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Relatively Unguided: Examining the Precedential Value of the Plurality Decision in Shady Grove Orthopedic Associates v. Allstate Insurance Co., and Its Effects on Class Action Litigation

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RELATIVELY UNGUIDED: EXAMINING THE PRECEDENTIAL VALUE OF THE PLURALITY DECISION IN *SHADY GROVE ORTHOPEDIC ASSOCIATES V. ALLSTATE INSURANCE CO.*, AND ITS EFFECTS ON CLASS ACTION LITIGATION

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I. INTRODUCTION

> "*In the sky, there is no distinction of east and west; people create distinctions out of their own minds and then believe them to be true.*"
>
> —Buddha

Shady Grove Orthopedic Associates v. Allstate Insurance Co.[1] is the latest installment in the U.S. Supreme Court's ongoing struggle to articulate a coherent analytical distinction between substantive and procedural rules as interpreted by *Erie Railroad Co. v. Tompkins*[2] and its progeny ("the *Erie* doctrine"). While the Court cobbled together majority support for the judgment that in diversity cases Federal Rule of Civil Procedure 23 ("Rule 23") conflicted with and preempted a New York statutory prohibition against certain class action lawsuits, the justices divided sharply over the proper rationale supporting that result. By issuing a plurality opinion, the Court layered precedential uncertainty on doctrinal ambiguity. Decoding what *Shady Grove* means for *Erie* doctrine jurisprudence requires careful evaluation under the narrowest-grounds doctrine that the

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

2. 304 U.S. 64 (1938).

Court set forth in *Marks v. United States*.[3] This Comment seeks to determine what precedential consequences follow from *Shady Grove* under the *Marks* doctrine and what such consequences will mean for future applications of the *Erie* doctrine—in particular for state class action litigation.

Part II provides a summary of the Court's decision in *Shady Grove*. Part III provides a brief overview of the *Erie* doctrine in preparation for the discussion of the Court's fragmented *Shady Grove* opinion in Part IV. Part V analyzes the precedential import of *Shady Grove* under the narrowest-grounds doctrine and then discusses the implications of *Shady Grove* for the *Erie* doctrine and for class action litigation in light of the Class Action Fairness Act (CAFA). Part VI concludes.

II. STATEMENT OF THE CASE

After an automobile accident, Sonia E. Galvez received medical treatment from Shady Grove Orthopedic Associates ("Shady Grove"), a Maryland corporation.[4] Galvez assigned to Shady Grove her rights to recover insurance benefits under her insurance policy, issued in New York by Allstate Insurance Company ("Allstate"), an Illinois corporation.[5] Shady Grove submitted a claim to Allstate.[6] Under New York law, the claim would be subject to statutory interest of two percent per month if Allstate failed to pay or deny benefits within thirty days.[7] Allstate paid late but refused to remit statutory interest, which amounted to roughly $500.[8]

Alleging that Allstate routinely failed to remit statutory interest, Shady Grove brought a class action suit in the Eastern District of New York on behalf of itself and other putative class members, claiming diversity jurisdiction.[9] The district court found that statutory interest constituted a statutory "penalty" under New York law and

3. 430 U.S. 188, 193 (1977). The *Marks* doctrine has been characterized by the Court as "more easily stated than applied . . . ." Nichols v. United States, 511 U.S. 738, 745 (1994).

4. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 466 F. Supp. 2d 467, 469 (E.D.N.Y. 2006), *aff'd*, 549 F.3d 137 (2d Cir. 2008), *rev'd*, 130 S. Ct. 1431.

5. *Id.* at 469–70.

6. *Shady Grove*, 130 S. Ct. at 1436.

7. *Id.*

8. *Id.* at 1436–37.

9. *Shady Grove*, 466 F. Supp. 2d at 469, 472.

that section 901(b) of the New York Civil Practice Law and Rules[10] precluded any class action claim for such a penalty, even though Rule 23 would not have barred the class action.[11] Since Shady Grove's individual claim did not meet the federal amount-in-controversy requirement,[12] the district court concluded that it lacked subject matter jurisdiction to hear the matter.[13]

The Second Circuit affirmed on the basis that section 901(b) and Rule 23 address different issues and therefore do not conflict.[14] The court reasoned that Rule 23 addresses prerequisites for class certification,[15] whereas section 901(b) limits the types of claims eligible for class action treatment even if all of Rule 23's certification requirements are met. Therefore, the court reasoned, section 901(b) is substantive, not procedural, and must be applied in federal diversity cases pursuant to the *Erie* doctrine.[16]

III. THE *ERIE* DOCTRINE IN A NUTSHELL

To better understand the Supreme Court's decision in *Shady Grove*, it will be helpful to briefly review the Court's vertical choice-of-law[17] jurisprudence following the Court's seminal decision in *Erie*. In its most general formulation, the *Erie* doctrine provides that federal courts sitting in diversity jurisdiction[18] apply federal

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

11. *Shady Grove*, 466 F. Supp. 2d at 472, 475.

12. To meet the amount-in-controversy requirement for federal diversity jurisdiction, a plaintiff must seek more than $75,000 in relief. 28 U.S.C. § 1332(a) (2006).

13. *Shady Grove*, 466 F. Supp. 2d at 475.

14. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 549 F.3d 137, 143–45 (2d Cir. 2008), *rev'd*, 130 S. Ct. 1431 (2010).

15. The four prerequisites for class certification under Rule 23 are numerosity, typicality, commonality, and adequacy of representation. *Id.* at 143. In addition, the type of claim must fall into one of three categories. FED. R. CIV. P. 23(a)–(b).

16. *Shady Grove*, 549 F.3d at 143–45.

17. A "vertical choice-of-law" problem refers to a situation in which a court must decide whether to apply a state or federal rule. A "horizontal choice-of-law" problem involves which of two or more states' laws should apply. The Supreme Court has ruled that a federal court should apply the horizontal choice-of-law rules of the state in which the federal court sits. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

18. For the sake of brevity, all future references to federal court activity pertain to diversity jurisdiction. The two general requirements for diversity jurisdiction are that the amount-in-controversy requirement is met and that there is complete diversity between the parties, meaning that every plaintiff is a resident of a different state than every defendant. 28 U.S.C. § 1332(a) (2006). CAFA relaxed the complete diversity requirement for class actions in which more than $5,000,000 is in controversy, authorizing diversity jurisdiction so long as any plaintiff is diverse from any defendant (with some exceptions). *Id.* § 1332(d).

procedural rules but state substantive law.[19] The doctrine nominally originated with the Supreme Court's 1938 decision in *Erie* and has developed through the Court's interpretation of two federal statutes: section 34 of the Judiciary Act of 1789 ("the Rules of Decision Act" or RDA)[20] and the Rules Enabling Act of 1934 ("the Rules Enabling Act" or REA).[21] Under the Court's pre-*Erie* jurisprudence, federal courts had to apply state statutory law, but not state court decisions.[22] Federal courts could thus ignore state court interpretations of state statutes and impose an independent federal common law on the states.[23] Writing for the Court in *Erie*, Justice Brandeis declared that "[t]here is no federal general common law" because the Constitution does not confer power on either Congress or the federal courts to declare substantive rules of common law applicable in a state.[24] In reaching this result, the Court addressed the problem that litigants were manipulating federal diversity jurisdiction to achieve desired outcomes in federal court that were not possible under applicable state law.[25] Discouraging forum shopping and minimizing disparate legal outcomes in state versus federal courts came to be known as the "twin aims of *Erie*,"[26] and they remain important policy touchstones in most applications of the *Erie* doctrine.

At its core, *Erie* established a strong federalism principle: to uphold the constitutional division of power between the state and federal legal systems, federal courts were bound to apply the states'

19. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1448 (2010) (Stevens, J., concurring in part and concurring in the judgment) (citing Hanna v. Plumer, 380 U.S. 460, 465 (1965)).

20. 28 U.S.C. § 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

21. *Id.* § 2072.

22. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 71 (1938) (discussing Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)).

23. *Id.*

24. *Id.* at 78. Some scholars have critiqued Justice Brandeis' constitutional reasoning in *Erie*, arguing that the commerce clause could be construed to confer such power. *See* Adam N. Steinman, *What Is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 312–13 (2008).

25. *See Erie*, 304 U.S. at 73–74 (discussing *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928), in which a Kentucky corporation reincorporated in Tennessee for the purpose of manufacturing diversity jurisdiction to sue in federal court on a contract void under Kentucky law).

26. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

own definitions of litigants' substantive rights when sitting in diversity.[27] However, *Erie* provided little guidance to courts in the critical determination of whether a particular state law should be labeled substantive or procedural.[28] To complicate matters, four years before the *Erie* decision, Congress had passed the Rules Enabling Act, which empowered federal courts to "prescribe general rules of practice and procedure" and led to the adoption of the Federal Rules of Civil Procedure.[29] Following *Erie*, the Court had to devise a framework to promulgate uniform federal rules of procedure while respecting state law in diversity cases.[30]

The Court eventually developed a bifurcated approach to vertical choice-of-law questions. In *Hanna v. Plumer*,[31] a case involving a conflict between federal and state service of process standards, [32] the Court established two distinct analyses depending on whether a vertical choice-of-law question was *guided* or *unguided*.[33] A court faces an unguided *Erie* choice if no Federal Rule of Civil Procedure ("Federal Rule")[34] covers the legal issue presented or the Federal Rule is invalid.[35] In an unguided *Erie* choice, a court must choose between applying a state procedural rule or a judicially created federal procedural standard based on which of the two would best further *Erie*'s twin policy aims.[36] If, after weighing these twin

27. *See id.* at 474 (Harlan, J., concurring) (describing *Erie* as "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems"); *see also* Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 110 (1945) ("*Erie R.[R.] Co. v. Tompkins* has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties.").

28. *See* Steinman, *supra* note 24, at 258–61.

29. 28 U.S.C. § 2072(a) (2006); Steinman, *supra* note 24, at 260.

30. Steinman, *supra* note 24, at 258.

31. 380 U.S. 460 (1965).

32. *Id.* at 461.

33. *Id.* at 471 ("When 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." (italics added)).

34. This Comment follows other *Erie* scholarship in using the capitalized term "Federal Rule" to refer to true Federal Rules of Civil Procedure passed in accordance with the Rules Enabling Act, as distinguished from other federal rules, such as those derived from the principle of stare decisis. *See* Steinman, *supra* note 24, at 261 n.104.

35. Some commentators have questioned the clarity of the distinction between guided and unguided *Erie* choices. Steinman, *supra* note 24, at 282–83 (noting that because the meaning of a Federal Rule is largely determined not by the Rule's text but by judicial gloss, there is a surprisingly strong argument for treating choices between state law and Federal Rules as unguided).

36. *See Hanna*, 380 U.S. at 468.

aims, a court concludes that the choice of rules would be "outcome-affective," the state rule is deemed to be substantive and to apply in federal court, provided there is no countervailing federal interest in maintaining a uniform system of federal procedural rules.[37]

A court faces a guided *Erie* choice when a legal issue is fully covered by an existing Federal Rule or another established federal procedural doctrine.[38] Under this analysis, a court must first decide if the Federal Rule directly conflicts with the state rule by determining if applying the Federal Rule would leave any room for the state rule's operation.[39] In making this determination, the court considers if the Federal Rule can reasonably be interpreted to avoid a conflict.[40] If a direct collision between the Federal Rule and state law is unavoidable, then the Federal Rule prevails and displaces the state law pursuant to the supremacy clause,[41] provided that the Federal Rule is both constitutional (construed to mean that it is "rationally capable of classification" as procedural)[42] and compliant with the REA, which mandates that applying a Federal Rule shall not "abridge, enlarge or modify any substantive right."[43] The Supreme Court has struggled to interpret the scope and meaning of this REA language. In particular, the Court has had difficulty articulating a coherent distinction between cases in which a Federal Rule incidentally (but permissibly) affects litigation outcomes and those in which a Federal Rule impermissibly alters litigants' substantive rights.[44]

The Supreme Court's previous attempts to draw this line led to equivocation concerning whether courts should only evaluate the

37. *See* Gasperini v. Ctr. for Humanities, 518 U.S. 415, 432 (1996) (citing Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958)); *Hanna*, 380 U.S. at 468.

38. *Hanna*, 380 U.S. at 471–72. While guided *Erie* choices typically involve a Federal Rule, it is not a prerequisite. *See* Steinman, *supra* note 24, at 261.

39. Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987) (citing *Hanna*, 380 U.S. at 471–72).

40. The Court has never found a Federal Rule invalid under the REA and appears to prefer either applying the Federal Rule or interpreting the Federal Rule to avoid a conflict. *See* Lucas Watkins, *How States Can Protect Their Policies in Federal Class Actions*, 32 CAMPBELL L. REV. 285, 296 (2010); *see, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 817, 842, 845 (1999) (interpreting Rule 23 to "minimize[] potential conflict with the Rules Enabling Act").

41. U.S. CONST. art. VI; *see* Steinman, *supra* note 24, at 312.

42. *Hanna*, 380 U.S. at 472.

43. 28 U.S.C. § 2072(b) (2006).

44. Steinman, *supra* note 24, at 270.

procedural nature of a given Federal Rule or should also evaluate the threatened state law's significance to state definitions of substantive rights. In *Sibbach v. Wilson & Co.*,[45] the Court stated that a Federal Rule complies with the REA if it "really regulates procedure."[46] The *Sibbach* Court held that Rule 35, which requires a party to submit to a physical examination if physical condition is at issue in the case, regulated procedure and therefore trumped a conflicting Illinois rule prohibiting such examinations.[47] In so holding, the Court rejected the argument that applying the Federal Rule would violate the petitioner's substantive right to be free from bodily intrusion under Illinois law.[48] The Court concluded that a standard that focused on the importance of the state right threatened with displacement, rather than on whether the Federal Rule covered the litigation's procedural aspects, would force courts to pass judgment on the relative value of the policies underlying state laws and thereby "invite endless litigation and confusion worse confounded."[49] In contrast, the Court in *Gasperini v. Center for Humanities, Inc.*[50] noted that in deciding whether a Federal Rule should trump state law, "[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies."[51] This doctrinal gap is what drove the Court to plurality in *Shady Grove*.

IV. REASONING OF THE COURT

A majority of the Court in *Shady Grove* agreed that section 901(b) and Rule 23 actually conflicted. Facing a guided *Erie* choice,[52] a majority of the Court agreed that Rule 23 was valid under the REA and that section 901(b) was not a substantive rule. However, the Court failed to reach a consensus about the proper

45. 312 U.S. 1 (1941).

46. *Id.* at 14 (defining procedure as "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").

47. *Id.* at 14–16.

48. *Id.* at 11. The Court also refused petitioner's proposed standard that "substantive" state rights should be construed to mean "important" or "substantial" rights under the state law scheme. *Id.*

49. *Id.* at 14.

50. 518 U.S. 415 (1996).

51. *Id.* at 428 n.7.

52. Hanna v. Plumer, 380 U.S. 460, 468, 471 (1965); Steinman, *supra* note 24, at 282–83; *see Gasperini*, 518 U.S. at 432.

standard to apply in distinguishing between procedural and substantive rules generally. In particular, the Court struggled to decide whether a state procedural rule that is "bound-up with" a state's definition of substantive rights is cognizable under the Court's *Erie* analysis.[53]

Justice Scalia's lead opinion garnered mixed support, with division in the Court cutting across ideological lines. The numerical breakdown in votes was as follows: five votes for the result that section 901(b) conflicts with and is preempted by Rule 23—with a 4–1 split in the reasoning used to reach the result and Justice Stevens writing separately; three votes supporting Justice Scalia's rebuttal to Justice Stevens' concurrence (with Justice Sotomayor withdrawing support); and four votes in dissent.[54]

A. Majority Support for the Result: Justice Scalia's Lead Opinion

Writing for a majority of the Court, Justice Scalia rejected the Second Circuit's distinction between certifiability and eligibility as artificial, observing that both Rule 23 and section 901(b) address the same question: whether a litigant may maintain a class action lawsuit.[55] Justice Scalia read into the language of Rule 23 a litigant's affirmative entitlement to proceed with a class action if the litigant meets Rule 23's prerequisites.[56] Since section 901(b) precluded Shady Grove from proceeding with its class action even if it met Rule 23's prerequisites, the two rules unavoidably conflicted, necessitating a guided *Erie* analysis.[57] Justice Scalia concluded that Rule 23 is consistent with the REA because applying Rule 23 would

53. *Compare* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1444–47 & nn.9–15 (2010) (Scalia, J., plurality opinion) (arguing against cognizability), *with Shady Grove*, 130 S. Ct. at 1453–55 & nn.8–14 (Stevens, J., concurring in part and concurring in the judgment) (arguing for limited cognizability).

54. Justice Scalia received majority support with respect to Parts I and II-A of his opinion, joined by Chief Justice Roberts and Justices Thomas, Sotomayor, and Stevens. *Id.* at 1435. Justice Sotomayor withdrew support for Part II-C, and Justice Stevens withdrew support for Parts II-B through II-D, submitting a separate concurring opinion. *Id.* Justices Ginsburg, Kennedy, Breyer, and Alito joined in dissent. *Id.*

55. *Id.* at 1437–38. Section 901(b) closely tracks Rule 23's class certification criteria. *Id.* at 1464 (Ginsberg, J., dissenting).

56. *Id.* at 1442 (Scalia, J., majority opinion). Justice Scalia argued that section 901(b)'s additional subject-matter limitations could not be harmonized with Rule 23 because Rule 23 "authorizes *any* plaintiff, in *any* federal civil proceeding to maintain a class action if the Rule's prerequisites are met." *Id.*

57. *Id.* at 1439.

not affect any plaintiff's substantive right to pursue statutory penalties individually; rather, it would only affect class members' ability to pool their individual claims into one lawsuit.[58]

B. Doctrinal Disconnect: Justice Scalia and Justice Stevens' Disagreement over the Cognizability of State Policy Interests

While Justice Scalia corralled majority support for his disposition of the case, he lost Justice Stevens' support for his approach to analyzing whether a Federal Rule complies with the REA. According to Justice Scalia, courts should follow *Sibbach* by limiting REA analysis to determining whether a Federal Rule "really regulates procedure" and disregarding the nature of the state law threatened with displacement.[59] A Federal Rule "really regulates procedure," in Justice Scalia's view, if it governs "the manner and the means by which the litigants' rights are enforced" but does not alter the rules of decision by which courts adjudicate those rights.[60] While acknowledging that this categorical approach encourages forum shopping,[61] Justice Scalia maintained that such a result is a tolerable price to pay to preserve a uniform system of federal procedural rules.[62]

Justice Stevens wrote separately to express a different conception of the REA analysis that courts should follow. Justice Stevens' disagreement with Justice Scalia concerned whether courts should scrutinize the policies behind a conflicting state rule to ensure that a facially procedural rule does not actually define the contours of state substantive rights.[63]

Justice Stevens' concurrence seems to straddle the judgment of

58. *Id.* at 1443 (Scalia, J., plurality opinion).

59. *Id.* at 1444 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 13–14 (1941)).

60. *Id.* at 1442 (internal quotation marks omitted) (citing Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 446 (1946)).

61. Claims based in state law that would be barred under the same state's procedural rules could still be maintained if brought in federal court. *Id.* at 1447.

62. *Id.* at 1447–48.

63. *Id.* at 1452 (Stevens, J., concurring in part and concurring in the judgment). As an illustration, Justice Stevens noted that a statute of limitations is procedural in the sense that it only governs a plaintiff's ability to access court procedures to enforce separately defined substantive rights. However, a statute of limitations also defines the temporal scope of a plaintiff's substantive rights and expresses the state's policy judgment about a tortfeasor's right to repose, to be free from the perpetual threat of lawsuit. *See id.* at 1453 n.9; *see also* Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99 (1945) (applying state statute of limitations in federal diversity case).

the Court and the reasoning of the dissent.[64] Observing that the line separating substance from procedure is often hazy, Justice Stevens argued that courts must determine whether a seemingly procedural rule is "so bound up" or "intertwined" with substantive rules that it defines the scope of state rights or remedies.[65] Courts must therefore be "sensitiv[e] to important state interests" when faced with a guided *Erie* choice.[66] Because "[i]n some instances, a state rule that appears procedural really is not," this approach ensures that applying a Federal Rule does not trammel a state rule of procedure that inextricably contributes to a state's definition of substantive rights.[67] Making this determination requires evaluating on a case-by-case basis how a state procedural rule fits into the state's statutory scheme and how it relates to the state policies that the scheme was designed to promote. Justice Stevens set a high threshold for such a finding, limiting the determination to those rare cases in which there is "little doubt" that the procedural rule helps define substantive rights.[68] Concluding that section 901(b) did not constitute one of those rare instances, Justice Stevens joined in the judgment that Rule 23 displaces section 901(b) in federal court.[69]

The resulting debate between the justices concerned whether federal courts should ever countenance state procedural rules that are inextricably bound up with substantive state rights and remedies. Justice Scalia contended that federal courts should never do so, citing concerns over judicial economy and doctrinal clarity.[70] In Justice

64. Justice Stevens agreed with Justice Scalia that section 901(b) is unequivocally procedural, in direct conflict with Rule 23, and therefore preempted by Rule 23. However, Justice Stevens also agreed with Justice Ginsburg's argument that federal courts sitting in diversity must sometimes apply state procedural rules when such rules define substantive rights and remedies. *Shady Grove*, 130 S. Ct. at 1448 (Stevens, J., concurring in part and concurring in the judgment). Justice Stevens' analysis subtly differs from Justice Ginsburg's because Justice Stevens endorses looking at state substantive policies to determine whether a Federal Rule complies with the REA *after* concluding that the federal and state rules conflict, whereas Justice Ginsburg would apply this analysis to determine whether a conflict exists. *See* Max W. Berger & Geoffrey Brounell, Shady Grove *and the Future of State-Law Restrictions on Class Action Lawsuits*, *in* CLASS ACTION LITIGATION STRATEGIES 2010, at 281, 302 n.141 (Jayne A. Goldstein & Howard S. Suskin eds., 2010).

65. *Shady Grove*, 130 S. Ct. at 1450, 1452–53, 1455 (Stevens, J., concurring in part and concurring in the judgment).

66. *Id.* at 1452.

67. *Id.* at 1453 n.8.

68. *Id.* at 1457.

69. *Id.* at 1456.

70. *Id.* at 1445 (Scalia, J., plurality opinion). According to Justice Scalia, federal judges

Scalia's view, Justice Stevens' case-by-case, purpose-driven approach is unworkable and contrary to the Court's *Sibbach* precedent.[71] Justice Stevens criticized Justice Scalia's view as incompatible with the language of the REA, which requires courts to do more than simply focus on whether the Federal Rule at issue "really regulates procedure."[72] Justice Stevens argued that a court cannot know whether a Federal Rule "really regulates procedure" without considering the nature and purpose of the state law that the Federal Rule would displace.[73]

C. Justice Ginsburg's Dissent

The dissent construed section 901(b) as a substantive cap on damages and therefore argued that it did not conflict with Rule 23, which only deals with class certification criteria. The dissent argued that because section 901(b) makes little sense as a procedural rule, it must be substantive in purpose. Because claims for statutory damages do not require proof of actual damages, they are best suited to the class action device.[74] Section 901(b) therefore bears no relation to judicial economy, a major policy purpose behind Rule 23.[75] Instead, the New York legislature had two substantive purposes in mind when it passed section 901(b): (1) to avoid excessive compensation for plaintiffs[76] and (2) to prevent plaintiffs from exploiting this excess liability by bringing unmeritorious claims in

would be "condemned to poring through state legislative history." *Id.* at 1441.

71. *Id.* at 1445–47 nn.9–10, nn.12–13.

72. *Id.* at 1452 (Stevens, J., concurring in part and concurring in the judgment). Justice Stevens argued that Justice Scalia unnecessarily worried about the difficulty of determining whether seemingly procedural state rules are bound up with substantive rights because facially valid federal rules rarely conflict with such quasi-procedural state laws. *Id.* at 1455 n.13.

73. *Id.* at 1454 n.10.

74. *Id.* at 1464–65 (Ginsburg, J., dissenting). Justice Ginsburg began her dissent by characterizing Shady Grove's class action suit as a form of "alchemy" transforming a $500 case into a $5,000,000 award. *Id.* at 1460. *But see id.* at 1459 n.18 (Stevens, J., concurring in part and concurring in the judgment) (responding that Shady Grove transforms 10,000 $500 claims into one $5,000,000 claim).

75. *Id.* at 1466–67 (Ginsburg, J., dissenting).

76. *Id.* at 1464–65. Both the class action device and statutory penalties are legislative tools to make otherwise negative-value lawsuits—lawsuits in which the cost of bringing the lawsuit exceeds individual expected recovery—worthwhile for plaintiffs. *See* Watkins, *supra* note 40, at 287 n.22, 294–95. However, when these two tools are combined, some argue, they can lead to greater defendant liability than is necessary to overcome the problem of negative-value lawsuits, creating excessive, and in some instances annihilative, liability. *See id.* at 294–95; *Shady Grove*, 130 S. Ct. at 1465 n.3 (Ginsburg, J., dissenting).

the form of class action lawsuits as leverage to force settlement.[77]

The dissent further observed that New York courts have routinely allowed class action suits to proceed when class members waive the right to receive statutory damages, and they pursue only actual damages.[78] The dissent interpreted this to mean that section 901(b) is not directed at controlling whether certain class actions may begin but rather at controlling how they end—in other words, it determines what remedies are available to class litigants.[79] Since Rule 23 does not address this issue, Justice Ginsburg did not believe that it conflicted with section 901(b)'s substantive limitation on remedies.[80] As a result, Justice Ginsburg would have affirmed the Second Circuit's judgment.[81]

While Justice Stevens' analysis was similar to Justice Ginsburg's dissenting argument, Justice Stevens criticized the dissent's view as an "end run around Congress' system of uniform federal rules."[82] While agreeing with Justice Ginsburg that the Court's *Erie* analysis should be sensitive to important state interests, Justice Stevens nevertheless maintained that "the bar for finding an [REA] problem is a high one."[83] Justice Stevens therefore distinguished between procedural rules that are intimately bound up with defining substantive state rights or remedies and procedural rules adopted merely for *some* policy reason.[84] Justice Stevens thus rejected the dissent's discussion of New York's legislative history with respect to section 901(b).[85]

77. *Shady Grove*, 130 S. Ct. at 1465 n.3 (Ginsburg, J., dissenting).

78. *Id.* at 1467 n.9.

79. *Id.* at 1467–68.

80. *Id.* at 1468–69.

81. *Id.* at 1473.

82. *Id.* at 1457 (Stevens, J., concurring in part and concurring in the judgment).

83. *Id.* at 1456–57.

84. *Id.* at 1458.

85. Justice Stevens considered it evidence merely that the legislature was motivated by the policy interest to limit the likelihood of crushing liability against class action defendants, rather than a finding that section 901(b) defined state rights per se. *Id.* at 1458–59. After all, section 901(b) does not prohibit a plaintiff from pursuing a claim for statutory interest—it only prohibits doing so in a class format. *Id.* Justice Scalia also rejected the dissent's "purpose-driven" analysis as misguided on the ground that it could lead to inconsistent results between two identically worded state statutes when one state legislature evinces a substantive intent while the other does not. *Id.* at 1440–41 (Scalia, J., majority opinion).

V. ANALYSIS: LIMITED PRECEDENT UNDER THE NARROWEST-GROUNDS DOCTRINE BUT POTENTIALLY BROAD EFFECTS ON CLASS ACTION LITIGATION

Under the narrowest-grounds doctrine, Justice Scalia and Justice Stevens' plurality opinions likely carry no precedential weight and should be viewed as persuasive authority only. Even if it is limited to its facts, however, *Shady Grove* will resonate in the class action litigation context because the Court's reasoning suggests that other state efforts to regulate class actions may be prone to attack in federal court.

A. Justice Scalia and Justice Stevens' Concurring Opinions Lack a Rational Common Denominator Under the Narrowest-Grounds Doctrine

At common law, the precedential weight of a plurality decision was limited only to the particular result.[86] Lower courts could therefore ignore the various rationales provided in plurality decisions and would only have to follow such decisions in future cases presenting substantially the same narrow factual situation.[87] In *Marks*, the Supreme Court issued its only official guidance for determining the precedential scope of the Court's plurality decisions.[88] The Court reconsidered the precedential value of its previous plurality decision in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, [89] concluding that "[w]hen a fragmented Court decides a case . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on

86. Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL'Y 261, 278 (2000).

87. Joseph M. Cacace, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *Doctrine After* Rapanos v. United States, 41 SUFFOLK U. L. REV. 97, 104–05 (2007).

88. Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1603 (1992). While beyond the scope of this Comment, legal scholars have proposed a variety of alternative models for determining the precedential value of plurality opinions. *See* Cacace, *supra* note 87 (applying social choice theory to interpretation of plurality opinions); Kimura, *supra* at 1600–24 (proposing five-category system for identifying the precedential value of a plurality decision).

89. 383 U.S. 413 (1966).

the narrowest grounds."[90] This section summarizes how courts and commentators have generally interpreted the narrowest-grounds doctrine, and it then applies the resulting framework to the *Shady Grove* decision. It concludes that the holding in *Shady Grove* should be limited to its facts.

1. Narrowest-Grounds Requirements

Courts and commentators that have considered the meaning of the *Marks* rule have concluded that *Marks* does not apply to all plurality decisions, and they have generally identified two related requirements in determining whether a narrowest ground exists in such a decision.[91] First, the narrowest-ground opinion must enjoy the implicit support of a majority of the justices concurring in the judgment.[92] Dissenting opinions are excluded from consideration, whatever their reasoning, because there is no logical nexus between a dissenting opinion and the disposition of the case.[93] Second, the narrowest ground must be the logical subset of another broader plurality opinion, so that each fits into the other "like Russian dolls."[94] In other words, there must be a rational "common denominator" underlying the opinions of those justices concurring in the judgment.[95] For example, a plurality opinion upholding a law under rational basis review shares a logical common denominator with a plurality opinion upholding the same law under strict scrutiny because a law that survives under strict scrutiny ipso facto survives

90. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

91. Cacace, *supra* note 87, at 110; Kimura, *supra* note 88, at 1602–03.

92. *See Marks*, 430 U.S. at 193 (specifying that only "those Members who *concurred in the judgments*" can support a narrowest ground (emphasis added)).

93. *See* Cacace, *supra* note 87, at 111 & nn.111–14; Kimura, *supra* note 88, at 1602–03 (noting that reliance on dissenting opinions to construe the legal rule resulting from a case entails that the disposition is not justified); Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 328 (2000).

94. Cacace, *supra* note 87, at 111, 129–30; Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 46–47 (1993).

95. King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), *cert. denied*, 505 U.S. 1229 (1992); Rafael A. Seminario, Comment, *The Uncertainty and Debilitation of the* Marks *Fractured Opinion Analysis—The U.S. Supreme Court Misses an Opportunity:* Grutter v. Bollinger, 2004 UTAH L. REV. 739, 761 (2004); *see, e.g.*, Nichols v. United States, 511 U.S. 738, 745 (1994) (citing three Courts of Appeals that found no rational common denominator, and therefore no narrowest grounds representing the Court's holding in *Baldasar v. Illinois*, 446 U.S. 222 (1980)).

rational basis review.[96] Those justices concluding that a law survives strict scrutiny can be said to implicitly support the position that the law survives rational basis review, resulting in a constructive majority.

If the above two requirements are met but it is unclear which is the narrower of two plurality decisions, the narrowest ground is considered the opinion that will affect or control the fewest laws or cases in the future.[97] Thus, if the result of a plurality decision is to uphold a law against constitutional attack, the opinion that would uphold the fewest laws is the narrowest ground. If the result is to invalidate a law, however, the opinion that would strike down the fewest laws is the narrowest ground.[98]

2. Applying the Narrowest-Grounds Doctrine to *Shady Grove*

As a preliminary matter, the narrowest-grounds doctrine excludes from consideration Justice Ginsburg's dissenting opinion.[99] It might be tempting to conclude that Justice Stevens' approach is controlling because he garnered the dissent's implicit support. However, this conclusion confuses the narrowest-grounds model of plurality interpretation with the dual-majority model. A dual majority occurs when the dissenting opinion and one of the concurring opinions advocate the same legal rule (resulting in one majority for the result and a separate majority for the legal rule—precisely what occurred in *Shady Grove*).[100] While there may be good arguments for adopting the dual-majority model, it is analytically distinct from the narrowest-grounds model that the Supreme Court selected in *Marks*. Narrowest-grounds analysis does not count dissenting opinions

96. Kimura, *supra* note 88, at 1603–04. Some scholars have criticized the theory of implicit support underlying the narrowest grounds doctrine. *See* Cacace, *supra* note 87, at 111 n.114; Kimura, *supra* note 88, at 1604, 1616–18.

97. Cacace, *supra* note 87, at 111.

98. Kornhauser & Sager, *supra* note 94, at 47. It is also worth mentioning that at least one lower court has suggested that an opinion to which only a single justice subscribes can never qualify as binding precedent. *See King*, 950 F.2d at 782 ("When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.").

99. *See King*, 950 F.2d at 783 ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority."); Kimura, *supra* note 88, at 1602–03. *But see* Cacace, *supra* note 87, at 111–12 (noting that some justices have analyzed dissenting opinions in determining which test a lower court should apply).

100. *See* Kimura, *supra* note 88, at 1602–03.

because to do so would delegitimize the result (which the dissent opposed).[101] Despite its partial alignment with Justice Stevens' approach, the *Shady Grove* dissent cannot carry precedential weight.[102]

The critical question is therefore whether a rational common denominator exists between Justice Scalia's and Justice Stevens' concurrences. There appears to be none. The justices presented two conflicting approaches to the same issue, with each justice criticizing the other's approach at length. Justice Scalia adamantly rejected the proposition that courts should spend time investigating the legislative intent behind state procedural rules, referring to such inquiries as "standardless" and contrary to *Sibbach*.[103] Conversely, Justice Stevens argued that the only way courts can give meaning to the REA limitation is to carefully examine whether the state procedural rule is inextricably bound up with the state's definition of substantive rights. While Justice Stevens would set a high bar for finding a Federal Rule incompatible with the REA, he nevertheless opens the door to this analysis, which Justice Scalia does not.[104]

This conceptual disagreement is more than academic. The dissent reached the opposite result using an approach similar to the one that Justice Stevens advocated. In close cases, the weight assigned to legislative intent determines whether state laws, and the lawsuits invoking them, survive or perish.[105] Given that Justices Scalia and Stevens stake out opposite positions on this narrow but critical issue, there is no rational common denominator between their opinions. They represent parallel lines of analysis, each extending from the facts to the result without meeting or touching each other. Under the narrowest-grounds doctrine, therefore, their approaches

101. *See id.*

102. The dissent's analysis substantively differs from Justice Stevens' analysis with respect to the point in a guided *Erie* analysis at which courts should consider state interests. Justice Stevens would weigh state interests after concluding that a state law conflicted with a Federal Rule, whereas Justice Ginsburg would consider state interests in determining if a conflict even existed. *Compare* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1465 (2010) (Ginsburg, J., dissenting) (finding no conflict between Rule 23 and section 901(b)), *with id.* at 1455–57 (Stevens, J., concurring in part and concurring in the judgment) (criticizing the dissent's approach as "an end run around Congress' system of uniform federal rules").

103. *Id.* at 1441 n.7, 1445 n.9 (Scalia, J., plurality opinion).

104. *Id.* at 1457 (Stevens, J., concurring in part and concurring in the judgment).

105. *See, e.g.*, *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., No. 1:08-WP-65000, 2010 WL 2756947, at *2 (N.D. Ohio July 12, 2010).

constitute mere persuasive authority for lower courts.

Even assuming that Scalia's and Stevens' opinions did logically overlap, it is unclear whether Stevens' approach is the narrower of the two.[106] As between two methodologies used to decide which jurisdiction's law—the state's or federal government's—will displace the other's, scope is relative to jurisdiction. Justice Stevens' approach is narrower in the sense that it would result in the preemption of moderately fewer state laws, but also broader in the sense that it would result in the displacement of federal law by an equal number of state laws. Alternatively, it is unclear which of the justices' approaches would affect fewer cases.[107] Viewed strictly in the context of class certification, Scalia's approach is arguably narrower in that it would result in the decertification of fewer class actions. In considering the consequence of the decision beyond the class action context, however, it becomes difficult to predict which of the two justices' approaches would have less far-reaching effects on litigation.

3. Missing the *Marks*: The Narrowest-Grounds Doctrine as Applied to *Shady Grove*

In early decisions applying *Shady Grove*, courts have favored Justice Stevens' more flexible approach. However, their narrowest-grounds analyses have been anemic and sometimes nonexistent. Several courts have purported to apply the narrowest-grounds doctrine but concluded that Stevens' approach constituted the controlling "narrowest grounds" either because it was "critical" or "crucial" to the result or because it accorded with the dissent, even though a dissent ipso facto cannot support the Court's disposition.[108]

106. *See* Kevin M. Clermont, *The Repressible Myth of* Shady Grove, 86 NOTRE DAME L. REV. (forthcoming 2011) (manuscript at 128 n.135), *available at* http://ssrn.com/abstract=1633541 ("[I]n *Shady Grove* the word "narrowest" has no clear meaning. . . . In any event, *Marks* certainly did not mean to give a concurring Justice the power to hijack the law.").

107. *See supra* note 97 and accompanying text.

108. Garman *ex rel.* Garman v. Campbell Cnty. Sch. Dist. No. 1, No. 08-8101, 2010 WL 5191359, at *5 (10th Cir. Dec. 23, 2010) (finding Justice Stevens' concurrence "critical" because he concluded the rule at issue was not part of substantive state law); Godin v. Schencks, 629 F.3d 79, 86–89 (1st Cir. 2010) (citing Justice Stevens' concurrence); *In re* Wellbutrin XL Antitrust Litig., No. 08-2433, 2010 WL 5186052, at *2–5 (E.D. Pa. Dec. 22, 2010); *see* Estate of C.A. v. Grier, No. H-10-0531, 2010 WL 4236865, at *3 (S.D. Tex. Oct. 15, 2010) (concluding that Justice Stevens' opinion was narrowest because his approach comported with the dissent); Bearden v. Honeywell Int'l Inc., No. 3:09-1035, 2010 WL 3239285, at *9–10 (M.D. Tenn. Aug. 16, 2010) (concluding that Justice Stevens' concurrence was the narrowest grounds in *Shady*

The misattribution of precedential authority to Justice Stevens' plurality opinion illustrates that lower courts do not apply the narrowest-grounds doctrine in a talismanic manner. While based on principles of logic, the doctrine is often treated as a rule of interpretation. In practice, lower courts rely on observations about what other lower courts have decided[109] and predictions about how the Supreme Court would likely resolve a similar issue.[110]

However, reliance on Justice Stevens' concurrence may not be predictively accurate. Given Justice Stevens' retirement, the Court's disposition on the same or similar *Erie* issue likely depends on newly sworn-in Justice Kagan's heretofore unknown views on the *Erie* doctrine.[111] Because *Shady Grove* leaves important methodological issues unresolved, it seems likely that the Court will revisit its *Erie* jurisprudence sooner rather than later.

B. Implications for Class Action Litigation and CAFA Policy

The *Shady Grove* decision renders state laws that bar categories of class action claims vulnerable to preemption in federal court.[112]

Grove); *In re Whirlpool Corp.*, 2010 WL 2756947, at *1–2 (partially decertifying a class on the ground that Rule 23, while not ultra vires under Justice Scalia's approach, was ultra vires under Justice Stevens' "crucial" concurrence). Other courts have cautiously applied both Justice Scalia's approach and Justice Stevens' approach. Retained Realty, Inc. v. McCabe, 376 F. App'x 52, 55–56 & n.1 (2d Cir. 2010) (concluding that Rule 54(b) superseded state law under either Justice Scalia's or Justice Stevens' approaches); Durmishi v. Nat'l Cas. Co., 720 F. Supp. 2d 862, 875–77 (E.D. Mich. 2010) (analyzing purported conflict with Rule 35 under both Justice Scalia's and Justice Stevens' approaches).

109. When a plurality opinion befuddles lower courts and leads to inconsistent interpretations, the Supreme Court may decline to apply *Marks* and instead issue a new ruling on the matter. *Nichols v. United States*, 511 U.S. 738 (1994), illustrates this practical dimension in applications of *Marks*. In *Nichols*, the Court reconsidered its previous plurality decision in *Baldasar v. Illinois*, 446 U.S. 222 (1980), regarding the constitutionality of certain criminal sentencing enhancements. Observing that the narrowest-grounds doctrine is "more easily stated than applied," the Court, in deciding to overrule *Baldasar* rather than subject it to a *Marks* analysis, wrote, "We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it. This degree of confusion following a splintered decision . . . is itself a reason for reexamining that decision." *Nichols*, 511 U.S. at 745–46. The *Marks* decision itself implicitly acknowledged that lower court consensus is a factor relevant to determining whether the narrowest-grounds doctrine is useful in analyzing particular plurality decisions. *See* Marks v. United States, 430 U.S. 188, 194 (1977) (noting that "every Court of Appeals that considered the question" reached the same conclusion as what the *Marks* Court concluded was the narrowest grounds in *Memoirs*).

110. *See* Hochschild, *supra* note 86, at 279–80; Kornhauser & Sager, *supra* note 94, at 45.

111. *See* Joseph P. Bauer, *Shedding Light on* Shady Grove*: Further Reflections on the* Erie *Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. (forthcoming 2011) (manuscript at 43 n.237), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677392.

112. *See Shady Grove*, 130 S. Ct. at 1468 n.11 (Ginsburg, J., dissenting); Brief for

The decision also raises many questions, three of which are discussed below. First, what does *Shady Grove* mean for the Court's attitude toward CAFA policy? Second, will *Shady Grove* preclude state law caps on class action damages or only categorical bars on maintaining class actions? Finally, will *Shady Grove* limit other state regulations on class actions, such as state laws that augment class certification standards?

1. *Shady Grove* and CAFA policy

Many commentators have noted that the motivation behind CAFA was to make it more difficult for plaintiffs to bring class action claims.[113] Congress passed CAFA partly in response to concerns that state court judges were overeager to certify class actions because of political pressures tied to local judicial elections.[114] By allowing class action defendants to remove state class action claims to federal court, CAFA allowed defendants to take advantage of the federal courts' more stringent standards for class certification.[115] *Shady Grove* does the opposite. By allowing plaintiffs to avoid restrictive state laws, the decision signals movement toward greater judicial leeway for class action plaintiffs bringing state law claims in federal court.[116]

However, *Shady Grove* does not repudiate CAFA policy so much as soften its edges. First, legislative history indicates that Congress was motivated not just to limit the quantity of class action lawsuits but also to federalize suits with effects on the nation as a

Respondent app. B, *Shady Grove*, 130 S. Ct. 1431 (No. 93-106) (listing state statutes prohibiting class actions for particular claims).

113. *See* Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2525 n.42 (2008); Steinman, *supra* note 24, at 304 n.313.

114. *See* Burch, *supra* note 113, at 2526. By bringing a class action in a "judicial hellhole," a class action attorney secured the best possible chance to have that class certified. *See* Georgene Vairo, *Why I Don't Teach Federal Courts Anymore, But Maybe Am or Will Again*, 53 ST. LOUIS U. L.J. 843, 850 (2009); Kimberly Nakamaru, Comment, *Touching a Nerve:* Hertz v. Friend*'s Impact on the Class Action Fairness Act's Minimum Diversity Requirement*, 44 LOY. L.A. L. REV. 1019, 1028 (2011).

115. Burch, *supra* note 113, at 2531 (reporting that state courts denied certification in 12 percent of cases remanded from federal court while federal courts denied certification in 27 percent of cases in which defendants removed to federal court).

116. In response, Justice Ginsburg suggested that Congress amend CAFA to prohibit maintenance of a class action in federal court that would be barred in the state under whose laws the class action is brought. *Shady Grove*, 130 S. Ct. at 1473 n.15 (Ginsburg, J., dissenting).

whole.[117] In this sense, *Shady Grove* is consistent with CAFA policy because the decision extends divestiture of the states' control over class action litigation.[118] Assuming that some class actions barred by state laws like section 901(b) would have national import, such laws frustrate rather than further this aspect of CAFA policy. Second, *Shady Grove* likely will not alter the federal courts' present rate of decertification.[119] While it expands forum access for class action plaintiffs, *Shady Grove* may be a pyrrhic victory for many litigants as district judges will likely review with heightened skepticism class certification requests that would have been barred under the laws of the states under which the class claims arose.

2. *Shady Grove* and Caps on Class Action Damages

In *Gasperini*, the Court suggested that a statutory cap on damages for a particular cause of action would likely be considered substantive under *Erie* analysis.[120] The dissent in *Shady Grove* accurately observed that Justice Scalia tied the result in *Shady Grove* to the fact that section 901(b) acts to categorically bar certain class actions from being *maintained*.[121] *Shady Grove* thus appears facially agnostic about the federal preemption of state law damages caps. However, there is a lower threshold at which a damages cap would obviously function as a complete prohibition. For example, if section 901(b) limited statutory damages to the amount the class representative could recover individually, the statute would nominally permit a class action to be "maintained" but would

117. *See* Burch, *supra* note 113, at 2525–26.

118. Whereas CAFA was viewed as an attempt to muzzle overzealous state court judges, *Shady Grove* can be viewed as reclaiming power from state legislatures.

119. *See supra* note 115.

120. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 428 (1996); *see Shady Grove*, 130 S. Ct. at 1439 n.4 ("[W]e express no view as to whether state laws that set a ceiling on damages recoverable in a single suit . . . are pre-empted.") (citing Brief for Respondent, *supra* note 112, app. A); *id.* at 1466 n.7 (Ginsburg, J., dissenting) (arguing that Congress, in authorizing promulgation of the Federal Rules, could not have intended to displace state-created damages caps).

121. *Shady Grove*, 130 S. Ct. at 1466 (Ginsburg, J., dissenting). Justice Scalia himself declined to address what his opinion in *Shady Grove* would have been if the state law at issue imposed a cap on damages instead of a categorical bar. *Id.* at 1439 (Scalia, J., majority opinion) ("We need not decide whether a state law that limits the remedies available in an existing class action would conflict with Rule 23."). However, Justice Scalia also characterized Rule 23 as creating an entitlement to proceed with a class action so long as Rule 23's requirements for class certification are met. *Id.* at 1438.

perform the same function as a categorical bar to the class action device.[122] A state legislature writing a well-calibrated statute would of course set the cap high enough to avoid the appearance of obstructionism while rendering most class actions economically inhospitable to plaintiffs.[123]

Even a well-calibrated state damages cap could arguably fall within the purview of *Shady Grove*, however, if it caused excessive interference with Rule 23's certification requirements. With lower damages caps, class action plaintiffs may be forced as a practical matter to bring class actions with fewer class members. For instance, if individual claims in a class action for fraud averaged $2,000 apiece, and the state imposed a $50,000 damages cap on that type of claim, then a class action with more than twenty-five class members would dilute the potential per-plaintiff recovery. Proceeding with twenty-five or fewer class members risks decertification for lack of numerosity. Alternatively, if a class action attorney decided to move forward with more than twenty-five class members to satisfy the numerosity requirement, the diluting effect of adding class members would risk decertification under two Rule 23 provisions. Under Rule 23(a)(4), it is questionable whether the class action attorney can "fairly and adequately protect the interests of the class" when the very structure of the litigation will result in the undercompensation of class members.[124] Similarly, under Rule 23(b)(3), the dilution effect would raise doubt about whether the class action "is superior to other available methods for fairly and efficiently adjudicating the controversy" because a plaintiff would arguably be better off pursuing an individual claim free from the dilution effect.[125] Thus, a low class action damages cap would make it difficult to assemble a sufficiently numerous class of plaintiffs that can be fairly and adequately represented and for which the class action is the superior method of adjudication. If state damages caps are aggressively ratcheted downward, they could be viewed by courts as the functional equivalents of categorical bars to maintaining class action

122. Berger & Brounell, *supra* note 64, at 285.

123. Current state laws imposing damages caps on class actions generally range from between $100,000 to $500,000. See Brief for Respondent, *supra* note 112, app. A for a list of state statutes imposing class action damages caps.

124. FED. R. CIV. P. 23(a)(4).

125. FED. R. CIV. P. 23(b)(3).

claims and therefore prohibited under *Shady Grove*. Whether this problem actually arises will depend on the legislative strategies that states adopt to regulate class actions in *Shady Grove*'s wake.

3. *Shady Grove* and State Regulation of Class Certification Requirements

Some scholars have argued that where the Federal Rules provide only general procedural guidance, they can function as procedural vessels for state substantive rights in diversity cases.[126] This would permit states to promulgate specific standards for numerosity, commonality, typicality, and adequacy of representation applicable to federal class certification proceedings.[127] Following *Shady Grove*, how viable is this conception?

Arguably, CAFA and *Shady Grove* constitute a Scylla and Charybdis[128] for such state regulations, creating a narrow channel through which state laws embodying legislative class action policy preferences can enter federal courts. Congress intended CAFA to enable class action defendants to avail themselves of the federal courts to avoid permissive state class action certification practices. Now, however, with *Shady Grove*, it appears that state efforts to restrict the availability of the class action device in federal courts may also be incompatible with Rule 23. Justice Scalia's gloss on Rule 23's language as conferring a federal right to proceed with a class action when Rule 23's requirements are met appeared unequivocal:

> Allstate asserts that Rule 23 neither explicitly nor implicitly empowers a federal court "to certify a class in each and every case" where the Rule's criteria are met. But that is *exactly* what Rule 23 does: It says that if the prescribed preconditions are satisfied "[a] class action *may be*

126. Watkins, *supra* note 40, at 298. For example, in *Gasperini*, the Court concluded that Rule 59 provided a general procedural standard for ordering new trials, including for cases in which damages were excessive, but held that a state rule providing a specific standard for determining when damages were excessive could give substantive content to Rule 59's general procedural form. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 437 n.22 (1996); Watkins, *supra* note 40, at 298.

127. Watkins, *supra* note 40, at 299 ("[F]ederal courts should consider state certification standards when deciding certification motions.").

128. In Homer's *The Odyssey*, Ulysses at one point must sail through a narrow, rocky corridor, assaulted from either side by two monsters, Scylla and Charybdis. HOMER, THE ODYSSEY 229–30 (Robert Fitzgerald trans., Doubleday & Co. 1961).

maintained"—not "*a class action may be permitted.*" Courts do not maintain actions; litigants do.[129]

Justice Stevens sounded a similar note in his concurrence, opining that "[f]ederal courts can and should interpret federal rules with sensitivity to 'state prerogatives,' but even when 'state interests . . . warrant our respectful consideration,' federal courts cannot rewrite the rules."[130]

While these comments suggest that the Court is inclined to protect Rule 23 from state regulatory erosion, exploitation of certification criteria will likely persist. By incorporating statutory requirements into state laws that indirectly interact with Rule 23 certification criteria, state legislatures can limit federal class action litigation despite CAFA and *Shady Grove*.[131] Without strong guidance from the Supreme Court, states are increasingly likely to write, and lower courts are increasingly likely to accept, state laws with such imbedded, indirect class action deterrents.

VI. CONCLUSION

The Court's plurality opinion in *Shady Grove* fails to provide lower courts with doctrinal clarity for analyzing future vertical conflict-of-law issues. This highlights a peculiar internal tension in the Court's *Erie* jurisprudence. To advance *Erie*'s original purposes—to deter forum shopping and disparate litigation outcomes—the Court must provide clear vertical choice-of-law standards for judges and lawyers. Uncertainty as to what the *Erie* doctrine entails will in itself lead enterprising attorneys armed with creative arguments to exploit the doctrinal morass to circumvent adverse state or federal law. In this sense, *Shady Grove* undermines *Erie*'s underlying policies and calls for the Supreme Court's reexamination.

129. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1438 (2010) (alteration in original) (citations omitted).

130. *Id.* at 1457 (Stevens, J., concurring in part and concurring in the judgment) (alteration in original) (citations omitted).

131. For example, the inclusion of a pre-suit demand requirement as an element of recovery under a no-fault insurance statute creates a predominance problem for suits brought under Rule 23(b)(3) without any reference to the class action device in statutory language. *See* DWFII Corp. v. State Farm Mut. Auto. Ins. Co., No. 10-20116-CIV-UNGARO, 2010 WL 5094242 (S.D. Fla. Dec. 10, 2010) (distinguishing *Shady Grove*, 130 S. Ct. 1431).