REVISING THE FEDERAL RULES OF CIVIL PROCEDURE: CARVING OUT A MORE ACTIVE ROLE FOR CONGRESS

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INTRODUCTION

The adoption of the Federal Rules of Civil Procedure ("FRCP") marked a major victory for progressives in the United States.[1] Conservative organizations like the American Bar Association had long advocated for a uniform set of procedural rules for the federal court system,[2] replacing the patchwork of rules created by the 1872 Conformity Act.[3] By 1934, when Congress passed the Rules Enabling Act,[4] progressives had ascended to power and would end up shaping the FRCP to advance progressive and liberal values.[5]

Illustrative were the pleading[6] and discovery rules.[7] Part of an integrated whole, pleading rules lowered the bar for plaintiffs.[8] No longer would hyper-technical rules, the playground for well-paid defense lawyers, result in dismissal

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1. *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 28 (2000) (describing Progressives' desire for professional law reform in the early twentieth century).

2. *Id.* at 28–32.

3. 1872 Conformity Act, ch. 255, 17 Stat. 197 (1872).

4. Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2018)).

5. *See* PURCELL, *supra* note 1, at 24 (explaining the progressives' rise to power with the elections of 1930 and 1932).

6. FED. R. CIV. P. 8–9.

7. *Id.* at 26–37.

8. *See* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002) ("Rather than require pleadings to shoulder the multiple burdens of the past—including factual development, winnowing issues, and speedy disposition of meritless claims—the rules would require pleadings to do the one thing they do best: provide notice.").

of plaintiffs' actions.[9] Instead, pleading put defendants on notice of the nature of the dispute.[10] No longer would pleadings be used to dismiss potentially weak cases.[11] Instead, litigants would move quickly to discovery.[12] The FRCP discovery rules remain unique in civil litigation around the world: the Rules level the playing field for litigants unable to pay for extensive pre-filing investigations or for litigants unable to secure proof because such proof is within opponents' control.[13] Joinder rules, notably class action provisions, allowed plaintiffs to achieve efficiency and cost-sharing, especially when individual plaintiffs would lack the resources to pursue widespread illegal conduct.[14]

By most accounts, the FRCP have been a success.[15] Critics, especially from the business community, have attempted to alter the rules dramatically.[16]

9. *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 4–5 (2010) ("Moreover, rather than eliminating claims based on technicalities, the Federal Rules created a system that relied on plain language and minimized procedural traps, with trial by jury as the gold standard for determining a case's merits.").

10. *See* Conley v. Gibson, 355 U.S. 41, 47 (1957) (emphasizing that "all the Rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.") (quoting FED. R. CIV. P. 8(a)(2)).

11. *See generally* Miller, *supra* note 9, at 3–5 (emphasizing the Federal Rules' attention to the merits of the claim rather than the pleadings).

12. *See* Fairman, *supra* note 8, at 561–62 ("Indeed, the pleading need only give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved. As long as the opposing party and the court can have a basic understanding of the claim being made, the requirements are satisfied. The discovery process then allows parties to fill in the details. In other words, one may 'sue now and discover later.'") (footnotes omitted) (quoting Elliott v. Perez, 751 F.2d 1472, 1482–83 (5th Cir. 1985)).

13. *See* Mary J. Davis, *Summary Adjudication Methods in United States Civil Procedure*, 46 AM. J. COMP. L. SUPP. 229, 231 ("Adjudication of claims under the American judicial system is widely recognized to be more complex than its European and international counterparts for a variety of reasons, not the least of which is this legal system's dedication to party autonomy in the investigation and control of the dispute resolution process."); *see also* Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States—Opportunity for Learning From 'Civilized' European Procedure Instead of Continued Isolation?*, 42 AM. J. COMP. L. 147 (1994) (reviewing American civil procedure reform and comparing the American civil justice system to that of Germany); *see also* Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (contrasting the American civil discovery system with other common law and civil law countries).

14. *See* Abraham L. Pomerantz, *New Developments in Class Action—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259 (1970).

15. As measured in 2016, at least thirty-three states have replicated the Federal Rules of Civil Procedure. *See* Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501, 536 (2016).

16. *See generally* Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083 (2015) (outlining the business community's support for the 2015 amendments to the Federal Rules of Civil Procedure).

Often, they have cited the federal discovery rules as excessive.[17] Despite several efforts at major reforms, the failure of those reforms demonstrates broad support for the FRCP.[18]

The FRCP create some complex vertical choice of law problems. To put the problem in context, start with the familiar mantra: in federal court, when the action invokes the court's diversity jurisdiction, state substantive law controls and federal procedure applies.[19] That masks a complex interplay of substance and procedure that the Court has struggled with for decades. Any procedural rule may affect substantive rights.[20] Are some procedural rules so bound up with state substantive rights that the federal courts must follow state procedure?[21] If so, where is the line between such substantive-controlling-procedural rules where a federal court must apply state law and "ordinary" procedural rules where federal law applies?

The conflict can be understood by reference to FRCP 1, which states that the Rules should advance the "just, speedy, and inexpensive determination of every action and proceeding."[22] Litigants need certainty that the FRCP will apply in every civil action and not be supplanted by state law on an ad hoc basis.[23] Determining whether federal or state law applies ad hoc introduces

17. *See* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) ("[T]he pretrial discovery process is broadly viewed as dysfunctional, with litigants utilizing discovery excessively and abusively. Plaintiffs' attorneys routinely burden defendants with costly discovery requests and engage in open-ended 'fishing expeditions' in the hope of coercing a quick settlement.") (footnote omitted).

18. For example, critics of liberal discovery have attempted to limit discovery at various times. Despite those attempts, the Court has made only modest reforms to the discovery rules. Most recently, for example, the Court gave district courts authority to limit discovery based on an assessment of proportionality. That is, the district court can limit discovery if the overall value of the case does not justify the cost of discovery. Despite that, in many cases, liberal discovery can continue largely unabated. *See, e.g.*, Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 28 (2016) (noting that the amendments do not compel a more restrictive approach to discovery).

19. *See generally* RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 541–43 (7th ed. 2016).

20. *See generally* Benjamin V. Madison, III, *Color-Blind: Procedure's Quiet but Crucial Role in Achieving Racial Justice*, 78 UMKC L. REV. 617 (2010) (emphasizing that procedural rules such as jury selection may strongly affect racially charged substantive issues such as desegregation and civil rights); *see also* Stephen B. Burbank, *The Bitter With the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291 (2000) (emphasizing the importance of procedure in the protection of substantive rights).

21. *See generally* Guaranty Tr. Co. v. York, 326 U.S. 99 (1945); Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958); Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 416–36 (2010) (Stevens, J., concurring).

22. FED. R. CIV. P. 1.

23. *See generally* Charles E. Clark, Book Review, 36 CORNELL L. Q. 181, 183–84 (1950) (reviewing CHARLES T. MCCORMICK & JAMES H. CHADBOURN, CASES AND MATERIALS ON FEDERAL COURTS (2d ed. 1950)) (expressing concern at the potential confusion that may accompany the use of an ad hoc approach).

expense and uncertainty, often resolved only after protracted satellite litigation.[24] Rigid adherence to the Federal Rules, however, may impair important state substantive values.[25]

The Court's track record in cases negotiating between application of federal versus state law in vertical choice of law cases has often been mind-numbing.[26] Despite numerous major decisions on the subject, few commentators would claim that the Court has provided clear guidance on how to negotiate complex cases posing the conflict of policies.[27]

This Article focuses on two areas where the conflict between the application of the FRCP and state law demonstrates the complexity of this general problem. The first conflict has arisen since the Supreme Court "rewrote" the intentionally liberal pleading requirements of FRCP 8(a)(2) in two controversial cases over a decade ago.[28] First in *Bell Atlantic Corp. v. Twombly*[29] and then in *Ashcroft v. Iqbal*,[30] the Court raised the pleading bar for plaintiffs to gain access to federal court.[31] Many states adopted state rules modeled after the FRCP, influenced by the progressive vision of the original proponents of liberal pleading rules.[32] What, then, today if a plaintiff files an action in state court and the defendant removes the action to federal court?[33]

24. *Id.* at 184 (suggesting that the ad hoc approach requires a "terrible price in waste [sic] effort and confusion and delay which can hardly succeed over the years, so contrary is it to all other trends of the times.").

25. *See infra* Part IV.

26. *See generally* Richard D. Freer & Thomas C. Arthur, *The Irrepressible Influence of* Byrd, 44 CREIGHTON L. REV. 61 (2010) (delineating the confusing history of the Court's vertical choice of law decisions). *See also* Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on* Erie *and* Gasperini, 46 U. KAN. L. REV. 751, 756 (calling the Court's post-*Gasperini* vertical choice of law doctrine "confused and unsatisfactory"); *see also* C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 BYU. L. REV. 267, 304–05 (1997) (suggesting that the Court had the opportunity to resolve the confusion surrounding its vertical choice of law jurisprudence with its decision in *Gasperini* but instead further muddled the area).

27. *But see* Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 966 (1998) (arguing that "since the Court decided *Hanna* in 1965 it has provided and maintained a reasonably stable, workable, and sensible structure for analyzing issues in . . . the *Erie-Hanna* area of state-federal law choice for federal courts").

28. *See infra* Part II.

29. 550 U.S. 544 (2007).

30. 556 U.S. 662 (2009).

31. *See* Swanson v. Citibank, 614 F.3d 400, 403 (7th Cir. 2010) (acknowledging that the Court raised the pleading bar for plaintiffs with its decisions in *Twombly* and *Iqbal* and noting that confusion exists as to what the new pleading standard requires).

32. *See* John P. Sullivan, *Do the New Pleading Standards Set Out in* Twombly *and* Iqbal *Meet the Needs of the Replica Jurisdictions?*, 47 SUFFOLK U. L. REV. 53, 54 (2014) ("[A] majority of thirty jurisdictions, including the District of Columbia, have rules or statutes that adopt the language of Federal Rule 8(a)(2) . . . .").

33. FED. R. CIV. P. 81(c).

Once in federal court, should the district court apply the higher bar set by the Court in *Twombly* and *Iqbal*, respectively? Unable to secure discovery, a plaintiff may lose her case on a defendant's Rule 12(b)(6) motion and her day in court even though under state law, she would have been able to proceed to discovery, perhaps developing sufficient evidence to prevail on the merits.[34]

The second conflict between federal and state law that has presented complex issues for federal courts arises when state law provides the controlling substantive law in defamation cases and that jurisdiction has in place an anti-SLAPP law.[35] States have created such laws because of concerns that a person should not be subjected to protracted litigation that may be aimed at deterring her from exercising her free speech rights and her right to petition the government.[36] States adopting such laws create special pleading and summary judgment provisions to allow an especially speedy adjudication of the litigation.[37] Those procedures seem to conflict with federal procedural rules; for example, early in the litigation, without the benefit of discovery, a plaintiff may have to come forward with evidence that the defendant acted with malice.[38] Absent such evidence, the court must dismiss the claim.[39] Here, district courts are divided on whether the FRCP apply or whether the court must follow state

34. *See* Jill Curry & Matthew Ward, *Are* Twombly *&* Iqbal *Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH L. REV. 827, 836 (2012) ("Commentators also criticized the impact that heightened pleading standards will have on those plaintiffs who rely on discovery to gain the information necessary to properly assert a claim. Commentators have argued that plaintiffs must now essentially prove their cases before they can obtain evidence from the defendants through the discovery process. This leads to a classic catch-22: plaintiffs cannot state a claim because they do not have access to discovery, but they will not have access to discovery until they state a claim.").

35. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16 (West, Westlaw through Ch. 372 of 2020 Reg. Sess.), D.C. CODE ANN. § 16-5502 (West, Westlaw through Oct. 9, 2020), *and* ME. REV. STAT. ANN. tit. 14, § 556 (West, Westlaw through 2019 Reg. Sess. 129th Legis.).

36. *See* Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328, 1332 (D.C. Cir. 2015) ("Many States have enacted anti-SLAPP statutes to give more breathing space for free speech about contentious public issues. Those statutes 'try to decrease the "chilling effect" of certain kinds of libel litigation and other speech-restrictive litigation.' The statutes generally accomplish that objective by making it easier to dismiss defamation suits at an early stage of the litigation.") (quoting EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 118 (5th ed. 2014)).

37. *E.g.*, ME. REV. STAT. ANN. tit. 14, § 556 (West, Westlaw through 2019 Reg. Sess. 129th Legis.) ("When a moving party asserts that the civil claims, counterclaims or cross claims against the moving party are based on the moving party's exercise of the moving party's right of petition under the Constitution of the United States or the Constitution of Maine, the moving party may bring a special motion to dismiss. The special motion may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require.").

38. *E.g.*, *id.* ("The court shall grant the special motion, unless the party against whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party.").

39. *E.g.*, *id.*

rules.[40] As with the application of *Twombly* and *Iqbal* to remove actions, the anti-SLAPP cases demonstrate the complex tension between neutral Federal Rules and state substantive policies.[41]

Both areas present strong arguments for application of state law. However, urging federal courts to decide such cases on an ad hoc basis invites litigants to make similar challenges to the application of other federal rules, potentially unraveling the uniform, efficient application of the FRCP.[42] One obvious solution would be for the Court to amend the relevant Rules to create room for application of state law in such cases.[43] The Court, in conjunction with the Advisory Committee, has considerable flexibility in reforming the Rules.[44]

This Article proposes a different solution. As scholars have argued, Chief Justice John Roberts has used his power to appoint members to the Judicial Conference and its subcommittees, including the Advisory Committee on Civil Rules, to reshape the politics of rulemaking.[45] As Woodrow Wilson research scholar Sarah Staszak has argued, "the members are 'ideologically predisposed to think like Federalist Society members, demographically predisposed to think like elite white males, or experientially predisposed to think like corporate defense lawyers.' It is also clear that they are ideologically oriented toward political conservatism."[46] As a result, the hope that the Court will make progressive changes is faint.

This Article explores the role that Congress should play in reforming the rules to accommodate important state substantive policies. In most instances, Congress's role in the rules-amending process has been passive, as anticipated

40. *Compare Abbas*, 783 F.3d at 1337 (holding that Federal Rules 12 and 56 applied, rather than the District of Columbia's Anti-SLAPP provision), *and* Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1349–50 (11th Cir. 2011) (concluding that Federal Rules 8, 12, and 56 answered the question at hand and, therefore, Georgia's anti-SLAPP provision could not apply), *with* Godin v. Schencks, 629 F.3d 79, 92 (1st Cir. 2010) (holding that the Federal Rules in question did not control the issue at hand, so state law should apply), *and* United States v. Lockheed Missiles & Space Co., 190 F.3d 963, 972 (9th Cir. 1999) (finding that there was no collision between California's anti-SLAPP statute and Federal Rules 8, 12, and 56, so California law should apply).

41. *See infra* Part III.

42. Clark, *supra* note 23, at 183 (expressing concern that "hardly a one of the heralded Federal Rules can be considered safe from attack by shrewd lawyers and obedient lower tribunals" if cases are decided on an ad hoc basis).

43. *See infra* Part IV.

44. James C. Duff, *Overview for the Bench, Bar, and Public: The Federal Rules of Practice and Procedure*, U.S. COURTS: RULES & POLICIES, https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public (last visited June 1, 2020).

45. *See* Sarah Staszak, *Procedural Change in the First Ten Years of the Roberts Court*, 38 CARDOZO L. REV. 691, 692 (2016) (arguing that Chief Justice Roberts has altered procedural rules to "limit access to courts" through "his capacity to appoint individuals to the Judicial Conference and its subcommittees").

46. *Id.* at 693 (quoting Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1087 (2015)).

by Congress when it enacted the REA.[47] That is appropriate, given the Court and the Advisory Committee's greater expertise in assessing procedural rules.[48] On occasion, Congress has created special procedural rules.[49] An overly active role for Congress would be undesirable.[50] In current times, however, with a Court that is far more right wing than the nation as a whole,[51] congressional action may be the best way to accommodate competing values, thereby assuring few challenges to the application of the Federal Rules while enforcing important state substantive policies.[52]

Part II reviews the Court's efforts to negotiate the line between substantive and procedural law in diversity actions.[53] The Court has made several efforts to clarify the line, without success. In one major relatively recent decision, the divided Court left the area opaque.[54] Part III reviews the applicability of state pleading rules in actions removed from state courts.[55] Despite the general resolution in favor of application of *Twombly* and *Iqbal*, this Article argues that those cases gloss over important substantive policies.[56] Part IV reviews the conflict among lower federal courts when the choice of law is between the

47. In passing the Rules Enabling Act, Congress gave the Supreme Court the primary role in establishing the Rules. 28 U.S.C. § 2072(a) (2018) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . .").

48. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1196 (1982) [hereinafter Burbank, *The Rules Enabling Act*] ("In recent years, the congressional review mechanism has proved inefficient. More basically, that mechanism is an imperfect instrument for the protection of rights and interests far removed from the domain of procedural expertise.").

49. Notably in the Class Action Fairness Act ("CAFA"). Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). There, among other provisions, Congress created a more stringent pleading requirement for certain class actions. No one can miss the political maneuvering that led to the adoption of CAFA. For a detailed discussion of the politics that led to CAFA, an apparent "procedural" reform largely aimed at tort reform, see Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008) [hereinafter Burbank, *The Class Action Fairness Act*].

50. The Rules Enabling Act reflects the sensible judgment that the courts have a greater understanding than does Congress of what rules advance efficient and just resolution of disputes between the parties before the court. Were Congress to enact case-specific rules on a regular basis, some of the advantages of the uniform system of federal rules would be lost. *See* Burbank, *The Rules Enabling Act*, *supra* note 48, at 1120–21 (suggesting that it may not be "realistic" or "wise" for Congress to be "actively engaged in the regulation of procedure . . . through a practice act").

51. *See generally* Emily Bazelon, *When the Supreme Court Lurches Right: What Happens When the Supreme Court Becomes Significantly More Conservative Than the Public?*, N.Y. TIMES (Aug. 22, 2018), https://www.nytimes.com/2018/08/22/magazine/when-the-supreme-court-lurches-right.html (outlining the political history of the Supreme Court up to the date of the article's publication).

52. *See infra* Part IV.

53. *See infra* Part I.

54. *See infra* Part I.

55. *See infra* Part II.

56. *See infra* Part II.

FRCP and state anti-SLAPP provisions.[57] While the division among lower courts may result in a grant of certiorari and the Court's resolution of the question,[58] one can only speculate what the result will be. Because of doubts about the Court's commitment to the progressive values underlying the FRCP, Part V argues why Congress should create specialized standards in these two areas of overlap between substantive and procedural law.[59]

I. SUBSTANCE OR PROCEDURE?

The Federal Rules of Civil Procedure were a long time coming.[60] Efforts to establish uniform procedural rules of the federal court system began at least as early as the beginning of the twentieth century.[61] For over fifty years, federal courts borrowed state procedural rules, except in admiralty and equity actions, consistent with the command of the 1872 Conformity Act.[62] Initially, pressure to create a consistent set of procedural rules came from conservative organizations, including the American Bar Association.[63] As documented by Professor Edward Purcell in *Brandeis and Progressive Constitution*, ascendency of progressives during the Depression guaranteed passage of enabling legislation for procedural reform.[64]

Enacted in 1934, the Rules Enabling Act authorized the Supreme Court to create procedural rules.[65] The Court, along with its Advisory Committee, spent three years developing a coherent set of procedural rules.[66] That background suggests the significant commitment that Congress and the Court made in promulgating a set of uniform rules.

The Rules Enabling Act seems straightforward enough. Section 2072(a) states that the Supreme Court has the power to create rules of practice and procedure for the federal court system.[67] Section 2072(b) states that the Court may not abridge, enlarge, or modify any substantive right.[68] Whether §2072(b)

57. *See infra* Part III.

58. SUP. CT. R. 10(a).

59. *See infra* Part IV.

60. PURCELL, *supra* note 1, at 28–32 (outlining the history of attempts to reform federal court procedural rules beginning in 1912 and culminating in 1934 with the passage of the Rules Enabling Act).

61. *Id.* at 28.

62. 1872 Conformity Act, 17 Stat. 197.

63. PURCELL, *supra* note 1, at 28.

64. *Id.* at 24 ("When the elections of 1930 and 1932 gave Democrats and Progressives large majorities in both houses of Congress, legislative action became politically feasible.").

65. 28 U.S.C. § 2072 (2018).

66. *See* STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., FED. RULES OF CIV. PROC. (Comm. Print 2019) ("The original rules, pursuant to act of June 19, 1934, were adopted by order of the Court on December 20, 1937, transmitted to Congress by the Attorney General on January 3, 1938, and became effective September 16, 1938.").

67. 28 U.S.C. § 2072(a) (2018).

68. 28 U.S.C. § 2072(b) (2018).

is redundant, merely a mirror image of §2072(a), or a distinct limitation on the Court's power, remains uncertain.[69] What is clear enough is that the REA creates a line between substance and procedure. As every first-year law student knows, identifying the line between substance and procedure is anything but straightforward.[70]

Sibbach v. Wilson & Co. Inc., decided three years after the effective date of the Federal Rules of Civil Procedure, is illustrative of the difficulty in drawing the line between substance and procedure.[71] The plaintiff brought a tort action against defendant in Illinois based on an accident that took place in Indiana.[72] The defendant sought to compel the plaintiff to submit to a physical examination.[73] When she refused, the district court found her in contempt of court.[74] The Supreme Court granted review after the court of appeals affirmed the district court's order.[75]

The Court found the district court in violation of Rule 37, which does not authorize contempt as a sanction for a Rule 35 violation.[76] Along the way, the Court addressed the interplay of federal and state law. Right out of a Civil Procedure professor's dreams, Illinois law did not allow a court to order a litigant to have a physical examination; to hold otherwise would violate her right to bodily integrity.[77] At the same time, Indiana, the place of the accident, would

69. *See* Burbank, *The Rules Enabling Act*, *supra* note 48, at 1108 (stating that the second sentence of the act did not perform "any additional function," but rather emphasized the first); *see also* Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407 (2010) (plurality opinion) (emphasizing that § 2072(b) merely means that a rule must "really regulate procedure") (citations omitted); *id.* at 422 (Stevens, J., concurring in part) (stating that "[u]nlike Justice Scalia, I believe that an application of a federal rule that effectively abridges, enlarges, or modifies a state-created right or remedy violates [the] command" that "the court . . . decide whether application of the federal rule 'represents a valid exercise of the rulemaking authority . . . bestowed on this Court by the Rules Enabling Act'") (quoting Burlington Northern R. Co., 480 U.S. 1, 5 (1987)).

70. At least some of the confusion over that line comes from a misunderstanding about enactment of the REA. As Professor Stephen Burbank demonstrated, the bar, the courts, and many commenters treat the problem of substance vs. procedure as a matter of federalism. On that view, the REA instructed the Court not to abridge, enlarge, or modify state substantive rights in diversity actions. Properly understood, Congress was to clarify the separation of powers question: Congress should create substantive rights, while leaving room for the courts to develop a set of procedural rules. One can only speculate how many of the difficult Supreme Court decisions would have been resolved had the Court recognized that important legislative history. *See generally* Burbank, *The Rules Enabling Act*, *supra* note 48.

71. 312 U.S. 1 (1941).

72. *Id.* at 4.

73. *Id.*

74. *Id.* at 7.

75. *Id.*

76. *Id.* at 16.

77. *Id.* at 7.

allow such an order.[78] Add the clear command of Rule 35, which also would allow such an order based on a proper showing of need.[79]

The plaintiff's argument that Rule 35 violated the REA was not frivolous. Rule 35 did not directly create a substantive rule in a formal sense.[80] However, according to the plaintiff, it violated § 2072(b) by abridging her substantive right.[81] As the Court has recognized often, this kind of argument undercuts policies reflected in the REA.[82] Virtually any, if not all, procedural rules can have an impact on substantive rights.[83] Upholding the plaintiff's challenge to the application of Rule 35 would "invite endless litigation and confusion worse confounded."[84] The Court also found obvious that Congress had "undoubted power to regulate the practice and procedure of federal courts."[85]

While the Court rejected the plaintiff's claim, its discussion of substance vs. procedure left much to be desired. The test, according to the Court, "must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[86]

Other attempts to draw that line have added to the confusion. *Guaranty Trust Co. v. York* presented the Court with a question of whether a federal court sitting in equity in a diversity action had to apply the relevant state statute of limitations.[87] Alternatively, the district court would have been able to apply the more flexible equitable doctrine of laches.[88] Justice Frankfurter's majority opinion, well worth reading for its discussion of legal realism,[89] held that state law governed and did so if application of state versus federal law would produce a substantially different outcome.[90] Obviously, in *York*, applying the state statute of limitations, thereby ending the litigation, would produce a different outcome from the application of the more flexible equitable standard.

Four years later, the Court decided three cases that cast doubt on the certain application of the FRCP, even when the rules were seemingly on point.[91]

78. *Id.*

79. FED. R. CIV. P. 35.

80. *See* Burbank, *The Rules Enabling Act*, supra note 48, at 1183 (reasoning that Rule 35 "regulates conduct only in[] the context of a lawsuit, in much the same way as the other discovery rules").

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

82. *Id.* at 14–15.

83. *Id.* at 13–14.

84. *Id.* at 14.

85. *Id.* at 9.

86. *Id.* at 14.

87. 326 U.S. 99, 107 (1945).

88. *Id.* at 105–06.

89. *Id.* at 102.

90. *Id.* at 109.

91. Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

Notably, in *Ragan v. Merchants Transfer & Warehouse Co.*,[92] the plaintiff filed an action in federal court. If FRCP 3 tolled the statute of limitations, his action was timely.[93] State law was to the contrary: only service of process, not the filing of the complaint, tolled the statute of limitations.[94] In a remarkably opaque decision, Justice Douglas's majority opinion held that local law, not FRCP 3, applied.[95] The result, according to Douglas, was controlled by *York*; quite obviously, the outcome differed depending on whether federal or state law applied.[96] Not clear was whether FRCP 3 was on point, but nonetheless did not control, or whether it simply did not address the issue before the district.[97]

Many courts read *Ragan* and the other two cases in the 1949 trilogy as holding the former; that is, that the federal rule was on point but nonetheless did not control.[98] Such a reading of *York* and *Ragan* created the unhappy situation referred to earlier: the uniform application of the FRCP was at stake.[99] Inviting satellite litigation in any instance where the result under state law and the FRCP might differ undercuts FRCP 1's promise of "just, speedy, and inexpensive determination of every action and proceeding."[100]

In *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*,[101] the Court reclaimed some of the territory ceded in cases like *York* and *Ragan*. There, an injured worker brought an action against the defendant in tort.[102] Under South Carolina law, a judge would decide whether a worker was a statutory employee.[103] If so, the worker's exclusive remedy was in workers' compensation.[104] The Court held that, when the action was filed in federal court

92. *Ragan*, 337 U.S. at 531.

93. *Id.*

94. KAN. STAT. ANN. § 60-306 (West 2020).

95. A close reading of Justice Douglas's opinion does not make clear whether FRCP 3 is not on point or the district court must apply state law because to hold otherwise would violate the REA. *Ragan*, 337 U.S. at 530–34.

96. *Id.* at 532–34.

97. *Id.* at 530.

98. *See generally* Edward Lawrence Merrigan, Erie *to* York *to* Ragan—*A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711 (1950) (delineating the Court's 1949 trilogy of vertical choice of law decisions and explaining the subsequent confusion regarding when a Federal Rule or state law should apply).

99. Clark, *supra* note 23, at 183 ("As it happened, however, the announcement of the rather natural conclusion from the adopted premise that any procedure which 'significantly' affects the result of the litigation must be governed by the state practice has led directly—and particularly after the three cases in June 1949 enforcing the rule with drastic logic—to the present situation where hardly a one of the heralded Federal Rules can be considered safe from attack by shrewd lawyers and obedient lower tribunals.").

100. FED. R. CIV. P. 1.

101. 356 U.S. 525 (1958).

102. *Id.* at 526.

103. *Id.* at 534.

104. *Id.* at 534 (quoting Adams v. Davison-Paxon Co., 96 S.E.2d 566, 572 (1957)).

and invoked that court's diversity jurisdiction, such questions should be resolved by juries.[105] No one can claim that *Byrd* is a model of clarity.[106]

Justice Brennan's opinion includes many notable points. In *Dice v. Akron, Canton & Youngstown R.R. Co.*,[107] a similar case involving a judge-jury allocation in a Federal Employee Liability Act ("FELA")[108] case filed in state court, the Supreme Court held that federal law governed on whether the plaintiff was tricked into waiving his rights by fraud.[109] While not explicit in FELA, the Court found that the right to a jury trial was bound up with or an integral part of the substantive FELA right of action.[110] Not so under South Carolina law in *Byrd*. Instead, the judge-jury allocation was "merely a form and mode" of enforcing the substantive right.[111] In addition, because the South Carolina judge-jury allocation was not bound up with the substantive right, the Court engaged in a balancing process, comparing, among other things, the relative state and countervailing federal interests.[112] While the Seventh Amendment right to a jury did not control the dispute, the federal interest, which outweighed the state's interest, was the "influence" of the Seventh Amendment.[113]

Byrd did not resolve the difficulty created by *Ragan* concerning displacing a federal rule even if on point. The federal law in *Byrd* was judge-made common law,[114] not a FRCP. Its importance, however, was to reassert the relevance of the federal system's interest in its procedural system.[115]

Chief Justice Warren would try to bring clarity to the area in *Hanna v. Plumer*.[116] There, the plaintiff served the defendant, an estate representative, consistent with FRCP 4(e)(2).[117] Under Massachusetts law, assumed to be the relevant state law provision, a plaintiff had to serve an estate representative in-

105. *Id.* at 531–32.

106. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 709 (1974) ("The opinion exhibits a confusion that exceeds even that normally surrounding a balancing test, and lower courts understandably experienced considerable difficulty in applying it.").

107. 342 U.S. 359 (1952).

108. 45 U.S.C. § 51 (2018).

109. *Dice*, 342 U.S. at 361.

110. *Id.* at 363.

111. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 536 (1958).

112. *Id.* at 536–38.

113. *Id.* at 538.

114. The judge-jury allocation was judge-made law implicitly because the Seventh Amendment did not resolve the question. Even in cases within the Seventh Amendment, judges must decide which issues are matters for the court and which are for the jury.

115. Henry J. Friendly, *In Praise of* Erie–*And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, n. 95 (1964) ("Although some have seen [*Byrd*] as a 'landmark' case initiating a new trend as to procedural matters, the decision seems to have been so clearly called for by the Seventh Amendment as hardly to warrant this characterization, despite the opinion's peculiarly delicate reference to the Constitution.").

116. 380 U.S. 460 (1965).

117. *Id.* at 461 (at the time of the Court's decision in *Hanna*, the rule was FRCP 4(d)(1)).

hand.[118] Were state law to apply, the claim was time-barred.[119] After discussing the "relatively unguided *Erie* choice[,]"[120] the Chief Justice addressed the core issue: *Hanna* was unlike cases like *York* and *Byrd.* Those cases involved the substance-procedure distinction under the Rules of Decision Act, not the REA.[121] The difference is significant, although both focus on procedure versus substance.[122]

Congress has the unquestioned authority to create rules of practice and procedure for federal courts.[123] Further, it has the power to allocate that responsibility to the Court.[124] That is what the REA did.[125] Importantly, the REA gave the Court, aided by the Advisory Committee, the power to create rules of practice and procedure.[126] In doing so, Congress instructed the Court not to abridge, enlarge, or modify any substantive right.[127] In drafting the rules, one can assume that the Court and Advisory Committee followed the REA.[128] Further evidence that the FRCP are valid is the fact that Congress allowed them to come into existence once the Court promulgated the Rules.[129] In Chief Justice Warren's words, a district court must "apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."[130]

Hanna makes sense. Congress gave the Court authority to create rules of practice and procedure. It created the FRCP. Of course, given the mandate in the REA, the legal world ought to be able to presume that the Court honored its responsibility.[131] What, then, of cases like *Ragan*?

118. MASS. GEN. LAWS ch. 197, § 9, *repealed by* MASS. GEN. LAWS ch. 521, § 16 (2008).

119. *Hanna*, 380 U.S. at 462.

120. *Id.* at 471.

121. *Id.* at 472–74.

122. *Id.* at 471.

123. *See id.* at 473.

124. *See id.* at 472–74.

125. *See* Burbank, *The Rules Enabling Act*, *supra* note 48, at 1097–98 (describing the passage of the Rules Enabling Act, which dictates "[t]hat the Supreme Court of the United States shall have the power to prescribe by general rules . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law").

126. 28 U.S.C. § 2072(a) (2018).

127. 28 U.S.C. § 2072(b) (2018).

128. 28 U.S.C. § 2072 (2018) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").

129. *Id.*

130. Hanna v. Plumer, 380 U.S. 460, 471 (1965).

131. *See* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 6 (1987) (asserting that the process by which the Federal Rules of Civil Procedure are promulgated "give[s] the Rules presumptive validity under both the constitutional and statutory constraints").

Presumably, *Ragan* held that FRCP 3 was on point—or was it?[132] After all, the Court has never struck down a FRCP.[133] Cases like *York* were ones where no FRCP was controlling.[134]

Even if one does not agree with the Chief Justice's analysis (I should make clear that I do agree with the analysis), as a pure matter of policy, the decision is brilliant. The decision states, in effect, if a FRCP is on point, a litigant challenging the application of the rule contrary to state law will almost certainly lose. FRCP 1 prevails; satellite litigation all but ends.

If only it were that simple. Think back to *Ragan.* FRCP 3 states, "A civil action is commenced by filing a complaint with the court."[135] How is that not a tolling provision?

The Court revisited *Ragan* in *Walker v. Armco Steel Corp*.[136] The operative facts were the same: if FRCP 3 tolled the statute of limitations, the plaintiff's claim was not time-barred.[137] If state law controlled, the claim was untimely.[138] A unanimous Court found that FRCP 3 was not on point, as the Court now said *Ragan* held.[139] Absent a conflict between federal and state law, of course, state law governed.[140]

The Court's explanation was facile. In passing, it noted that lower courts had held that FRCP 3 was a tolling provision in federal question cases.[141] The Court would adopt that view in *West v. Conrail*.[142] The Court also insisted that it was not giving the rule a narrowing gloss to avoid the conflict with state law.[143] One can only marvel at *Walker*'s assertions. The natural reading of

132. *See* discussion regarding uncertainty of Douglas' opinion *supra* Part I.

133. *See* Shady Grove Orthopedic Ass'n., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407 (2010) (plurality opinion) ("[W]e have rejected every statutory challenge to a Federal Rule that has come before us."); *see also Burlington Northern*, 480 U.S. at 6 ("[T]he study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, see 28 U.S.C. §2072, give the Rules presumptive validity under both the constitutional and statutory constraints.").

134. The sources of federal law in conflict with the state laws in *York* and *Byrd* were equity and judge-made law, respectively. Guaranty Tr. Co. v. York, 326 U.S. 99, 103–07 (1945); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 534 (1958).

135. FED. R. CIV. P. 3.

136. 446 U.S. 740 (1980).

137. *Id.* at 743.

138. *Id.* at 742–43.

139. *Id.* at 750–51.

140. *See id.* at 748 ("[T]here being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law.") (quoting Hanna v. Plumer, 380 U.S. 460, 470 (1965)).

141. *Id.* at 751 n.11.

142. 481 U.S. 35 (1987). For a criticism of the Court's decision to read Rule 3 narrowly in *Walker* and more naturally in *West*, see Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent* Erie *Decisions*, 92 VA. L. REV. 707 (2006).

143. *Walker*, 481 U.S. at 750 n.9.

FRCP 3, according to the unanimous Court, is as follows: "A civil action is commenced by filing a complaint with the court. The statute of limitations is tolled in federal question cases, but not in cases based on the court's diversity jurisdiction. Then this rule merely starts the clock on other rules."[144]

A more honest opinion might have admitted that the Court was giving a particularly strained reading to the language of the rule to avoid a potential REA challenge.[145] To read the Rule naturally would, on the facts of the case, have extended the statute of limitations inconsistently with the application of the state law. In that literal sense, FRCP 3 would be enlarging a state substantive right: it would have been dead under state law but continued to breathe under FRCP 3. One might argue that such a modification was "merely incidental" to the application of the rule.[146] In effect, only when a rule significantly altered substantive rights would the REA be violated.[147] Perhaps because cases like *York* demonstrate that statutes of limitations are so bound up with state substantive rights, the Court was not willing to go the route that I suggest.[148]

Elsewhere, the Court has been more forthcoming that it does give a FRCP a narrow interpretation considering state substantive policies. In a case that provides almost no guidance, Justice Ginsburg's opinion in *Gasperini v. Center for Humanities, Inc.*[149] resolved a conflict between federal and state law involving the standard of review of a jury verdict, first by the trial court and then by the appellate court.[150] In the middle of tort reform, when state legislatures were impelled to limit jury awards, it adopted a standard giving trial

144. Consistent with West v. Conrail, 481 U.S. 35 (1987), that is exactly what the Court says the rule means. For a defense of the Court's rulings, see Kermit Roosevelt, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to* CAFA *and* Shady Grove, 106 NW. U. L. REV. 1 (2012).

145. In the footnotes, the Court seems to admit as much. *See Walker,* 481 U.S. at 752 n.14.

146. In some instances, the Court has held that the fact that application of a federal rule has an incidental effect on state substantive rights does not mean that the rule violates the REA. *See, e.g.*, Shady Grove Orthopedic Ass'n., P.A. v. Allstate Ins. Co., 559 U.S. 393, 410 (2010) (plurality opinion) ("We have held since *Sibbach*, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure . . . . If it does, it is authorized by §2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights.").

147. *See id.*

148. The Court has not done a particularly good job explaining why a procedural rule is bound up with a substantive right. Nor is an alternative formulation (that a procedural rule may be an integral part of the right) particularly helpful. The length of a statute of limitations does reflect upon the value that a legislature places on a particular right of action. Policies relating directly to the nature of the claim may dictate a shorter or longer statute of limitations. For example, the right of action for construction defects often includes a long statute of limitations. No doubt that is the case because such defects may not appear for a long time and, at least with home construction, the investment in one's home may be that family's most important asset.

149. 518 U.S. 415 (1996). For discussion of the confusion following the Court's opinion in *Gasperini*, see Richard D. Freer, *Some Thoughts on the State of* Erie *after* Gasperini, 76 TEX. L. REV. 1637 (1997–1998); Perdue, *supra* note 26, at 768 (calling the opinion "confusing and unsatisfactory"); Floyd, *supra* note 26, at 305 (stating that the opinion "confuses and confounds").

150. *Gasperini*, 518 U.S. at 418 (majority opinion).

and appellate courts more control over jury verdicts than was the case under the traditional "shock the conscience" test.[151]

Under *Hanna*, the district court would have to apply the more deferential standard if that were implicit in a FRCP.[152] Thus, if FRCP 59, dealing, in part, with granting a new trial or altering or amending a judgment controlled, the court had to ignore state law.[153] Justice Ginsburg read FRCP 59 narrowly and now explained cases like *Walker* as follows: "Federal courts have interpreted the Federal Rules . . . . with sensitivity to important state interests and regulatory policies."[154] Thus, *Walker* read FRCP 3 narrowly to avoid the conflict of law.

At least that explanation explains the curious and elaborate reading of FRCP 3 that I offered above.[155] However, it presents another challenge to the coherent interpretation of the federal rules. Imagine two jurisdictions with similar laws in place. One state has adopted its law because of administrative convenience, while its neighboring state has adopted the law to advance substantive policies.[156] Unrealistic? Think back to *Byrd*.[157] There, Justice Brennan interpreted South Carolina's judge-jury allocation merely as a matter of administrative convenience.[158] By contrast, a state might have relied on judicial determinations out of concern that juries would be too liberal in allowing an injured employee to sue in tort, thereby impairing important substantive policies.[159] Presented with a conflict between a Federal Rule and

151. N.Y. C.P.L.R. § 5501 (McKinney 2019). It is unclear whether the federal standard, whereby the court would overturn the jury verdict only if it shocked the conscience, was part of FRCP 59 or a judge-made rule. *Gasperini*, 518 U.S. at 437 n.22 (denying Justice Scalia's assertion, based on the Court's decision in Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989), that Federal Rule 59 included federal standards for review).

152. Hanna v. Plumer, 380 U.S. 460, 471 (1965) (holding "[w]hen a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* Choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions").

153. *Gasperini*, 518 U.S. at 468 (Scalia, J., dissenting) (emphasizing that if Federal Rule 59 controlled the issue, there would be "no room for the operation of that [state] law").

154. *Id.* at 427 n.7 (majority opinion).

155. *See* discussion *supra* Part I.

156. *See* Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 404 (2010) (majority opinion) ("The . . . approach of determining whether state and federal rules conflict based on the subjective intentions of the state legislature is an enterprise destined to produce 'confusion worse confounded' . . . . It would mean, to begin with, that one State's statute could survive preemption (and accordingly affect the procedures in federal court) while another State's identical law would not, merely because its authors had different aspirations.") (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

157. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

158. *Id.* at 536.

159. *Cf.* Dice v. Akron, Canton, & Youngstown R.R. Co., 342 U.S. 359, 363 (holding that "the right to trial by jury is too substantial a part of the rights accorded by the [Federal Employers'

the laws of those two hypothetical states, what should a court do? Seemingly, Justice Ginsburg would have the court read the Federal Rule narrowly in one federal district, but not in the other.[160]

That dilemma faced the Court in the last important *Hanna* decision. In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[161] the Court had to decide whether the federal district court had to follow New York law or FRCP 23.[162] New York law limits class action suits seeking penalties and statutory minimum damages.[163] FRCP 23 contains no such limitation.[164] Writing for four dissenters, Justice Ginsburg argued that FRCP 23 needed to be read narrowly to avoid the conflict with New York law.[165] In her view, New York law advanced obvious substantive policies.[166]

Five justices disagreed with the dissent.[167] On the core question, Justice Scalia wrote for the five justices: the language in a FRCP should not vary depending on state substantive law.[168] As suggested in my example above, FRCP 23 should not be given one meaning in New York and another in New Jersey.[169] From an interpretative point of view, Justice Scalia's opinion makes a great deal of sense.[170]

Were that the end of the inquiry, *Shady Grove* would seem to fit consistently with *Hanna.* If the rule is on point, the FRCP controls.[171] As was often the case,[172] Justice Stevens split the difference between Justices Scalia and

Liability] Act" to be denied in favor of an Ohio law mandating that a judge decide a portion of the factual issues in the case).

160. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 462–63 (1996) (Scalia, J., dissenting).

161. 559 U.S. 393 (2010).

162. *Id.* at 398.

163. N.Y. C.P.L.R. § 901 (McKinney 2019), *invalidated by* Holster v. Gatco, Inc., 618 F.3d 214 (2d Cir. 2010).

164. FED. R. CIV. P. 23.

165. *Shady Grove*, 559 U.S. at 446–47 (Ginsburg, J., dissenting).

166. *Id.* at 447.

167. *Id.* at 402–06 (majority opinion).

168. Despite the Court's fractured opinions, Justice Scalia wrote for a majority in Parts I and II-A of the plurality opinion. *Id.* at 395.

169. *Id.* at 404 (majority opinion) ("It would mean . . . that one State's statute could survive pre-emption (and accordingly affect the procedures in federal court) while another State's identical law would not, merely because its authors had different aspirations.").

170. *See* Dudley & Rutherglen, *supra* note 142. As Justice Ginsburg pointed out in her dissent, even Justice Scalia was not immune from reading a particular rule narrowly, as she suggested he did in *Semtek*. *See also Shady Grove*, 559 U.S. at 442 (Ginsburg, J., dissenting); Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001).

171. Hanna v. Plumer, 380 U.S. 460, 471 (1965).

172. For two of Justice Stevens's previous concurrences, see Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cty., 480 U.S. 102, 121–22 (1987); Burnham v. Super. Ct. of Cal., Cty. of Marin, 495 U.S. 604, 640 (1990).

Ginsburg's views.[173] He agreed with Justice Scalia's single interpretation of the language.[174] Like Justice Ginsburg, Justice Stevens feared intrusion upon important state substantive policies.[175] Perhaps the easiest way in which to understand where Justice Stevens parted from a critical section of Justice Scalia's opinion, thereby depriving him of a majority, is to think of the relationship between the two provisions of §2072.

Justice Scalia viewed §2072(b) as a mirror image of §2072(a).[176] Section 2072(a) gave the Court the authority to create rules of practice and procedure; §2072(b) reminded the Court not to abridge, modify or enlarge substantive rights. If a rule satisfied §2072(a), it was arguably procedural and, therefore, did not violate the REA.[177]

Justice Stevens disagreed. In his view, a rule might satisfy §2072(a), but so impinge upon state substantive rights that it might violate §2072(b).[178] He set the bar high for a litigant challenging a Rule as violating the REA, thereby protecting against frequent REA challenges.[179] Indeed, in a case where New York's law seemed to advance important substantive policies, Justice Stevens found that the defendant failed to meet that burden.[180]

The tension between conflicting policies described above played out in *Shady Grove*. Justice Scalia's approach advances the overall goals of the Rules, reflected in FRCP 1.[181] Litigants can begin litigation in federal court confident that the FRCP will apply, without extensive ad hoc litigation to assure application of a specific rule. However, Justice Scalia's position may result in a choice of federal court ignoring important state substantive policies.[182] As developed below, this tension plays out in the two areas that are the focus of this Article.

173. *Shady Grove*, 559 U.S. at 416–36 (Stevens, J., concurring).

174. *Id.* at 416 (Stevens, J., concurring) ("I agree with Justice Scalia that Federal Rule of Civil Procedure 23 must apply in this case and join Parts I and II-A of the Court's opinion.").

175. *Id.* at 419–21.

176. *Id.* at 407 (plurality opinion) (emphasizing that § 2072(b) merely means that a Rule must "really regulate procedure") (internal citations omitted).

177. *Id.* at 410 ("[T]he validity of a Federal Rule depends entirely upon whether it regulates procedure. If it does, it is authorized by § 2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights.") (internal citations omitted).

178. *Id.* at 422 (Stevens, J., concurring).

179. *Id.* at 422–23 (stating "federal courts must consider whether the rule can reasonably be interpreted to avoid" a violation of the REA).

180. *Id.* at 436.

181. *See* discussion *supra* Intro.

182. *See Shady Grove*, 559 U.S. at 447 (Ginsburg, J., dissenting).

II. A NOT SO SHORT AND PLAIN STATEMENT OF ONE'S CLAIM

If any rule regulates procedure, surely it is a rule governing pleading.[183] Despite that, any standard to determine the sufficiency of pleading is based on important substantive policy choices.

This section reviews briefly the familiar history that led to FRCP 8(a)(2), which provides that a plaintiff's claim must include merely "a short and plain statement of the claim showing that the pleader is entitled to relief."[184] It then discusses the Court's questionable rewriting of that rule in *Twombly* and *Iqbal*.[185] Thereafter, it explores how lower federal courts have dealt with the application of *Twombly* and *Iqbal* after a defendant has removed an action from a state court that would have applied a more liberal pleading standard.[186] The approach, applying *Twombly* and *Iqbal*, is defensible considering the Supreme Court's case law described above.[187] However, as argued below, that result has a significant and negative effect on important state substantive policies.[188]

We have had two major civil procedural reforms. Introduced in the mid-nineteenth century through efforts of David Dudley Field, Code pleading remains in place in many states.[189] Superseding the arcane common law writ system, Code pleading was innovative, certainly for its time.[190]

Code pleading required a complaint to include "facts" sufficient to state a "cause of action."[191] While that standard was to make a plaintiff's job easier than under common law pleading, many courts gave hyper-technical readings to those terms. Courts dismissed complaints if they alleged evidentiary facts or conclusions of law.[192] Only if a complaint alleged ultimate facts would the plaintiff get past a motion to dismiss or a demurrer.[193] Examining case law demonstrates that defining "ultimate facts" was often a matter within the eyes of the beholder.[194] To borrow examples from one prominent Civil Procedure casebook, what is an allegation that the plaintiff "has superior title to the

183. Substantive rules are those that define our primary conduct. Procedural rules are those that govern conduct of a lawsuit. *See* FREER & PERDUE, *supra* note 19, at 560 (quoting Martin Redish & Carter Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1997). Pleading rules define the form and content of the first important document governing commencement of a lawsuit.

184. FED. R. CIV. P. 8(a)(2).

185. *See infra* Part II.

186. *See infra* Part II.

187. *See infra* Part II.

188. *See infra* Part II.

189. *See generally* FREER & PERDUE, *supra* note 19, at 295–96.

190. *See id.* at 296.

191. *Id.*

192. *See id.* at 303.

193. *Id.*

194. *Id.* at 303–04.

property" in question?[195] Or what is the allegation that a plaintiff is "entitled to possession of the property?"[196]

Not only did courts compel pleading niceties, but also the results of failing to thread the pleading needle between evidentiary facts and conclusions of law could be draconian.[197] For example, some appellate courts found pleading insufficient even after a trial on the merits.[198] Often, by the time of trial, a defendant could not claim any prejudice.[199] Retrial seemed simply to favor defendants over plaintiffs.

One might argue that such technical pleading served important policies. In most cases where courts required hyper-technical pleading, defendants could not claim lack of notice about the subject matter of the dispute.[200] Ironically, pleadings might provide opposing parties notice of the facts at issue in the case; but the requirement that a pleader not include "evidentiary facts" cuts the other way.[201] Eliminating such facts left one's opponent with less idea about the facts to be proven.[202] Ditto if the goal of pleading is to narrow the issues involved in the case.[203] Finally, pleading is ill-suited to dispose of weak cases.[204]

As interpreted, Code pleading ended up favoring defendants. A system of arcane pleading favors the party with access to high-priced counsel, adept at manipulating that system.[205] Until relatively recently, the United States lacked a robust plaintiffs' bar.[206] Below, but close to the surface, were important policies advanced by such technical requirements: the system favored

195. *Id.* at 303.

196. *Id.*

197. *See, e.g.*, McCaughey v. Schuette, 117 Cal. 223 (1897).

198. *Id.*

199. By the time of trial, litigants have had discovery and otherwise learned about their opponents' cases. Surely, the complaint by trial did not serve as a roadmap that could mislead the defendant.

200. *See* Conley v. Gibson, 355 U.S. 41, 47–48 (1957).

201. *See* M.D.G., *The Admission in Evidence of Pleadings Under the Codes and Under the Federal Rules of Civil Procedure*, 106 U. PA. L. REV. 98, 106 (1957) (noting that pleadings under the Federal Rules of Civil Procedure "need only sketch the broad outlines of transactions in question" and that "no penalty [was] attached to pleading conclusions of law or evidentiary facts").

202. *Cf.* Lisa Eichhorn, *A Sense of Disentitlement: Frame-Shifting and Metaphor in* Ashcroft v. Iqbal, 62 FLA. L. REV. 951, 953 (2010) (noting how the *Iqbal* opinion shifted the emphasis from the defendant's lack of entitlement to receive detailed notice of the facts of the complaint to "the plaintiff's lack of entitlement to proceed to discovery").

203. *See* M.D.G., *supra* note 201, at 107–08 (noting that Federal Rule 8(a) allowed parties to state a claim upon which relief could be granted, while Rule 11 allowed for the pleading of facts to which they had "good ground to support," even without believing such facts to be true).

204. *See* Peter Flynn, Twombly *and Illinois "Fact Pleading:" Welcome to Our World* (August 8, 2012) (unpublished course materials) (on file with Westlaw); *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 554, 572–73 (2007) (Stevens, J., dissenting).

205. *See* McCaughey v. Schuette, 117 Cal. 223 (1897).

206. *See* Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183 (noting the progression of the plaintiffs' bar from 1926 to 2001 and its substantial improvement).

defendants. The net result would be, in some significant number of cases, to allow lawbreakers to avoid liability.[207]

The drafters of the FRCP saw a much more limited role for pleadings. Self-consciously, they did not use neither "facts" nor "cause of action," yet another term capable of multiple meanings.[208] As stated above, FRCP 8(a)(2) requires only a "short and plain statement," not facts. Further, it requires a showing that one has a "claim," not a cause of action, that allows the plaintiff to recover.[209]

A common enough example of the difference between hyper-technical Code pleading and the FRCP standard is in an action for negligence. A plaintiff in a Code jurisdiction almost certainly ran afoul of the rules if she stated that she was injured as a result of a defendant's negligence.[210] Some courts construed negligence, a mixed question of law and fact, as a legal conclusion.[211] The federal rules' drafters rejected that view. Indeed, one of the sample forms, until recently appended to the Federal Rules, made clear that the allegation that on a specific date, a defendant negligently operated his vehicle, thereby injuring the plaintiff was sufficient to meet FRCP 8(a)(2).[212]

Consider the previous example. Plaintiff and defendant are involved in an automobile accident. Defendant may have been negligent for many different reasons, or non-negligent. A pre-filing investigation may provide the parties with some idea of the cause of the accident. However, most likely, a defendant knows how the accident occurred—or at least how she was driving at the time of the accident. A simple statement of the claim informs the defendant about the nature of the dispute.[213] She can begin to prepare a defense to the claim.

What about dismissing cases lacking merit? As part of an integrated whole, the drafters of the FRCP also promulgated the most liberal discovery standards in any court system.[214] The Rules allow a plaintiff, often otherwise unable to afford an extensive investigation, to develop her case through liberal discovery rules.[215] More importantly, as case law shows, often a defendant has

207. *See generally* Howard M. Erichson, *The End of the Defendant Advantage in Tobacco Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 123, 124–25 (noting the ability of corporate defendants to fund litigation at the highest level and hire lawyers who have the experience and resources to litigate at such a level, among other advantages).

208. ARTHUR R. MILLER, MARY KAY KANE, & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE (WRIGHT & MILLER) § 1216 (3d ed. 2020).

209. FED. R. CIV. P. 8(a)(2).

210. *See* Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 974 (11th Cir. 2008).

211. *See* AlliedSignal, Inc. v. City of Phx., 182 F.3d 692, 696–97 (9th Cir. 1999).

212. FED. R. CIV. P. RULES APPENDIX OF FORMS, FORM 11 (2014) (superseded 2015).

213. *Id.*

214. *See* Subrin, *supra* note 13, at 300 ("From a comparative law perspective, we really are different in our approach to discovery. . . . [T]he Advisory Committee turned away from what had been quite limited discovery in federal court and in most state courts and embraced virtually every known discovery method . . . .").

215. *See generally* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 81 (7th ed. 2011) (acknowledging the wide scope of discovery under the Federal Rules).

exclusive access to critical information.[216] Short of a direct request for that information, a plaintiff may not be able to bring a defendant to bar to pay for harm caused by the defendant.[217] Thus, even in a simple negligence case, only by securing a defendant's phone records may a plaintiff be able to show that the defendant was texting while driving.

As stated above, pleading rules are as procedural as it gets.[218] Yet, as implicit above, the adoption of one system or another is based on important substantive policies.[219] Although proposed early in the twentieth century by conservatives, including the American Bar Association, when it finally came, procedural reform was progressive.[220] As designed, the FRCP favor access to courts, lowering the bar at the pleading stages and moving quickly to full discovery.[221]

For years, typically conservative or right-wing organizations and often courts pushed for heightened pleading standards.[222] Some courts crafted ad hoc heightened standards.[223] Often targeted were civil rights cases.[224] Until *Twombly* and *Iqbal*, the Court rebuffed such efforts.[225]

That changed with *Twombly* and *Iqbal*. *Twombly* involved a complaint alleging an extensive conspiracy to violate antitrust laws after the split up of AT&T.[226] The complaint alleged that the regional phone carriers, the "Baby Bells," violated the Sherman Act by refusing to attempt to compete in other Baby Bells' territory.[227] The court granted a FRCP 12(b)(6) motion.[228] The Supreme Court ultimately affirmed.[229]

216. *See, e.g.*, Wash. State Physicians Ins. Exch. & Assoc. v. Fisons Corp., 858 P.2d 1054, 1080–81 (Wash. 1993).

217. In some instances, when a defendant engages in evasive practices, a plaintiff may have no means of discovering critical information. *Id.* at 1083.

218. *See supra* Part II.

219. *See* Burbank, *The Class Action Fairness Act*, *supra* note 49, at 1442 (noting that claims that CAFA was not substantive tort reform was disingenuous). As stated by the author, "Members of Congress now realize what most informed observers have long realized, to wit, that procedure is power." *Id.*

220. *Cf.* Miller, *supra* note 9, at 3–5 (noting that the adoption of the Federal Rules of Civil Procedure emphasized only the need to give the defendant fair notice of the claim and minimized procedural traps and claim invalidation based on technicalities).

221. *Id.*

222. *See* Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009).

223. *See* Leatherman v. Tarrant Cty. Narcotics Intel. & Coordination Unit, 507 U.S. 163, 167 (1993).

224. *Id.* at 168.

225. *Id.*

226. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 550 (2007).

227. *Id.* at 550.

228. *Id.* at 552.

229. *Id.* at 569–70.

Writing for seven justices, Justice Souter made several statements about why the complaint failed.[230] At various points, he seemed to suggest that the complaint alleged only legal conclusions, not facts.[231] Presumably, although not inevitably, a "conspiracy" is a legal conclusion, not an ultimate fact.[232] Justice Souter disclaimed reinstating Code pleading requirements despite much language suggesting the opposite.[233]

Alternatively, the complaint may not have given the several defendants adequate notice about the nature of the dispute.[234] According to Justice Souter, the defendants would have to scour years of records involving many employees to respond to the complaint.[235] So perhaps the case might be limited to complex litigation involving unwieldy discovery requests without more factual inquiry?[236] Of course, the Rules do seem to support such a result.[237]

Yet another unusual aspect of *Twombly* was the discussion of the underlying legal standard. Plaintiffs could not prevail merely on a showing of conscious parallelism.[238] According to Justice Souter,[239] the complaint stated no more than such conduct.[240] Thus, on the face of the complaint, the plaintiffs did not state enough facts to make their claim "plausible."[241]

Some commentators support *Twombly* on narrow grounds, dealing with antitrust cases and the underlying high bar for recovery.[242] Whatever thoughts that the Court meant to limit *Twombly* in such a matter proved false two years later in *Iqbal*.[243] Writing for a five-justice majority, Justice Kennedy stated the blackletter law, derived from *Twombly*:

> First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, . . .

230. *Id.* at 555.

231. *Id.* at 564–65.

232. *Id.* Part of the difficulty with the Code pleading was sorting through arcane concepts. One could not plead legal conclusions; instead, one needed to plead ultimate facts. Is conspiracy an ultimate fact or legal conclusion? Arguably, it is a legal conclusion. The definition of conspiracy involves a legal standard, and, to determine whether a conspiracy took place, one would have to analyze relevant historical facts in light of that definition. At the same time, lay people use the term conspiracy frequently. As such, they use the term without reference to a controlling legal standard.

233. *Twombly*, 550 U.S. at 563.

234. *Id.* at 555.

235. *Id.* at 559.

236. *See* FREER & PERDUE, *supra* note 19, at 316.

237. *See* FED. R. CIV. P. 8(a)(2).

238. *Twombly*, 550 U.S. at 553–54.

239. *Id.* at 548.

240. *Id.* at 554.

241. *Id.* at 553–54 (citation omitted).

242. *See* FREER & PERDUE, *supra* note 19, at 316.

243. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

> [d]etermining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.
>
> . . . [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.[244]

Justice Kennedy made no effort to cabin *Twombly*.[245] That may make sense from one perspective: FRCP 8(a)(2) and the other FRCP are trans-substantive.[246] Elsewhere, the Court rejected lower court efforts to carve out special areas for heightened pleading not listed in FRCP 9.[247]

Iqbal is a dramatic departure from the original understanding of FRCP 8(a)(2). Even the quoted language makes clear that departure: the Rules abandoned the concept of a "cause of action," and the idea of "legal conclusions."[248] Not surprisingly, most academic discussion of *Twombly,* and especially *Iqbal,* has been unfavorable.[249] Lower courts have divided significantly on their interpretation of the Court's new pleading doctrine.[250] Even the Court has seemed to back off the broadest reading of its new pleading rules.[251]

Application of *Twombly* and *Iqbal* may be fatal to a plaintiff's claim. That was so in *Twombly*.[252] Unable to get to discovery, a plaintiff may not be able to get past a FRCP 12(b)(6) motion, with a dismissal on the merits.[253] A defendant's illegal conduct may go undetected.[254]

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244. *Id.* at 678–79 (citations omitted).

245. Despite disagreeing with the Court's holdings in *Twombly* and *Iqbal*, I concede that Justice Kennedy's refusal to create a separate pleading standard for antitrust cases makes sense in light of the Court's refusal to support lower court efforts to create special heightened pleading standards for sub-categories of cases, like civil rights cases. *See, e.g.*, Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit, 507 U.S. 163 (1993).

246. FED. R. CIV. P. 8(a)(2).

247. *See Leatherman*, 507 U.S. at 168.

248. *See* discussion *supra* Part II.

249. *Contra* Michael R. Huston, Note, *Pleading with Congress to Resist the Urge to Overrule* Twombly *and* Iqbal, 109 MICH. L. REV. 415 (2010) (arguing that *Twombly* and *Iqbal* should not be overturned by legislation proposed by Congress).

250. *See* Walsh v. U.S. Bank, N.A., 851 N.W.2d 598, 603 (Minn. 2014).

251. *See* Erickson v. Pardus, 551 U.S. 89 (2007).

252. Bell Atl. Corp. v. Twombly, 550 U.S. 554, 586–87 (2007) (Stevens, J., dissenting).

253. *See* Sullivan, *supra* note 32, at 60 (noting an increase in successful 12(b)(6) motions under *Iqbal* as opposed to *Conley*).

254. *Twombly*, 550 U.S. at 571–72.

One area where the conflict between procedural rules and substantive polices is most in display after *Twombly* and *Iqbal* occurs when an action is filed in state court and removed to federal court.[255] Indeed, some defense lawyers advocate the strategy in order to invoke the heightened pleading requirements now imposed by the Court.[256]

About half of the state court systems have adopted pleading rules modeled on the FRCP.[257] Since *Twombly* and *Iqbal*, state courts have divided on whether to adhere to the Supreme Court's new reading of FRCP 8(a)(2).[258]

State courts refusing to apply *Twombly* and *Iqbal* to parallel state procedural rules cite various policy justifications.[259] Some focus on different conditions present in federal and state courts, matters that seem to be grounded in administrative convenience.[260] Less clear, but present, is concern about access to the courts.[261]

What should happen if a plaintiff files in a state court adhering to the traditional liberal pleading standards and the defendant removes the action to federal court? Lower courts are largely uniform in concluding that *Twombly* and *Iqbal* apply.[262] *Maness v. Boston Scientific* is illustrative.[263] There, the court rejected the claim that state pleading rules applied, largely in reliance on FRCP 81(c), stating that the FRCP apply to actions upon removal to federal court.[264]

If one merely applies Supreme Court case law, that result seems entirely warranted. The Federal Rules, in this case FRCP 8(a)(2), FRCP 12(b)(6), and FRCP 81(c), are all on point.[265] Further, they are unquestionably arguably procedural rules.[266] Consistent with Justice Scalia's *Shady Grove* opinion, that ends the discussion.[267] Even Justice Stevens would almost certainly agree: the

255. Warne v. Hall, 373 P.3d 558, 590 (Colo. 2016).

256. Monette Davis, *Applying* Twombly/Iqbal *on Removal*, AM. BAR ASS'N: PRAC. POINTS, (April 30, 2020), https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2020/applying-twombly-iqbal-on-removal/.

257. *See* Sullivan, *supra* note 32, at 54 (stating twenty-three jurisdictions have adopted the Federal Rules, four have similar rules in statutory codes, and three jurisdictions have rules that are closely similar in content and organization).

258. *Id.* at 62.

259. *See* Walsh v. U.S. Bank, N.A., 851 N.W.2d 598, 603 (Minn. 2014).

260. *See* McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 863 (Wash. 2010).

261. *See* Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 432 (Tenn. 2011).

262. *See* Warne v. Hall, 373 P.3d 588, 590 (Colo. 2016); *see also* Christiansen v. West Branch Cmty. Sch. Dist., 674 F.3d 927, 938–39 (8th Cir. 2012)); Retail Prop. Tr. v. United Brotherhood of Carpenters & Joiners of Am., 768 F.3d 938, 943, 945 (9th Cir. 2014).

263. Maness v. Boston Sci., 751 F. Supp. 2d 962 (E.D. Tenn. 2010).

264. *Id.* at 968.

265. FED. R. CIV. P. 8(a)(2); FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 81(c).

266. *See supra* Part II, n.186.

267. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 406–08 (2010) ("Congress has undoubted power to supplant state law, and undoubted power to prescribe

plaintiff would have to show not only that application of the Federal Rule impaired state substantive policies, but that the procedural device was bound up with the substantive right.[268] By comparison to the New York statute that Justice Stevens did not find so bound up with state substantive policies in *Shady Grove* and the pleading standards, one doubts that a plaintiff could have prevailed on Justice Stevens' test to uphold the application of state law.[269]

Even acknowledging that federal pleading rules, even as "rewritten" by the *Twombly* and *Iqbal* Courts, should apply does not gainsay important state substantive policies. Implicit in the discussion above, *Twombly* and *Iqbal* have eroded important policy decisions made by the framers of the FRCP.[270] The drafters of the FRCP saw the pleading rules as a matter of access to justice.[271] Imagine a set of potential cases with some cases where plaintiffs had ready access to proof and could easily meet high pleading standards, but a significant number of cases where plaintiffs might have meritorious claims but lack resources, absent liberal discovery, to do the kind of extensive pre-filing investigation needed to meet the heightened pleading requirements. The *Twombly* and *Iqbal* Courts exclude the latter set of plaintiffs, despite the potential merits of their claims.[272] Those results, though, are inconsistent with intentions of the original drafters of the Rules.[273]

After reviewing a second area where application of Federal Rules may conflict with important state substantive policies, this Article returns to this issue.[274] There, this Article argues why congressional action is needed to clarify that state pleading rules should apply if they permit a plaintiff to move past a FRCP 12(b)(6) motion despite the holdings in *Twombly* and *Iqbal.*[275]

III. ANTI-SLAPP LITIGATION IN FEDERAL COURT

Anti-SLAPP laws[276] present a clear example of a state adopting procedural rules to advance important substantive goals. So, what happens when a plaintiff files a defamation action in federal court in a diversity action when the

rules for the courts it has created, so long as those rules regulate matters 'rationally capable of classification' as procedure.") (citing Hanna v. Plumer, 380 U.S. 460, 472 (1965)).

268. *Id.* at 417.

269. *Id.* at 421–22.

270. *See* Miller, *supra* note 9, at 24 (noting that the fact-legal conclusion dichotomy posed by *Twombly* was sought to be eliminated by the "short and plain" language of the rules).

271. *Id.* at 3.

272. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 582–83 (2007) (Stevens, J., dissenting).

273. *See* Dioguardi v. Durning, 139 F.2d 774, 775 (1944).

274. *Infra* Part IV.

275. *Infra* Part IV.

276. CAL. CIV. PROC. § 425.16 (West 2020).

controlling state law includes an anti-SLAPP statute? That question has divided lower federal courts.[277]

As then-Judge Kavanaugh explained in *Abbas v. Foreign Policy Group, LLC*,[278] anti-SLAPP laws protect free speech and attempt to decrease the chilling effect of defamation litigation.[279] While those are obviously substantive goals, anti-SLAPP laws "accomplish that objective by making it easier to dismiss defamation suits at an early stage of the litigation."[280]

Abbas summarized the procedural methods used to advance the substantive free speech goals:

> Under the Act as relevant here, a defendant may file a special motion to dismiss "any claim arising from an act in furtherance of the right of advocacy on issues of public interest." To obtain dismissal, the defendant first must make a "prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest." If the defendant makes that prima facie showing, then the plaintiff must demonstrate that "the claim is likely to succeed on the merits." If the plaintiff makes that showing, the defendant's special motion to dismiss must be denied. Otherwise, the special motion to dismiss must be granted. . . . While a special motion to dismiss is pending, discovery is stayed except for limited purposes.[281]

But for such procedures, an action in federal court would proceed differently.[282]

Without reference to state law, consider a defamation action filed in federal court. A defendant would file a FRCP 12(b)(6) motion to dismiss for a failure to state a claim for relief. Given the liberal pleading standard in the FRCP, seldom will a plaintiff fail to state a claim for relief.[283] Alternatively, after discovery, a defendant may be able to move for summary judgment.[284] Consistent with *Anderson v. Liberty Lobby, Inc.*,[285] a defendant has a good chance of prevailing at that stage, at least, if the plaintiff is a public figure or

277. *See* Makaeff v. Trump Univ., LLC, 715 F.3d 254 (9th Cir. 2013); *see also* United States v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999); Wilcox v. Superior Court L.A. Cnty., 33 Cal. Rptr. 2d 446 (1994).

278. 783 F.3d 1328 (D.C. Cir. 2015).

279. As summarized by then-Judge Kavanaugh, the Council of the District of Columbia passed the Anti-SLAPP Act of 2010 in response to what the Council described as an upsurge in "lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." COUNCIL OF THE DIST. OF COLUMBIA, COMM. ON PUB. SAFETY AND THE JUDICIARY, REP. ON BILL 18-893, at 1 (2010).

280. Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1332 (D.C. Cir. 2015).

281. *Id.* (citations omitted).

282. *Id.* at 1333.

283. *See, e.g.*, Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).

284. FED. R. CIV. P. 56.

285. 477 U.S. 242 (1986).

official or if under state law, even a private figure must prove malice.[286] In a case in which a defendant may be able to show some special need for timely discovery, the district court can schedule discovery on an expedited basis.[287] But that scheme is different from state law where a defendant can make an early motion to shift the burden to the plaintiff to make a showing, in effect, that the plaintiff has sufficient evidence at an early stage in the proceedings.[288]

Two cases demonstrate the division among lower federal courts. *Abbas* found a direct conflict between the FRCP and the local law: "Put simply, the D.C. Anti–SLAPP Act's likelihood of success standard is different from and more difficult for plaintiffs to meet than the standards imposed by Federal Rules 12 and 56."[289] Therefore, consistent with *Shady Grove*, federal procedural rules trump, and those rules do not violate the REA.[290]

The First Circuit came to the opposite conclusion in *Godin v. Schencks*.[291] In reliance on cases like *Walker,* the court found that it could avoid the conflict and give effect to both state and federal law.[292] Hence, in that case, Maine's anti-SLAPP law controlled.[293]

Given the split among lower courts, the Supreme Court may resolve this dispute.[294] Which way might the Court rule? The change in Court personnel makes a prediction difficult. Justice Kennedy joined Justice Ginsburg's *Shady Grove* dissent, reading the FRCP narrowly in light of important state substantive policies.[295] Justice Kavanaugh, who replaced Justice Kennedy,[296] wrote *Abbas,* which found a direct conflict.[297] Justice Scalia's view is consistent with Justice Kavanaugh's.[298] Uncertain is how Justice Gorsuch, Justice Scalia's

286. *See id.* at 254; *see also* Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569, 571 (N.Y. 1975).

287. *See* FED. R. CIV. P. 26; FED. R. CIV. P. 28; FED. R. CIV. P. 29; FED. R. CIV. P. 30; FED. R. CIV. P. 31.

288. *See* Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1333–34 (D.C. Cir. 2015).

289. *Id.* at 1335.

290. *See id.*

291. Godin v. Schencks, 629 F.3d 79 (1st Cir. 2010).

292. *See id.* at 88–90.

293. *See id.* at 92.

294. *See* SUP. CT. R. 10 (2019).

295. Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 436 (2010).

296. *See Brett M. Kavanaugh*, OYEZ, https://www.oyez.org/justices/brett_m_kavanaugh (last visited June 23, 2020).

297. Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1337 (D.C. Cir. 2015) ("In sum, Federal Rules 12 and 56 answer the same question as the D.C. Anti-SLAPP Act, and those Federal Rules are valid under the Rules Enabling Act. A federal court exercising diversity jurisdiction therefore must apply Federal Rules 12 and 56 instead of the D.C. Anti-SLAPP Act's special motion to dismiss provision.").

298. *See Shady Grove*, 559 U.S. at 405–06.

replacement,[299] and Justice Kagan, Justice Stevens' replacement,[300] would vote on the issue.

Were I offering a neutral evaluation of how Justice Stevens's pivotal *Shady Grove* concurrence would apply, I would agree with the result in *Abbas.* The natural reading of FRCPs 12(b)(6) and 56 encompass the dispute.[301] Both rules seem so obviously procedural that they do not violate §2072(a). Are they nonetheless so bound up with state substantive rights that they violate §2072(b)?[302] I doubt it.

In *Shady Grove*, Justice Stevens found that a New York law that severely limited class actions among small claim holders was not so bound up with the underlying substantive right.[303] That would seem to be equally true in anti-SLAPP cases. The Court has often stated that procedural rules often have an impact of substantive rights, but that incidental effects do not arise to violations of the REA.[304] Anti-SLAPP provisions provide swifter adjudication than do the Federal Rules.[305] Application of federal law does not deny a defendant her day in court.

Upholding the FRCP would be consistent with important policies discussed above.[306] Inviting more challenges to application of specific Federal Rules erodes the core vision of the FRCP captured in FRCP 1.[307] Satellite litigation wastes resources in direct violation of the spirit of the rules.[308] A lawyer's ability to argue the niceties of *Hanna-Walker-Gasperini-Shady Grove* may determine the outcome of a lawsuit, instead of the merits of the case. The drafters of the FRCP surely would not want that result.[309]

299. *See* Nina Totenberg, *Senate Confirms Gorsuch To Supreme Court*, NAT'L PUB. RADIO (Apr. 7, 2017), https://www.npr.org/2017/04/07/522902281/senate-confirms-gorsuch-to-supreme-court.

300. *See* Robert Barnes & Cortlynn Stark, *John Paul Stevens Remembered for 'Deep Devotion' to Law and Justice*, WASH. POST (July 22, 2019), https://www.washingtonpost.com/politics/courts_law/john-paul-stevens-to-lie-in-repose-at-supreme-court-on-monday/2019/07/21/defed9ba-abf6-11e9-bc5c-e73b603e7f38_story.html.

301. *See Shady Grove*, 559 U.S. at 405–06.

302. *See id.* at 421–24 (Stevens, J., concurring).

303. *See id.* at 431–34 (Stevens, J., concurring).

304. *See id.* at 408.

305. *See* Abbas v. Foreign Policy Grp., LLC, 783 F.3d 1328, 1332 (D.C. Cir. 2015).

306. *See supra* Intro.

307. *See* Clark, *supra* note 23, at 183 (stating that "hardly a one of the heralded Federal Rules can be considered safe from attack by shrewd lawyers and obedient lower tribunals"). This creates an opportunity for satellite litigation, which stands in stark contrast to the goal of the Federal Rules outlined in FRCP 1. FED. R. CIV. P. 1 (dictating that the Rules are meant to promote the "just, speedy, and inexpensive determination of every action and proceeding.").

308. *See* Clark, *supra* note 23, at 184 (suggesting that ad hoc adjudication of the Federal Rules may lead to a "terrible price in waste effort and confusion and delay").

309. *See generally id.* at 183–84 (explaining how the excitement and intentions for the new uniform system were challenged by the Court's confusing vertical choice of law doctrine, which

Thus, a decision that Federal Rules apply advances important federal policies. Despite that, application of federal law has a negative impact on important state substantive policies. Below, the article turns to the need for congressional action to create special rules applicable in cases involving the conflicts between federal and state law discussed above.[310]

IV. CONGRESS TO THE RESCUE?

Given the important state substantive policies that may be overridden by the application of the FRCP in the cases described above, this Article urges that the FRCP be modified to make explicit that in removal cases from states giving a more plaintiff-friendly interpretation to pleading rules, state law should govern.[311] I would also urge a similar provision in defamation actions where the controlling substantive state law includes an anti-SLAPP provision; in such cases, the state procedure should apply.[312]

Such a proposal is not without difficulties. Even if Congress should make laws and the courts interpret them,[313] the REA delegated part of that power to the courts.[314] The REA reflected an important insight: courts are more adept at assessing workability of a set of rules.[315] The Court has in place a mechanism for amending the Federal Rules.[316] The process for amending the FRCP can be effective, if time-consuming.[317] The Advisory Committee studies proposed rules changes and invites input from other committees with the Judicial Conference and from other organizations.[318] It conducts public hearings and invites public comments.[319] Before proposed changes to the rules become law, Congress has veto power over proposed changes.[320]

In the past, Congress has directly altered Federal Rules. Notably, in 2005, a probusiness Congress created a carve-out from Rule 23, regulating class

seemed to allow for a determination as to whether state or federal law would apply on an ad hoc basis).

310. *Infra* Part IV.

311. *Infra* Part IV.

312. *Infra* Part IV.

313. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (declaring that there is no general federal common law).

314. Rules Enabling Act, 28 U.S.C.A. § 2072 (Westlaw through Pub. L. No. 116-141). *See also* Burbank, *The Rules Enabling Act*, supra note 48, at 1028 (discussing the *Sibbach* Court's analysis of how the DEA delegates power to regulate the practice and procedure of federal courts to the Court).

315. *See* Burbank, *The Rules Enabling Act*, *supra* note 48, at 1179–81.

316. *See* Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 444 (1946).

317. *See* Smith v. Sw. Feed Yards, 835 S.W.2d 89, 98 (Tex. 1992).

318. *See generally* Duff, *supra* note 44.

319. *See id.*

320. *See id.*

actions.[321] The Class Action Fairness Act was the George W. Bush administration's effort to undercut the plaintiffs' bar's successful forum shopping.[322] In major class action suits, plaintiffs' attorneys were able to file in populist state courts.[323] In some instances, including the tobacco litigation, the results represented major victories for injured plaintiffs, including the states that must subsidize health care for tobacco's victims.[324] CAFA not only altered Rule 23, but expanded diversity jurisdiction and altered removal provisions.[325] Hence, Congress has shown a willingness to make direct changes to the FRCP.

As developed below, however, especially under Chief Justice Roberts' leadership, the Advisory Committee is now dominated by the Federalist Society wing of the Republican Party.[326] Far-right libertarian organizations have an outsized influence on policy judgments, often favoring distinct minority views.[327] In effect, the far right has made the Advisory Committee a captive agency. As a result, Congress may be the best hope for progressive reform.

Many scholars have criticized the Court's *Twombly* and *Iqbal* cases for closing the courthouse door on plaintiffs.[328] As a general matter, those cases favor corporate defendants over plaintiffs who may not be able to prevail on otherwise meritorious claims.[329] Indeed, as I have argued in *Animating Civil Procedure*, the right wing of the Court has frequently used procedural devices to impair plaintiffs.[330] Members of the public understand the issues when the Court expands or narrows substantive rights.[331] Witness the public debates over

321. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

322. *See* Burbank, *The Class Action Fairness Act*, *supra* note 49, at 1443 (noting that the consequences of forum shopping may justify CAFA's possible legal rule reforms).

323. .*See id.* at 1508.

324. .*See generally* Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477 (1999) (explaining the history of tobacco litigation and the complex discovery process in Minnesota v. Philip Morris, Inc., 551 N.W.2d 490 (Minn. 1996)).

325. *See* Aerotek, Inc. v. Boyd, 598 S.W.3d 373, 380 n.10 (Tex. App. 2020).

326. *Supra* Part IV.

327. *See* Staszak, *supra* note 45, at 693 (noting that the anti-plaintiff effects of the Roberts Court are due to members being "ideologically predisposed to think like Federalist Society members").

328. *See id.*; *see also* Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U. L. REV. 1217, 1257–58 (2008) (noting that the ambiguity of *Twombly* has an anti-plaintiff influence).

329. *See* Staszak, *supra* note 45, at 693 (noting that the changes are the product of corporate defendants attempting to insulate themselves from litigation).

330. *See* MICHAEL VITIELLO, ANIMATING CIVIL PROCEDURE (2017). *See also* Burbank, *The Class Action Fairness Act*, *supra* note 49, at 1468–69 (noting that corporate defendants often preferred the federal courts for favorable rules of substantive law and that such courts acted as the bastions of business interests).

331. *See* Dennis A. Henigan, *The* Heller *Paradox*, 56 UCLA L. REV. 1171, 1174–76 (2009) (noting that the Second Amendment guaranteeing the personal ownership of guns in District of

abortion and gun rights.[332] Few members of the public react when the Court narrows access to the courts through procedure decisions.[333] Hence, the Court is not likely to take a leadership role in advancing progressive state substantive policies.

As Professor Staszak has argued, Chief Justice Roberts' commitment to values shared with the Federalist Society is clear.[334] Since the end of Earl Warren's term as Chief Justice, the federal court system has been led by conservative or right-wing Chief Justices, even when the country has tracked left of center.[335] Chief Justice Roberts has deeply committed, as have many members of the Republican right wing, to reshaping the federal judiciary even more deeply and well into the future.[336] As indicated above, the Advisory Committee is likely to reflect the membership of the Federalist Society, elite white males, predisposed to think like corporate defense lawyers and on the rightwing of the political spectrum.[337]

Often sounding non-partisan, as he attempted to do with his famous comments during his nomination hearings,[338] Chief Justice Roberts is hardly a non-partisan. Consider his discussion of efforts to reform federal discovery rules.[339] His public statements focused on two kinds of perceived abuse of the

Columbia v. Heller, 554 U.S. 570 (2008), was seen as a substantial victory for opponents of gun control).

332. *See id.*; *see also* Zoë Robinson, *A Comparative Analysis of the Doctrinal Consequences of Interpretive Disagreement for Implied Constitutional Rights*, 11 WASH. U. GLOB. STUD. L. REV. 93, 128 (2012) (noting that in Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the dissent argued about accepting *Roe* limitations on state police power, and whether or not a statute that would allow a woman to have an abortion without her husband's consent should be struck down).

333. *See* Brent Kendall, *Supreme Court Bars U.S. Suit Against Goodyear Units Over French Crash*, WALL ST. J. (June 27, 2011), https://www.wsj.com/articles/SB10001424052702304447804576411650063028560.

334. *See* Staszak, *supra* note 45, at 693 (noting that the anti-plaintiff effects of the Roberts Court are due to members being "ideologically predisposed to think like Federalist Society members.").

335. *See generally* Sahil Chinoy, *What Happened to America's Political Center of Gravity?*, N.Y. Times (June 26, 2019), https://www.nytimes.com/interactive/2019/06/26/opinion/sunday/republican-platform-far-right.html; *see also* JACOB S. HACKER & PAUL PIERSON, OFF CENTER: THE REPUBLICAN REVOLUTION & THE EROSION OF AMERICAN DEMOCRACY (2005).

336. *See* Ted Barrett, *In Reversal from 2016, McConnell Says He Would Fill a Potential Supreme Court Vacancy in 2020*, CNN POL. (May 29, 2019, 7:01 AM), https://www.cnn.com/2019/05/28/politics/mitch-mcconnell-supreme-court-2020/index.html; *see also* Staszak, *supra* note 45 (explaining the influence the Roberts Court has had on federal procedure).

337. Staszak, *supra* note 45, at 693.

338. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary of the United States Senate*, 109th Cong. 1 (2005).

339. *See* Adam Liptak, *Chief Justice's Report Praises Limits on Litigants' Access to Information*, N.Y. TIMES (Dec. 31, 2015), https://www.nytimes.com/2016/01/01/us/politics/chief-

system: over-discovery and evasive practices.[340] Most often, when abuses occur, plaintiffs engage in over-discovery, increasing the cost to the defendant to compel a favorable settlement.[341] By contrast, defendants are more likely to engage in evasive practice, hiding smoking guns that would lead to a clear showing of liability.[342] Despite the Chief Justice's public statements about his concern for both forms of abuse, the changes to Rule 26, governing the scope of discovery, addressed only over-discovery.[343] No efforts were advanced to address evasive practices. Again, Professor Staszak summarized the previous point as follows:

> In effect, however, these changes [to the discovery rules] primarily influence lawsuits brought by individuals against institutional defendants and are the product of intense lobbying by corporate defendants aiming to insulate themselves from litigation. As one commentator has put it, the substantive anti-plaintiff effect of these changes is clear, "evidenced by a stark split in the public reaction, with plaintiff's lawyers almost unanimously against most of the amendments and defendant's lawyers almost unanimously in favor."[344]

Public statements aside, the Chief Justice and the increasingly Federalist Society-dominated Advisory Committee show their hand in their proposals for reform.[345]

Because the likelihood of progressive reforms, given the current composition of the Court and Advisory Committee, is unlikely, the best alternative is for direct action by Congress. The ages of right-wing justices

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justices-report-praises-limits-on-claimants-access-to-information.html. While his public statements focused on over-discovery and evasive and dilatory practices, the changes that he advanced addressed only over-discovery, an abuse associated with plaintiffs and did nothing to address evasive practices, a practice more frequently associated with defendants. *See* Fed. R. Civ. P. 26(b) (requiring courts to consider whether discovery requests are excessive in light of the amount at issue in a case).

340. *See* Adam Liptak, *Chief Justice's Report Praises Limits on Litigants' Access to Information*, N.Y. TIMES (Dec. 31, 2015), https://www.nytimes.com/2016/01/01/us/politics/chief-justices-report-praises-limits-on-claimants-access-to-information.html; *see also* Vitiello, *supra* note 330, at 127–29.

341. *See* Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(A)—'Much Ado About Nothing?'*, 46 HASTINGS L.J. 679, 699 (1995) (noting that over-discovery can be used to impose excessive costs or to go on "fishing expeditions" to force disclosure of evidence that could support an otherwise marginal claim).

342. *See* Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1080 (Wash. 1993).

343. *See* David J. Waxse, *"Do I Really Have to Do That?": Rule 26(A)(1) Disclosures and Electronic Information*, 10 RICH J.L. & TECH. 50, 61 n.41 (2004) (noting that Rule 26(c) protects respondents from undue burden or expense by restricting discovery by balancing the disclosure of computerized records against the burdens of the respondent).

344. Staszak, *supra* note 45, at 693.

345. *See id.* at 716.

suggest that the right wing will dominate the Court well into the future.[346] In 2009, then-Senator Arlen Specter placed a bill in the hopper that would have repealed *Twombly* and *Iqbal*.[347] Representative Jerrold Nadler introduced a similar bill in the House.[348] Those bills produced pushback from various sources, leading to some proposed amendments.[349] After the Republicans regained control of Congress in 2010 with the support of the extreme right wing, those bills died.[350] Renewed interest in similar reforms may be timely now that the Democrats have regained control of both houses of Congress.[351]

With the balance of power back to Democratic control, a bill like the Specter-Nadler bills might not have traction.[352] A more focused bill might require federal courts to apply state pleading rules in removal actions where the state law is more permissive than the Supreme Court's *Twombly* and *Iqbal* rulings. Such a bill, focused on important states' rights, might even appeal to some conservative members of Congress.[353]

The modifications to the rules would be straightforward. The change to Rule 81(c)(1) would state: (1) these rules apply to a civil action after it is removed from a state court, except Rule 8(a)(2) if state pleading rules are more favorable to the pleading party. In such a case, the district court should apply state pleading rules.

Similarly, Congress might easily craft legislation to require federal courts to apply anti-SLAPP measures when the state law governing the dispute allows for such procedures. Again, the appeal to states' rights may garner some votes from Republicans.[354] In addition, First Amendment speech rights find support

346. *See* Bruce Ledewitz, *Taking the Threat to Democracy Seriously*, 49 U. MEM. L. REV. 1305, 1319–21 (2019) (noting that the Republicans' efforts to bar the nomination of a Supreme Court justice from a Democratic President and the vetting of candidates prepared by the Federalist Society has led to a conservative majority in the Supreme Court).

347. Huston, *supra* note 250, at 425–26 (noting Specter's Notice Pleading Restoration Act of 2009, which would have supported the *Conley* standard over the *Twiqbal* standard).

348. *Id.* at 426–27.

349. *See id.* at 437–38.

350. *See* Mike Dorf, *Senator Specter's Notice Pleading Parting Shot*, DORF ON L. (Dec. 28, 2010), http://www.dorfonlaw.org/2010/12/senator-specters-notice-pleading.html.

351. Dierdre Walsh & Kelsey Snell, Democrats Take Control of Senate with Twin Georgia Victories, NPR (Jan. 6, 2021, 6:07 AM), https://www.npr.org/2021/01/06/953712195/democrats-move-closer-to-senate-control-as-counting-continues-in-georgia.

352. *See* Huston, *supra* note 249; *see also* Dorf, *supra* note 350.

353. *Cf.* Craig Peyton Gaumer & Paul R. Griffith, *Whose Life Is It Anyway?: An Analysis and Commentary on the Emerging Law of Physician-Assisted Suicide*, 42 S.D. L. REV. 357, 372 (1998) (noting, in a discussion regarding the 10th Amendment, the expansion of states' rights and its interpretation has been a right-wing mantra).

354. *See* Horace E. Johns, *Nine Means to an End: The Members of the U.S. Supreme Court*, 39 TENN. B.J. 26, 27 (2003) (noting that Justice Rehnquist, the leader of the conservative wing of the Supreme Court in his tenure, advocated for states' rights).

from a broad coalition.[355] Indeed, a bill targeted at expanding anti-SLAPP provisions may be an easier lift than would be legislation overruling *Twombly* and *Iqbal*.

The change to Rules 12 and 56 would also be concise and easily drafted. Thus, Rule 12 might state: "Unless another time is specified by this rule, a federal statute or a s*tate law statute or rule governing defamation actions*, the time for serving a responsive pleading is as follows: . . . (2) If the claim for relief is for defamation, the district court shall follow state law that allows for a speedier resolution of the dispute."

Rule 12(b) would need to include what would be numbered Rule 12(b)(8), making clear that a defense to a defamation action allowed under a state SLAPP provision may be filed prior to the defendant's answer.

Rule 56 might be revised in a similar manner. Thus, Rule 56(b) would state that, "Unless a different time is set by local rule, a state law governing defamation actions, or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery. If the claim for relief is for defamation, the district court shall follow state law that allows for a speedier resolution of the dispute."

V. CONCLUDING THOUGHTS

The federal system's commitment to a set of uniform procedural rules remains an important goal.[356] In addition, the Court and Congress should remain committed to avoiding satellite litigation about the application of the FRCP.[357]

The two examples explored in this Article create the risk that lower courts, or the Supreme Court, might read the Federal Rules in a way to allow application of state law.[358] Doing so creates uncertainty about other state laws that might supersede Federal Rules that otherwise seem to be on point.[359] Adhering to Justice Ginsburg's approach in *Gasperini* and her dissent in *Shady Grove* creates an odd situation: courts would have to read a rule narrowly or broadly depending on the conflict with state law.[360] When the state law advanced important substantive policies, a Federal Rule would be read to avoid

355. *Cf.* George Vetter & Christopher C. Roche, *The First Amendment and the Artist—Part I*, 44 R.I. B.J., Mar. 1996 at 7, 7–8 (listing the various conflicts between First Amendment rights and different regulatory laws, and how the free speech of various artists often leads to the involvement of different legal doctrines).

356. *See* PURCELL, *supra* note 1, at 28 (explaining that procedural form was a priority for various groups dating back to the 1920s).

357. *See generally* Clark, *supra* note 23, at 183–84 (expressing concern about how costly it may be to decide vertical choice of law cases on an ad hoc basis).

358. *Supra* Parts II & III.

359. *Supra* Intro.

360. *Supra* Part I.

the conflict. Yet, a dispute arising in a neighboring state might require the court to give the rule its more natural reading.[361]

Both conflicts discussed above present significant conflicts between Federal Rules and important state substantive policies.[362] Liberal pleading and ready access to discovery are hallmarks of our system.[363] Part of the animating principles of the Federal Rules, they may be at risk with the Supreme Court's turn to the right.[364] Speaking freely on important matters of public concern remains a foundational principle of a democratic society.[365] Anti-SLAPP laws advance that principle.[366]

Given the Court's turn to the right, now dominated by policies of the Federalist Society,[367] hoping for progressive reforms coming from the Court and Advisory Committee is naïve. Hence, this Article urges congressional solutions for the two areas of conflict between Federal Rules and state substantive policies. The solution would advance those policies without inviting broader challenges to the application of the FRCP.

361. *Supra* Part I.

362. *Supra* Parts II & III.

363. *Supra* Intro.

364. *Supra* Part II.

365. *See* Marni M. Zack, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. REV. 893, 905–06 (2005) (referencing Ceballos v. Garcetti, 547 U.S. 410 (2016), where the court ruled that depriving the plaintiffs of free speech protection would undermine the maintenance of governmental integrity).

366. *Supra* Part III.

367. *Supra* Part IV.