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**SYMPOSIUM: *ERIE* UNDER ADVISEMENT:
THE DOCTRINE AFTER *SHADY GROVE***

**MAINTAINING UNIFORM FEDERAL RULES:
WHY THE *SHADY GROVE* PLURALITY WAS RIGHT**

*Mark P. Gaber**

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I. INTRODUCTION

In March 2010, the Supreme Court announced its decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,¹ holding that Rule 23 of the Federal Rules of Civil Procedure allows a class action to proceed even where the state that created the cause of action explicitly prohibits that claim from being brought as a class action. *Shady Grove* is the latest in the long line of cases applying the *Erie* doctrine. *Shady Grove*’s splintered opinion, with its unlikely line-up of justices (Scalia, Sotomayor, Roberts, and Thomas plurality; Stevens concurrence; Ginsburg, Alito, Breyer, Kennedy dissent), demonstrates the complexity of the substance/procedure distinction of the *Erie* cases.

* J.D., Stanford Law School, 2010; B.A., St. Norbert College, 2005. I am grateful to Professor Janet Alexander of Stanford Law School for her helpful guidance and comments in developing this piece. Furthermore, I wish to thank Robert Garcia, Clifford Davidson, and N. Andrew Sfeir for their suggestions.

1. 130 S. Ct. 1431 (2010).

This Article examines the Court's decision in *Shady Grove*, concluding that Justice Scalia's plurality opinion has the better argument—his approach is the most consonant with precedent and the least disruptive to the careful balance the Court has struck with its *Erie* line of cases. Part II examines Justice Scalia's plurality opinion, and considers its strengths and weaknesses. I then turn to Justice Ginsburg's dissenting opinion, concluding that it rests on a fundamental misapplication of the *Erie* doctrine, though she admirably attempts to give teeth to the substantive rights limitation of the Rules Enabling Act—a limitation that the *Erie* doctrine admittedly ignores. Part III considers the concurring opinion of Justice Stevens, who suggests a middle ground test that, while initially appealing, collapses under the weight of a closer analysis. It is not yet clear which opinion will provide controlling precedent in future cases, and this paper argues that the plurality opinion should control as the narrowest ground of decision, rather than Justice Stevens's concurrence.

I conclude with a discussion of the case's ironic result and the lesson *Shady Grove* provides for future Congresses that might attempt to achieve substantive outcomes by regulating procedure. *Shady Grove* reached federal court through diversity jurisdiction made possible only by a Republican Congress's enactment of the Class Action Fairness Act (CAFA), which, ironically, was passed with the purpose of *reducing* the number of class actions. Since its enactment, CAFA has become a *tool* for the plaintiff's bar—leading to even more class action suits. Congressional regulations of procedure are uniquely capable of backfiring by producing results inconsistent with the legislative purpose.

II. *SHADY GROVE V. ALLSTATE*: SCALIA PLURALITY AND GINSBURG DISSENT

A. *Facts and Posture*

Shady Grove came before the Court under a set of facts reminiscent of a civil procedure law school exam. Sonia E. Galvez of Maryland was injured in a car accident while driving her New York registered car on May 30, 2005.² She was insured by Allstate, a citizen of Illinois.³ After the accident, Ms. Galvez received medical treatment for her injuries at

2. Brief for Petitioner at 5-6, *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) (No. 08-1008).

3. *Id.* at 1.

Shady Grove Orthopedic Associates in Maryland.⁴ The substantive law governing the case is that of New York, where her car was registered.⁵ New York's insurance law requires that insurance companies pay benefits to customers within thirty days of receiving a properly documented claim; failure to make timely distribution of benefits results in a two percent interest charge per month.⁶ A separate New York statutory provision, in the state's procedural code, prohibits class action suits for statutory minimum damages or penalties.⁷ In partial payment of her medical bills, Ms. Galvez assigned her right to insurance benefits to Shady Grove Orthopedic Associates—a claim that Allstate paid, though not by the thirty-day deadline mandated by law.⁸ Allstate then refused to pay the statutory interest of two-percent per month required by statute.⁹ Alleging that Allstate regularly refused to pay the statutory penalty amount, Shady Grove filed a class action suit in the Eastern District of New York, asserting diversity jurisdiction under 28 U.S.C. § 1332(d)(2),¹⁰ amended in 2005 under CAFA to expand federal diversity jurisdiction over class actions.¹¹ The Petitioners proposed a class of

4. *Id.* at 6.

5. *Id.* at 5-6.

6. N.Y. INS. LAW § 5106(a) (McKinney 2010).

7. N.Y. C.P.L.R. 901 (McKinney 2010) provides in relevant part:

§ 901. Prerequisites to a class action
(b) Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

Id.

8. Shady Grove Orthopedics Assoc. v. Allstate Ins. Co., 130 S. Ct. 1431, 1436 (2010).

9. *Id.*

10. Brief for Petitioner, *supra* note 2, at 6. Section 1332(d)(2) provides that:

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—

(A) *any* member of a class of plaintiffs is a citizen of a State different from *any* defendant;

(B) *any* member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and *any* defendant is a citizen of a State; or

(C) *any* member of a class of plaintiffs is a citizen of a State and *any* defendant is a foreign state or a citizen or subject of a foreign state.

28 U.S.C. § 1332 (2006) (emphasis added).

11. Before passage of the CAFA in 2005, section 1332 required complete diversity of parties, even in class actions, and thus, Petitioners would not have been able to assert diversity jurisdiction in this matter. Congress passed CAFA in response to business concerns that state courts were too friendly to class action lawsuits. The findings and purposes of CAFA indicate that, from the mid-1990s through 2005, there had been “abuses of the class action device” that “harmed plaintiffs with legitimate claims and defendants who [had] acted responsibly,” and “undermined public respect for our judicial system.” Class Action Fairness Act of 2005 § 2, 28 U.S.C. § 1711 (2005) (setting forth

over 1,000 members—well in excess of the 100 required by CAFA—with statutory penalty damages exceeding five million dollars.¹² Allstate responded with a motion to dismiss, arguing that the *Erie* doctrine required that New York’s prohibition on class actions be applied, not Rule 23 of the Federal Rules of Civil Procedure, and as such the class action could not be maintained.¹³ The district court granted the motion to dismiss, and the Second Circuit affirmed.¹⁴ The Supreme Court granted certiorari and the Court heard oral arguments on November 2, 2009, releasing its opinion on March 31, 2010.¹⁵

B. *An Erie Background*

Before turning to an analysis of *Shady Grove*, a brief background discussion on *Erie* is necessary to provide the context of the case. In *Erie*, the Court ruled that the Constitution did not permit federal courts hearing diversity cases to supplant state law with “federal general common law.”¹⁶ This accords with the two statutes on point—the Rules of Decision Act¹⁷ (RODA) and the Rules Enabling Act¹⁸ (REA): the

findings and purposes). Specifically, Congress took state courts to task for “keeping cases of national importance out of Federal Court; sometimes acting in ways that demonstrate bias against out-of-State defendants; and making judgments that impose their view of the law on other States and bind the rights of residents of those States.” *Id.*; see also Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: “The Political Safeguards” of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929, 1930 (2008).

12. Brief for Petitioner, *supra* note 2, at 7.

13. Respondent’s Motion to Dismiss at 11-12, *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467 (2006) (No. 06 CV 1842 (NG) (KAM)), 2006 U.S. Dist. Ct. Motions LEXIS 38759. In its Motion to Dismiss, Allstate argued that under the *Erie* line of cases and *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988), Federal Rule 23 did not displace the New York prohibition on class actions. Respondent’s Motion to Dismiss, *supra*, at 11-12. It relied heavily on *Leider v. Ralfe*, 387 F. Supp. 2d 283 (S.D.N.Y. 2005), a class action for treble damages under the state’s anti-trust law. The treble damages constituted a penalty under New York law, and under section 901(b), could not be maintained as a class action. The *Leider* court found that the state statute and Rule 23 addressed different issues, and thus, could co-exist. Respondent’s Motion to Dismiss, *supra*, at 11-12; *Leider*, 387 F. Supp. 2d at 290. The *Leider* court found section 901(b) substantive for *Erie* purposes because application of Rule 23 would lead to forum-shopping—one of the twin aims *Erie* was meant to avoid. See *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

14. *Shady Grove Orthopedics Assoc. v. Allstate Ins. Co.*, 549 F.3d 137, 146 (2008). The Second Circuit likewise found that there was no collision between Rule 23 and section 901(b). The court noted that both Rule 23 and New York’s analogue class action procedural statute, section 901(a), established the requirements for maintaining a class action. However, the court found that “there is no analogue to [section 901(b)] in Rule 23.” *Id.* at 143. Thus, the court held that section 901(b) is substantive for *Erie* purposes and operates co-extensively with Rule 23. *Id.* at 144.

15. *Shady Grove Orthopedics Assoc. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010).

16. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

17. 28 U.S.C. § 1652 (2006). RODA provides that: “The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or

substantive law is supplied by the state, while the federal procedural rules apply. In promulgating federal rules of procedure under REA, the Supreme Court may not “abridge, enlarge or modify any substantive right.”¹⁹ Of course, the line between procedure and substance is not always clear. “[C]lassification of a law as ‘substantive’ or ‘procedural’ for *Erie* purposes is sometimes a challenging endeavor.”²⁰ Since *Erie* in 1938, the Court has struggled to explain the doctrine. For a while, it looked to whether a state statute was “outcome determinative,” and if so, it labeled it “substantive” and applied state law.²¹ The Court moved away from this approach in *Hanna v. Plumer*.²² In *Hanna*, the Court found that, on the basis of the Necessary and Proper Clause, combined with Congress’s constitutional power to establish lower federal courts, Congress could “regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.”²³ In *Sibbach v. Wilson & Co.*,²⁴ the Court announced the test for determining if a federal rule “abridge[s], enlarge[s], or modif[ies] any substantive right.”²⁵ “The test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”²⁶

Together, *Hanna* and *Sibbach* hold that if there is a direct conflict between a federal rule and a state statute, the federal rule will supplant the state statute so long as the *federal rule* can rationally be classified as procedural and it, in fact, “really regulates procedure.” This is so because if the federal rule is rationally capable of classification as procedural, then the Supremacy Clause requires the conflicting state law to give way. If, on the other hand, there is not a direct conflict between the federal rule and the state statute, then *Hanna* requires that the “relatively unguided *Erie*”²⁷ choice be made as to whether state or federal law applies, with RODA as the guide. In making that choice, the

provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.” *Id.*

18. 28 U.S.C. § 2072 (2006).

19. *Id.*

20. *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 427 (1996).

21. *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945).

22. 380 U.S. 460 (1965).

23. *Id.* at 472 (emphasis added).

24. 312 U.S. 1 (1941).

25. *Id.* at 14; 28 U.S.C. § 2072 (2006).

26. *Sibbach*, 312 U.S. at 14 (emphasis added).

27. *Hanna*, 380 U.S. at 471.

Court cautioned that the “[o]utcome-determination analysis was never intended to serve as a talisman,”²⁸ and that the outcome-determination test “cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”²⁹ In that case, a court would consider whether application of the federal rule would lead to forum-shopping or inequitable administration of the laws, and if so, *Erie* would dictate that the federal rule give way to the state statute.

But a court applying the REA analysis, where there *is* a direct conflict, would only assess the state statute for the purpose of determining if there is a conflict with a federal rule—to determine if the federal rule affects substantive rights in violation of the REA, the court would look only to the *federal rule* to see if it regulates procedure.³⁰ Unfortunately, the Court did not leave well enough alone. In *Gasperini v. Center for Humanities*,³¹ Justice Ginsburg, writing for the Court, stated that federal rules should be interpreted “with sensitivity to important state interests.”³² This command seemingly comports with the REA’s requirement that the federal rules of procedure not affect substantive rights. But it marks a departure from *Hanna* and *Sibbach*—one that Justice Scalia refuses to take in *Shady Grove*.³³ I turn now to the Court’s decision in *Shady Grove*.

C. *Rule 23 v. Section 901(b): Unavoidable Conflict*

Justice Scalia, joined by Justices Thomas, Roberts, Sotomayor, and Stevens, wrote the majority opinion reversing the Second Circuit and finding that Rule 23 and section 901(b) of the New York procedural code were in conflict—“[b]oth of § 901’s subsections undeniably answer the same question as Rule 23: whether a class action may proceed for a given suit.”³⁴ But that was the only issue on which Justice Scalia was able to muster five votes. Justice Stevens penned a separate concurring opinion, suggesting that in some cases, an ordinarily procedural state law

28. *Id.* at 466-67.

29. *Id.* at 468.

30. *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1444 (2010).

31. 518 U.S. 415 (1996).

32. *Id.* at 427 n.7.

33. Justice Scalia acknowledges the obvious criticism of his position in favor of the *Sibbach* test, which is that it is difficult to determine if a federal rule “really regulates procedure” if one is not allowed to examine the state law to determine its substantive effect. *Shady Grove*, 130 S. Ct. at 1445-46. While this critique is valid, the opposite result, with the potential for variation in the meaning of the federal rules from state to state, “would be chaos.” *Id.*

34. *Id.* at 1439.

might be so “sufficiently interwoven” with the state’s substantive law as to require it to supplant a federal rule.³⁵ Justice Scalia devoted a large section of his opinion to refuting Justice Stevens, a section that Justice Sotomayor did not join.³⁶

Justice Scalia’s critical disagreement with the dissent, written by Justice Ginsburg and joined by Justices Breyer, Kennedy, and Alito, is based on whether Rule 23 is in conflict with New York’s law banning class actions for statutory penalties. On this point, Justice Scalia has the better of the arguments. Rule 23 provides that a class action may be “maintained” if “two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (i.e., numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories of subdivision (b).”³⁷ The New York statute, which is included in the state’s procedural code, discusses when class actions “may not be maintained.”³⁸ At base, the federal statute, Rule 23, discusses when class actions *may* be maintained, and the New York statute, section 901(b), discusses when they *may not* be maintained. Rule 23 is completely silent about statutory penalty cases. Very clearly, a statutory penalty class action, like the litigation in *Shady Grove*, is disallowed under the New York rule, and allowed under Rule 23—the conflict between the federal and state law could not be more direct.

Justice Scalia rejects the Second Circuit’s argument that the New York law actually addresses a different question—whether a certain type or class of claims is *eligible* for class treatment.³⁹ Under the Second Circuit’s reading, the dispute in *Shady Grove* would never reach the doorstep of Rule 23 because New York law would make it ineligible for maintenance as a class action. But as Justice Scalia states, “the line between eligibility and certifiability is entirely artificial; both are preconditions for maintaining a class action.”⁴⁰ The fact that the words are interchangeable is “a sure sign that . . . the distinction is made-to-order.”⁴¹ Further support, as Justice Scalia notes, is found in specific federal claims that Congress has put outside Rule 23’s reach.⁴² Congress

35. *Id.* at 1456 (Stevens, J., concurring).

36. *Id.* at 1442, 1444 (plurality opinion).

37. *Id.* at 1437; FED. R. CIV. P. 23.

38. N.Y. C.P.L.R. 901(b) (McKinney 2010).

39. *Shady Grove*, 130 S. Ct. at 1438.

40. *Id.*

41. *Id.*

42. *Id.* Justice Scalia cites 8 U.S.C. § 1252(e)(1)(B) (2006) (addressing judicial review of alien removal orders). Allstate argued in briefing that this fact demonstrated that Rule 23 was *not* all-inclusive, and thus, left room for the operation of section 901(b). Brief for Respondent at 14,

believed that, unless it specifically excepted certain claims, cases meeting the requirements of Rule 23 would be permitted to proceed as class actions. Therefore, had Congress meant to except from Rule 23's coverage suits seeking statutory penalties, it would have done so explicitly.

The dissenters, led by Justice Ginsburg, disagree that there is a direct conflict between Rule 23 and section 901(b). Justice Ginsburg's analysis rests on ambiguous state legislative history and the conclusion that New York's statute, which, by its terms, regulates when class actions may not be *maintained*, actually is a substantive cap on damages. Justice Ginsburg points to the signing statement of then-Governor, Hugh Carey of New York, who said that section 901(b) "empowers the court to prevent abuse of the class action device and provides a *controlled remedy*."⁴³ She concludes, "The limitation was not designed with the fair conduct or efficiency of litigation in mind. Indeed, suits seeking statutory damages are arguably *best* suited to the class device because individual proof of factual damages is unnecessary."⁴⁴ Justice Ginsburg goes on to conclude that

New York's decision instead to block class-action proceedings for statutory damages therefore makes scant sense, except as a means to a manifestly substantive end: Limiting a defendant's liability in a single lawsuit in order to prevent the exorbitant inflation of penalties—remedies the New York Legislature created with individual suits in mind.⁴⁵

If section 901(b)'s drafters intended it to serve a "manifestly substantive end" as Justice Ginsburg concludes, why did the legislature choose to put it in the state's *procedural* code? And why did they use language that mimics the *procedural* language of Rule 23—whether suits may or may not be "maintained" as class actions? Indeed, as Shady Grove argued at oral arguments,⁴⁶ section 901(b) is not limited to actions based upon New York substantive law. As petitioners argue in their brief, "[b]ecause New York has no power to determine the substantive

Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010) (No. 08-1008), 2009 U.S. S. Ct. Briefs LEXIS 836 at *14. The Court rejected this argument and instead found this fact detrimental to Allstate's position. *Shady Grove*, 130 S. Ct. at 1438.

43. *Shady Grove*, 130 S. Ct. at 1464 (Ginsburg, J., dissenting) (citing Memorandum on Approving L. 1975, Ch.207, reprinted in 1975 N.Y. Laws, at 1748).

44. *Id.* at 1465.

45. *Id.*

46. Transcript of Oral Argument at 13-14, *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) (No. 08-1008).

rights of litigants under federal statutes, or statutes of other states, the facial applicability to section 901(b) to actions brought under such statutes is incompatible with the notion that it defines substantive rights.”⁴⁷

True, as petitioners admitted at oral arguments,⁴⁸ there are no examples of New York courts applying section 901(b) to actions based on other *states’* substantive laws, though there have been cases applying it to federal substantive laws.⁴⁹ This is hardly a convincing attack on the procedural nature of the law—after the New York courts initially decided the statute applied as a procedural rule to bar statutory penalty class actions in the federal cases, why would anyone else file such a claim in New York?

Justice Ginsburg acknowledges that “[i]t is true that section 901(b) is not specifically *limited* to claims arising under New York law. But neither is it expressly *extended* to claims arising under foreign law.”⁵⁰ Justice Ginsburg goes on to state that “New York legislators make law with New York plaintiffs and defendants in mind, i.e., as if New York were the universe,” suggesting that the legislature simply did not contemplate that New York courts might hear cases based on other states’ laws.⁵¹

The implication, that New York would have to explicitly extend application of a rule to foreign claims in order for it to definitively classify that rule as procedural, is too stretched. The state’s joinder rules, for example, say nothing about their explicit application to foreign claims.⁵² Under Justice Ginsburg’s theory, the absence of such an explicit statement might make the joinder rules substantive. Furthermore, the New York legislature included a provision in its procedural code granting full faith and credit to the judgments of foreign jurisdictions,⁵³ belying Justice Ginsburg’s claim that the New York legislature operates under the impression that the legal universe consists solely of New York plaintiffs and defendants. Finally, the state

47. Brief for Petitioners, *supra* note 2, at 36.

48. Transcript of Oral Argument, *supra* note 46, at 14.

49. See *Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*, 799 N.Y.S.2d 795 (N.Y. App. Div. 2005) (rejecting the argument that section 901(b) was substantive and applying it to claim under federal Telephone Consumer Protection Act); *Vickers v. Home Fed. Sav. & Loan Ass’n*, 390 N.Y.S.2d 747 (N.Y. App. Div. 1977) (permitting class action under federal Truth in Lending Act because it expressly authorized class actions, as required by section 901(b)).

50. *Shady Grove*, 130 S. Ct. at 1469 (Ginsburg, J., dissenting).

51. *Id.*

52. N.Y. C.P.L.R. 601 (McKinney 2010).

53. N.Y. C.P.L.R. 5402(b) (McKinney 2010).

legislature was explicit in the introduction to its procedural rules that “the civil practice law and rules shall govern *the procedure* in civil judicial proceedings in all courts *of the state . . .*”⁵⁴ The clarity of the statutory text undermines Justice Ginsburg’s turn to the legislative history, which itself is not exceptionally convincing.

More alarming are the potential ramifications of Justice Ginsburg’s argument on future applications of Rule 23 in federal court. Justice Ginsburg opens her dissent with the argument that section 901(b) is actually about damages: “The Court today approves Shady Grove’s attempt to transform a \$500 case into a \$5,000,000 award . . .”⁵⁵ Justice Ginsburg conflates each class member’s *claim* with the class action *case*. This is what every class action does—it is a procedural tool to permit claimants to aggregate many *claims* into one *case*. It is impossible to ignore the implication of Justice Ginsburg’s argument on the operation of Rule 23—if accepted, her argument inescapably brings into question whether Rule 23 is truly procedural, or if it, in fact, is actually substantive, creating just the type of slippery slope Justice Ginsburg derides.⁵⁶

If it is true that section 901(b)—again, by its terms about “maintenance” of a class action—is *actually* a substantive cap on damages, then how does Rule 23 retain its procedural label? It, too, is about when class actions may be maintained. If the New York statute’s prohibition of class actions is really a cap on damages over a certain amount, then how is Rule 23 not actually a substantive *grant* of damages over a certain amount? Accepting her argument, Rule 23 is actually a substantive expansion of litigating power for each claimant—leading to a large case award. Justice Ginsburg, perhaps anticipating this argument (one that was not made by Justices Scalia or Stevens), preemptively argues that Rule 23 is, in fact, procedural.

Rule 23 prescribes the considerations relevant to class certification and postcertification proceedings—but it does not command that a particular remedy be available when a party sues in a representative capacity. Section 901(b), in contrast, trains on the latter issue.

54. N.Y. C.P.L.R. 101 (McKinney 2010) (emphasis added).

55. *Shady Grove*, 130 S. Ct. at 1460 (Ginsburg, J., dissenting).

56. *Id.* at 1465 n.5. Justice Ginsburg responds to the Petitioner’s argument that, if Allstate were to prevail, courts would always look to state law rather than Rule 23 when certifying classes, by stating that “[t]his slippery slope projection is both familiar and false,” and noting that “Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski to the bottom.” *Id.* (citing ROBERT H. BORK, *THE TEMPTING OF AMERICA* 169 (1990)). Perhaps that statement is so, but it assumes a slope with no slip.

Sensibly read, Rule 23 governs procedural aspects of class litigation, but allows state law to control the size of a monetary award a class plaintiff may pursue.⁵⁷

Justice Ginsburg draws a distinction that does not exist—or exists only on the basis of scant (and refutable) state legislative history. Also, her last point is incorrect. Section 901(b) says nothing about what a *class plaintiff* may pursue—it just says they cannot aggregate their claims. On a purely textual basis, Rule 23 allows class actions where section 901(b) does not—they are precisely opposites. At least for those particular cases, accepting Justice Ginsburg’s argument, one can easily argue that Rule 23 does *not* govern procedural aspects of class litigation—instead it actually operates as a substantive *floor* on damages, by allowing individual damages to be aggregated into a large *case* award—that, in theory, is just the sum of all individual claims, in practice, is larger because most individuals would not sue on their own.⁵⁸ Indeed, CAFA, the statute that expanded federal jurisdiction for class actions, specifically mandates that class actions governed under Rule 23 in diversity cases involve damages in excess of five million dollars.⁵⁹ Under Justice Ginsburg’s analysis, Rule 23, particularly when operating in coordination with CAFA, is actually a substantive regulation about damages.

It is not difficult to imagine that, if Justice Ginsburg had prevailed, a federal judge not fond of class actions⁶⁰ might adopt this argument to declare, on an as-applied basis, that a certain run-of-the-mill class action suit under Rule 23 was impermissibly substantive—precisely for the reason that *all* class actions meet the superiority requirement of Rule 23(b)(3). They involve small individual claims, and without the class action mechanism, there would be little economic incentive for an individual to bring suit.⁶¹ So conceived, Rule 23 would run afoul of

57. *Id.* at 1465-66.

58. *See, e.g.*, Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842 (1974). Landers argues that in a practical sense, Rule 23 created an action that otherwise did not exist because no one would bring many of the small individual claims that are aggregated into class actions—and that this treats businesses, who also often have no recourse for small individual claims against clients, unfairly. *Id.* at 845-47.

59. 28 U.S.C. § 1332(d)(2) (2006).

60. *See, e.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995). In *Rhone-Poulenc*, Judge Posner reversed a grant of class certification for HIV-positive hemophiliacs on the concern that an unreviewable class certification grant could lead to “blackmail settlements.” *Id.* at 1298 (citing HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973)).

61. *Cf.* FED. R. CIV. P. 23(b)(3) advisory committee’s note. The Advisory Committee’s Note states that “[t]he interests of individuals in conducting separate lawsuits may be so strong as to call

section 34 of the Rules Enabling Act, which requires that the federal rules “not abridge, enlarge or modify any substantive right,”⁶² because the defendant would otherwise *face no lawsuit*.

Of course, this argument is not what Justice Ginsburg intended—she rejected it herself by declaring Rule 23 procedural;⁶³ however, that is not the point. Following Justice Ginsburg’s argument, to its natural conclusion, inevitably leads one to question the procedural status of Rule 23—and that alone should suffice to demonstrate the dissent’s ill-conception, given Rule 23’s consistent and widespread acceptance.⁶⁴

for denial of a class action.” *Id.* A class action suit will meet the superiority requirement where this is *not* the case—that is, “where each injured person’s limited damages would make individual litigation cost-prohibitive.” ROBERT H. KLONOFF & EDWARD K.M. BILICH, *CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION* 245 (2000).

62. 28 U.S.C. § 2072 (2006).

63. *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1466 (2010) (Ginsburg, J., dissenting).

64. The acceptance of Rule 23’s constitutionality, though unanimous among the Court—as demonstrated in *Shady Grove*—has not been entirely unanimous among commentators. Martin Redish argues that Rule 23—and by extension the REA and the entirety of the Federal Rules of Procedure and Evidence—are unconstitutional because they are promulgated by the Supreme Court, and Congress only acts if it objects to them. MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 228-32 (2009). Redish argues that class actions “undermine democracy . . . by the indirect manipulation of underlying substantive law, under the guise of a procedural mechanism. In this manner, the class action contravenes basic dictates of legislative transparency and electoral accountability that are essential to the operation of a successful democratic system.” *Id.* at 228.

Redish extends his criticism to the process established by the REA: “the current class action rule is legislatively promulgated by the one branch of the federal government that is unrepresentative of and unaccountable to the electorate.” *Id.* at 229. He then concludes by suggesting “[f]or the modern class action rule to possess both constitutional and democratic legitimacy, it must be promulgated, in the first instance, through legislative enactment in accord with the constitutional dictates of bicameralism and presentment.” *Id.* To be sure, Redish acknowledges that as a practical matter, there is no reason to believe that the constitutionality of the REA, at least as declared by the Court, is in doubt. *Id.* at 64. He nonetheless doubts its constitutionality. *See also* Martin H. Redish, Peter Julian, & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 641 (2010) (stating that cy pres awards to charities of unclaimed settlement funds violate the constitution by creating a trilateral, rather than bilateral, adjudicative system, turning a compensatory scheme into a civil fine, and violating the due process rights of defendants and absent class members); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1575 (2007) (arguing that the mandatory participation components of Rule 23 and the opt-out provisions are unconstitutional impositions on individual litigants’ autonomy under procedural due process).

While Redish raises interesting points, his main constitutional objection—that the REA’s process of Court-promulgated federal rules undermines democratic legitimacy—is unconvincing. First, Congress can always reject the rules. Second, his argument relies on the suggestion that it is “political nonsense” that the rules regulate procedure internal to the operation of the courts—that the rules “impact the scope of substantive political choices.” REDISH, *supra*, at 64. However, as Justice Scalia states in *Shady Grove*, this “has no bearing on [the parties’] legal rights . . . [and is]

The better view—and that of five justices—is that there is a direct conflict between Rule 23 and section 901(b). Indeed, Justice Stevens, in his concurrence, says the dissenters should “argue within the Enabling Act’s framework” rather than deny a conflict.⁶⁵

III. JUSTICE STEVENS’S “SUFFICIENTLY INTERWOVEN” TEST

Justice Stevens begins his opinion by stating his agreement with Justice Scalia that Rule 23 applies in the case, but also that he agrees with Justice Ginsburg that “there are some state procedural rules that federal courts must apply in diversity cases because they function as part of the State’s definition of substantive rights and remedies.”⁶⁶ Justice Stevens announces the test that he would apply: “[I]f a federal rule displaces a state rule that is procedural in the ordinary sense of the term, but sufficiently interwoven with the scope of a substantive right or remedy,”⁶⁷ then the federal rule must give way to the state rule, lest the “substantive rights” sentence of the REA be violated.

While Justice Stevens agrees with Justice Scalia that the relevant framework is provided by the REA, and not the RODA, Justice Stevens believes that the state law must be examined and that “federal courts must respect [the] choice” of states “to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies.”⁶⁸ Justice Stevens, like Justice Ginsburg, leans on the statement from *Gasperini* that federal rules should be interpreted with

just the sort of ‘incidental effec[t]’ [the Court has] long held does not violate [the REA].” 130 S. Ct. at 1443. Affecting substantive political choices is simply not the same thing as “abridging, expanding, or modifying substantive *rights*.” 28 U.S.C. § 2072(b) (2006) (emphasis added). Simply put, no plaintiff’s or defendant’s substantive rights are changed by the existence of the class action mechanism. That a plaintiff might choose to *exercise* a preexisting right, as a result of Rule 23, is of no relevance to the constitutional analysis.

Finally, Redish’s concerns about democratic accountability are overstated. Congress can always—and in the case of the 1973 Federal Rules of Evidence, did—reject a rule. *See* Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9. Further, Congress has enacted a number of laws passing on or discussing Rule 23—indicating, through Article I bicameralism and presentment, its endorsement of the Rule. *See, e.g.*, 8 U.S.C. § 1252(e)(1)(B) (2006) (prohibiting use of class actions for immigration removal judicial review); 15 U.S.C. § 77z-1 (2006) (establishing procedures for private securities litigation class actions); 15 U.S.C. § 2310(a)(3) (2006) (asserting Rule 23 representative plaintiff requirements for consumer product warranty class actions); 15 U.S.C. § 6614 (2006) (establishing requirements for class actions based on Y2K bug product defects); 28 U.S.C. § 1332(d) (2006) (extending federal diversity jurisdiction to cover class actions based on minimal diversity for disputes in excess of five million dollars).

65. *Shady Grove*, 130 S. Ct. at 1457 (Stevens, J., concurring).

66. *Id.* at 1448.

67. *Id.* at 1456.

68. *Id.* at 1450.

“sensitivity to important state interests and regulatory policies.”⁶⁹ Notably, Justice Stevens states his disagreement with Justice Ginsburg’s application of RODA: “I disagree with Justice Ginsburg . . . about the degree to which the meaning of federal rules may be contorted, absent congressional authorization to do so, to accommodate state policy goals.”⁷⁰

Justice Stevens takes Justice Scalia to task for ignoring the REA’s substantive rights limitation—suggesting that his test is no more difficult for courts to apply than that of the plurality, and that even if it were, Justice Scalia’s preference for bright-line rules “does not give us license to adopt a second-best interpretation of the Rules Enabling Act. Courts cannot ignore text and context in the service of simplicity.”⁷¹ Summing up his view of Justice Scalia’s approach, Justice Stevens says: “The plurality’s ‘test’ is no test at all—in a sense, it is little more than the statement that a matter is procedural if, *by revelation*, it is procedural.”⁷²

Applying his test, Justice Stevens finds first that Rule 23 controls the question of whether a class may be certified⁷³ and that section 901(b) is not sufficiently interwoven with the state’s substantive law so as to pre-empt application of Rule 23.⁷⁴ He cites the fact that section 901(b) applies to claims based on federal and other states’ laws,⁷⁵ that it is found in the procedural section of the state’s code,⁷⁶ and that the legislative history cited by Justice Ginsburg only demonstrated that there was “*some policy reason*”⁷⁷ for the law—but that the legislature demonstrated a “classically procedural calibration of making it easier to litigate claims in New York courts (under any source of law) only when it is necessary to do so, and not making it *too* easy when the class tool is not required.”⁷⁸ Finally, he notes that Justice Ginsburg’s assertion that this turns a \$500 case into a \$5,000,000 case⁷⁹ is incorrect—that it, in fact, turns 10,000 \$500 cases into one \$5,000,000 case.⁸⁰ In the end,

69. *Id.* at 1449 (citing *Gasparini v. Ctr. for Humanities*, 518 U.S. 415, 427 n.7 (1996)).

70. *Shady Grove*, 130 S. Ct. at 1451 n.5.

71. *Id.* at 1454.

72. *Id.* at 1454 n.10.

73. *Id.* at 1456.

74. *Id.* at 1459-60.

75. *Id.* at 1457.

76. *Id.* at 1460.

77. *Id.* at 1458 (emphasis added).

78. *Id.* at 1459.

79. *Id.* at 1460 (Ginsburg, J., dissenting).

80. *Id.* at 1459 n.18 (Stevens, J., concurring).

Justice Stevens finds the text of section 901(b) too straightforwardly procedural to make application of Rule 23 a violation of the REA.⁸¹

In doing so, Justice Stevens clarifies his newly announced test to reflect the rarity with which a federal Rule will be found to violate the substantive rights limitation of the REA:

The mere fact that a state law is designed as a procedural rule suggests it reflects a judgment about how state courts ought to operate and not a judgment about the scope of state-created rights and remedies. And for the purposes of operating a federal court system, there are costs involved in attempting to discover the true nature of a state procedural rule and allowing such a rule to operate alongside a federal rule that appears to govern the same question. The mere possibility that a federal rule would alter a state-created right is not sufficient. *There must be little doubt.*⁸²

To be sure, Justice Stevens's approach gives the superficial satisfaction of giving credence to the REA's limitation on the federal Rules' effects on substantive rights. But the problem is that, just as he critiques Justice Scalia, Justice Steven's test is also *no test at all*—for it will always lead to the same answer—application of the federal rule.

Justice Stevens states that it is “rare that a federal rule that is facially valid under [the REA] will displace a State's definition of its own substantive rights.”⁸³ Indeed, as Justice Stevens fashions his test, it is almost impossible to conceive of a state law that would ever be found to be “sufficiently interwoven” with the state's definition of substantive rights, yet at the same time “ordinarily procedural” in form such that a court would ever reach the need to *apply* his test in the first place. Any state law that is “ordinarily procedural” in its form, but “sufficiently interwoven” with the state's substantive law, in such a way that there is “little doubt” the state *meant* it to be substantive, would simply not realistically be in direct conflict with a federal rule and, thus, would not be judged against the REA. That is, the group of state laws about which Justice Stevens is concerned would be diverted off the REA track and into the regular RODA analysis, to determine, per *Hanna*, if application of the federal rule would lead to forum-shopping or an inequitable administration of laws.⁸⁴

81. *Id.* at 1460.

82. *Id.* at 1457 (emphasis added).

83. *Id.* at 1454 n.10.

84. *See Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

As examples of state rules that are ordinarily procedural, but might be so interwoven as to require application over a contrary federal rule, Justice Stevens suggests that a rule about how damages are reviewed on appeal may actually be a substantive damages cap. A statute of limitations rule might actually be “a limit on the existence of the right to seek redress,” and a standard of proof rule could really be a “definition of the scope of the claim.”⁸⁵ However, these examples do not support his premise.

His first example is a recitation of the facts of *Gasperini v. Center for Humanities*.⁸⁶ In *Gasperini*, a New York statute permitted appellate judges to order a new trial if a jury award “deviates materially from what would be reasonable compensation.”⁸⁷ The Court rejected the argument that federal Rule 59(a), which allows for courts to grant new trials, was in direct collision with the New York statute.⁸⁸ As such, the REA *did not apply*—there was no direct conflict between the federal rule and the state law. Justice Stevens dissented in that case, but only on the disposition. Notably, he agreed that “[b]ecause there is no conceivable conflict between [Rule] 59 and the application of the New York damages limit, this case is controlled by *Erie* and not the Rules Enabling Act’s limitation on federal procedural rules that conflict with state substantive rights.”⁸⁹ As his first example of a state law that might be subject to his “sufficiently interwoven” test for the REA’s substantive rights limitation, Justice Stevens cited a law that he previously agreed is outside the scope of his test.

As to Justice Stevens’s other proposed candidates for his “sufficiently interwoven” test, there simply is *no federal rule on point* that would cause his test to even be applied to them. “A rule that a plaintiff can bring a claim for only three years” that “may really be a limit on the existence of the right to seek redress,”⁹⁰ would never be in direct conflict against a federal rule because there simply is no procedural federal rule establishing a statute of limitations. In fact, it is long settled that statutes of limitations are substantive for *Erie* purposes⁹¹—so that again, RODA applies, not REA. Finally, there is likewise no federal rule or statute on point establishing burdens of

85. *Shady Grove*, 130 S. Ct. at 1453 n.8 (Stevens, J., concurring).

86. 518 U.S. 415 (1996).

87. *Id.* at 418; N.Y. C.P.L.R. 5501(c) (McKinney 2010).

88. *Gasperini*, 518 U.S. at 438 n.22.

89. *Id.* at 440 n.1 (Stevens, J., dissenting).

90. *Shady Grove*, 130 S. Ct. at 1453 n.8 (Stevens, J., concurring).

91. *See Guar. Trust Co. v. York*, 326 U.S. 99, 110 (1945).

proof—any potential conflict between a federal law and a state law would be handled under the RODA analysis.

The fact that Justice Stevens could not come up with a relevant procedural state law that is so interwoven with a state’s substantive law so as to make application of a federal rule a violation of the REA (or even *undergo* his REA analysis) demonstrates that the initial appeal of his approach—that he gives muscle to the substantive rights limitation of the REA—is actually misplaced. In practice, Justice Stevens’s test would simply lead to unnecessary confusion and require federal courts to “consider[] hundreds of state rules”⁹² when there is seemingly no chance that any rule that would be found substantive would undergo his test—any such rule would be diverted off the REA track for lack of a direct conflict with a federal rule. The analytical burden of Justice Stevens’s test outweighs its initial academic appeal. As Justice Scalia concludes, “[t]he more one explores the alternatives to *Sibbach*’s rule, the more its wisdom becomes apparent.”⁹³

IV. CONCLUSION: FUTURE LITIGATION AND *SHADY GROVE*’S IRONY

Shady Grove did little to clarify things. Indeed—it seems to have made matters worse for those who might wish to understand the Court’s *Erie* doctrine. Going forward, will Justice Scalia’s approach, true to *Hanna* and *Sibbach*, apply—or are courts to apply Justice Stevens’s “sufficiently interwoven” test when a federal rule conflicts with a state law?

Some commentators have suggested that Justice Stevens’s approach controls, citing the practice that when there is a plurality opinion, the narrower approach controls;⁹⁴ however, it is hard to classify Justice Stevens’s as the “more narrow” opinion. Against what benchmark are we to judge narrowness? If deference to state procedural laws is the benchmark, perhaps, Justice Stevens’s opinion is more narrow. But Justice Stevens’s test, as this paper has demonstrated, reaches the same result in all but potentially a few unascertainable cases, and in so doing, up-ends precedent in *Hanna* and *Sibbach*. In that very real sense, Justice

92. *Shady Grove*, 130 S. Ct. at 1447.

93. *Id.*

94. See, e.g., Marcia Coyle, *Supreme Court Ruling Opens Federal Courts to More Class Actions*, THE NAT’L L.J., Apr. 1, 2010, available at <http://www.law.com/jsp/scm/PubArticleSCM.jsp?id=1202447278574>; Lyle Denniston, *Analysis: Sorting Out an Erie Sequel*, SCOTUSBLOG (Mar. 31, 2010, 1:16 PM), <http://www.scotusblog.com/2010/03/analysis-sorting-out-an-erie-sequel>.

Scalia's plurality opinion is the more narrow. It certainly requires less analysis for future courts.

Justice Ginsburg asserts that "a majority of [the] Court, it bears emphasis, agrees that Federal Rules should be read with moderation in diversity suits to accommodate important state concerns."⁹⁵ But only *one* justice—Justice Stevens—did so as part of the REA analysis, where a federal rule is in direct conflict with a state law. The four dissenters ignored Justice Stevens's plea that they join him in arguing under the REA framework.⁹⁶ There was never any question that, under the RODA analysis conducted by the dissenters, important state interests should be considered. So, in that sense, the only five justices to speak on the question of whether important state interests should be considered as part of a REA analysis are those in the plurality and Justice Stevens. Four justices say no; one justice says yes. The other four—the *Shady Grove* dissenters—have not weighed in. In that sense, Justice Ginsburg's point does not bear as much emphasis as she suggests.

While *Shady Grove*'s result, as announced by the plurality decision, seems to best accord with the Court's *Erie* jurisprudence and follow the most workable path for courts applying the Rules in diversity cases, one cannot help but remain alarmed by its result. New York created a substantive cause of action and then decided, for whatever reason, that it did not want that action to be brought through the class action vehicle. Permitting such claims to be brought as class actions in federal court seems unfair to defendants. As Justice Ginsburg notes, the most effective way for Congress, should it be concerned with this outcome, to remedy this seemingly unfair *result* of a fair *application* of the *Erie* doctrine, is to pass a federal statute making diversity class actions unavailable in cases where the state providing the substantive law does not allow such claims to be brought as class actions in state court.⁹⁷

What is clear is the irony of this case, as Justice Ginsburg points out.⁹⁸ Were it not for CAFA extending federal diversity jurisdiction to class actions with minimal diversity, *Shady Grove* could never have brought this action in federal court. CAFA was passed for the express purpose of *limiting* the number of class actions, under the expectation that federal judges were less likely to certify class actions than state judges.

95. *Shady Grove*, 130 S. Ct. at 1463 n.2 (Ginsburg, J., dissenting).

96. *Id.* at 1457 (Stevens, J., concurring).

97. *Id.* at 1473 n.15 (Ginsburg, J., dissenting).

98. *Id.* at 1473.

If CAFA had worked as Congress had intended, then one would expect there to have been an increase in the number of class action removals from state court to federal court, and a decrease in class certifications overall. In the immediate aftermath of CAFA, removals from state court did increase, but have since returned to pre-CAFA levels.⁹⁹ What is anomalous and, perhaps, the most striking result of CAFA, is the dramatic increase in new original filings of class actions in federal court—that is, instances in which *plaintiffs* have chosen to file their class actions in federal, rather, than state court.¹⁰⁰ Indeed, filings increased in district courts in eleven of the twelve circuits.¹⁰¹ Given the large number of district courts in which plaintiffs’ class action counsel can choose to file, it should not be altogether that surprising that they would use CAFA to file their actions strategically in federal district courts they find favorable, rather than be removed from favorable state courts into potentially unfavorable federal courts.

CAFA was not the deathblow to class actions that some may have hoped it would be. Indeed, CAFA seems to have led to results Congress did not expect: an increase in the number of class actions in federal court, and now it has torpedoed a state’s attempt to rein in class actions. *Shady Grove* provides a stark example of what can happen when Congress tries to reach a substantive outcome—decreased liability for defendant businesses—by tinkering with procedural mechanisms and jurisdiction.

99. EMILY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS 2 (2008), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/\\$file/cafa0408.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf).

100. *Id.*

101. *Id.*