision between the two rules. Subsequently, the dissenters then inquire whether failure to apply the New York rule “would have so important an effect upon the fortunes of one or both the litigants that failure to [apply] it would be likely to cause a plaintiff to choose the federal court.” With all due respect, this inquiry is misplaced in this case. The only way that forum shopping would occur by failing to apply the state law in this case is by applying Rule 23 to certify the action for class action treatment. However, by first finding Rule 23 inapplicable to the case, the dissenters have logically foreclosed this possibility. Therefore, by interpreting Rule 23 as not governing the case before the Court, a plaintiff seeking penalties would have no reason to forum shop for a federal court. Under these circumstances, the dissent’s inquiry into “outcome determination” is, to say the least, the product of muddled thinking.

94. See id. at 467-69.
96. Shady Grove, 130 S. Ct. at 1469 (quoting Hanna, 380 U.S. at 468 n.9).
97. There is no doubt that the dissent is evaluating whether the Rules of Decision Act requires application of the state rule by inquiring whether it would be permissible to certify the case for class treatment under Rule 23. It states: Just as Erie precludes a federal court from entering a deficiency judgment when a State has “authoritatively announced that [such] judgments cannot be secured within its borders” . . . so too Erie should prevent a federal court from awarding statutory penalties aggregated through a class action when New York prohibits this recovery.
98. Id. at 1472 (citations omitted). The only way that statutory penalties could be aggregated through a class action is if Rule 23 is applicable to the case and allows such an action, but the dissent had previously found Rule 23 to be inapplicable to the case, so
Having construed Rule 23 and the state rule together to determine that Rule 23 does not conflict with the state law, I would simply apply the state law "because there can be no other law." It certainly makes no sense to ask whether a litigant would forum shop to get the benefit of an inapplicable Federal Rule of Civil Procedure.

In another way, however, I believe it is possible to obtain guidance from the Rules of Decision Act side of the Erie doctrine when federal diversity courts confront potential conflicts between Federal Rules of Civil Procedure and state law. In Byrd v. Blue Ridge Rural Electric Cooperative, Inc., this Court divided the universe of state rules into three categories: (1) rules defining state rights and obligations; (2) rules "bound-up" with state rights and obligations; and (3) rules of "form and mode." In Byrd, we treated the first two categories of rules as absolutely binding on federal diversity courts, while rules of form and mode, and only those rules, were subject to evaluation under the outcome determinative test of Guaranty Trust, and the outcome determinative policies themselves could be trumped by the presence of sufficiently weighty "federal countervailing considerations." Rules defining state rights and obligations are "pure" substantive rules, such as those involved in Erie itself. In Byrd, rules "bound up" with the definition of state rights and obligations appeared to be rules procedural in form, such as certain burden-of-proof rules, that were supported by specific policies designed to advance or retard the purposes of the substantive rights to which the bound-up rules were linked. The form and mode category encompasses all other rules.

It makes sense that rules bound up with state rights and obligations are treated as mandatory in federal diversity actions just like rules defining state rights and obligations.

Such rules are so closely related to the substantive rights at issue in the case as to be virtually identical to those substantive rights for purposes of the Erie doctrine. The strength of the Erie policy is as great in this category of cases as it would
be in a case in which a rule defining state rights and obligations is directly involved (as in *Erie* itself).106

Unfortunately, this Court has ignored the *Byrd* categorization process in its subsequent cases, even in cases that arguably involved bound-up rules,107 though occasionally a member of this Court (such as Justice Stevens, concurring today) will make an offhand reference to the category,108 and the lower federal courts likewise sometimes advert to the category.109 Nevertheless, we have never overruled *Byrd* or even seriously questioned its reasoning. I would therefore revive the *Byrd* categorization process, which I believe will aid us both under the Rules of Decision Act and the Rules Enabling Act branch of *Erie*.

First, it seems clear that the New York limitation on class actions in penalty cases is a rule that should be considered “bound up” with the substantive right of the plaintiff to obtain a judgment for penalties. As stated in the preceding subsection, it is a rule that is clearly designed for the protection of defendants rather than for efficiency reasons, and it is a rule limited to a particular kind of claim.110 Thus, I would treat it as mandatory under the Rules of Decision Act. Had the dissent followed this approach, it would not have been misled into making forum shopping and other irrelevant inquiries.

106. *Id.* at 462.

107. *See* Gasperini v. Ctr. for Humanities, 518 U.S. 415 (1996). In *Gasperini*, the Court dealt with a New York statute that applied to judicial review of money judgments in which an itemized verdict was required by another statute. The latter statute required itemized verdicts in particular kinds of tort actions only. Thus, the statute appeared to be the kind of provision that *Byrd* would treat as “bound up” with state rights, in that it is designed to affect the decision of the damages issue only in limited and specific kinds of substantive cases. Nevertheless, *Gasperini* did not refer to the categorization process, but simply applied the outcome determinative test of *Guaranty Trust* to require application of state law. This and other similar cases have lead some commentators to speculate that the *Byrd* categorization process is dead. *Teply & Whitten*, supra note 6, at 473.

108. *See Shady Grove*, 130 S. Ct. at 1458 (Stevens, J., concurring) (stating that it is necessary to distinguish between state rules that are adopted for some policy reason and state rules that are “intimately bound up in the scope of a substantive right or remedy”).

109. *See* *Teply & Whitten*, supra note 6, at 473 n.255.

110. I am unpersuaded by Shady Grove’s objection that the limitation can apply to claims arising under laws other than that of New York. *See Shady Grove*, 126 S. Ct. at 1469 (Ginsburg, J., dissenting). It would hardly be possible for New York to protect defendants in whom it has an interest without extending the limitation to claims arising under all claims for penalties whatever law might govern. Of course, this does not mean that in a case involving a federal claim in federal court we would be bound by the limitation. Under such circumstances, the policies of *Erie* are irrelevant. Nor does it mean that in a suit in another state applying New York penalty law, the other state would be obligated in either a conflict-of-laws or constitutional sense to apply the New York restriction on class actions. *See Felix & Whitten*, supra note 31, Ch. 6 (discussing the constitutional limits on the power of states to apply their law to an action).
I also believe, however, that the insights of Byrd can be applied to conflicts between Federal Rules and state laws. I take it that all members of this Court would agree that we cannot create under the Enabling Act a Federal Rule of Civil Procedure that embodies a rule "defining state rights and obligations." However, if this cannot be validly done, how can it be reasoned that it is permissible for the Court to create a Federal Rule under the Enabling Act that would prevent the operation of a state law that is in all respects the equivalent of a rule defining state rights and obligations—a rule specifically designed to advance or retard the substantive rights to which it is linked. Therefore, even if we were to find that Rule 23 conflicts with the state rule, I would hold that neither Rule 23 nor any other Federal Rule can be validly applied when to do so would supplant a state rule bound up with state substantive rights and obligations.

This approach would, I believe, go a considerable distance towards solving many of the dilemmas we face under the Enabling Act. It would also assure that we respect the variety of ways in which state legislatures choose to create and implement substantive policy and would additionally coordinate our jurisprudence under the Rules of Decision and Rules Enabling Acts in an important way.

V.

(A) In summary, I would hold that
(1) Cohen v. Beneficial Industrial Loan Corp. controls this case and dictates that we construe Federal Rule of Civil Procedure 23 as not broad enough to cover the issue in this case; and
(2) Rule 23 being inapplicable, New York law applies to limit the plaintiff's ability to bring a class action in federal court because state law is the only law left to apply.

(B) Alternatively, if Rule 23 is held to be applicable to the case, I would hold that Rule 23 may not be validly applied to this case because to apply the rule would impinge upon a state rule "bound up" with the substantive right of the plaintiff to recover on a claim for penalties and thus abridge the defendant's substantive right to be free of aggregated claims that might impose ruinous punishment on it in a single case.

Because the Court holds Rule 23 applicable and disregards the New York limitation on class actions, I respectfully dissent.

111. 337 U.S. 541 (1949).