Federal Class Actions: A Near-Death Experience in a *Shady Grove*

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Introduction

In a significant appeal decided March 31, 2010—and largely ignored by the media—a plurality of Supreme Court Justices in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[1] rescued federal class actions from withering demise at the hands of the states. The media is to be forgiven for its neglect, however, as *Shady Grove* turned on a nuanced *Erie*[2] problem, a jurisprudential doctrine that defies witty sound bites and easy summarization. Even Justice Scalia, delivering the plurality opinion to a Supreme Court audience, noted: "Eyes have glazed over already."[3]

The Court decided that Federal Rule of Civil Procedure 23 takes precedence in federal diversity class actions and preempts state statutory provisions that limit class litigation. *Shady Grove* is muddled, however, by an array of decisions running nearly forty-two pages in length, with Justices joining and concurring in various parts. One needs a scorecard to tally doctrinal positions. Moreover, *Shady Grove* resulted in an unusual alignment of Justices that defied ideological predispositions and stereotypes. Justice Sotomayor joined conservative Chief Justice Roberts and Justices Scalia and Thomas to save the federal class action, while Justice Alito joined liberal dissenting Justices Kennedy, Ginsburg, and Breyer in support of state prerogative.

There is no majority opinion in *Shady Grove*. The Court split 4–1–4, with the departing Justice Stevens's concurrence supplying the pivotal vote in support of Rule 23. Justice Stevens's concurrence,

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1 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010).

2 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

3 *Eyes Glaze Over at the U.S. Supreme Court*, Reuters Blog (Mar. 31, 2010, 12:03 EDT), http://blogs.reuters.com/frontrow/2010/03/31/eyes-glaze-over-at-the-u-s-supreme-court/.

however, simultaneously disagrees with Scalia's opinion and agrees with Ginsburg's dissent, further mystifying *Erie* doctrine.

As a policy matter, the Court's decision in *Shady Grove* will have a wide-ranging impact on the future of class action litigation in both federal and state courts. In essence, a slim plurality of the Supreme Court saved the federal class action from death by a thousand cuts through state-limiting provisions on class litigation. The Justices recognized that their decision will encourage class action federal forum shopping to evade states with existing statutory limits on class litigation. Justice Ginsburg noted the irony inherent in the Court's decision, which undermined congressional intent in enacting the Class Action Fairness Act of 2005 ("CAFA")[4] while saving the federal class action.[5] As a matter of *Erie* jurisprudence, the Court splintered on *Erie* principles and muddied the already murky swamp of *Erie* doctrine. *Shady Grove* is destined to become a classic "teaching case" in law schools that will perplex professors and law students alike.

For actors involved in complex litigation, the *Shady Grove* appeal presented an almost-perfect storm: the collision of *Erie* doctrine with class action litigation. The potential policy implications of the Court's decision in *Shady Grove* were readily apparent early in the litigation. If a majority of Justices had chosen to apply some form of *Erie* doctrine to the New York state limitation on class action litigation, then such a ruling could have opened the floodgates to similar legislative initiatives in other states that would have limited the ability of litigants to pursue class litigation in both state and federal courts. When coupled with the emergence of other contractual limitations on the class action mechanism—such as class action waivers—federal enforcement of state statutory limitations on class actions would have signaled a further withering away of the class action device. The conservative coalition of the Court, ironically, saved the federal class action from this fate.

The collision between federal and state class action practice in *Shady Grove* arose from a New York state civil code provision that prohibits plaintiffs from pursuing a class action to recover statutory penalties or minimal recoveries.[6] In the underlying litigation, the

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4 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1453(b) (2006)).

5 *Shady Grove*, 130 S. Ct. at 1473 (Ginsburg, J., dissenting).

6 N.Y. C.P.L.R. 901(b) (McKinney 2005). This section provides: "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.*

plaintiff Shady Grove Orthopedics Association filed a class action in a New York federal court to recover a two-percent monthly late-payment fee, on behalf of all class members, from the defendant Allstate Insurance Company.[7] The Federal District Court for the Eastern District of New York applied section 901(b) of the New York civil code, which prohibits class actions for penalties or minimal recoveries, and dismissed the federal class action.[8] The Second Circuit affirmed.[9]

In the *Shady Grove* appeal, the Supreme Court was asked to decide whether the federal class action Rule 23, which contains no such prohibition on penalty fee cases, applied, or whether the lower federal courts were correct in dismissing the lawsuit based on New York state law.

The *Shady Grove* appeal raised the single issue whether federal courts in diversity class actions must apply state provisions that limit or prohibit certain categories of class actions, or whether the federal class action Rule 23 trumps the field so as to override any countervailing state law provisions. The Court's resolution of the *Erie* dispute in *Shady Grove* was significant for litigants potentially involved in class action litigation, because if the Court affirmed the lower courts' dismissals of the *Shady Grove* class action, other states potentially would have followed New York's example and sought to impose similar or additional statutory limitations on the class action mechanism. At the extreme, states might have chosen to ban class actions altogether, as Virginia and Mississippi currently ban class action litigation.[10]

In addition, such a decision might have rendered similar state statutes limiting the remedies or claims for certain types of class actions enforceable in federal court, resulting in dismissals of class ac-

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7 Shady Grove Orthopedic Assocs., P.A. 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 (2010).

8 *Id.* at 472–73, 476.

9 *Shady Grove*, 549 F.3d 137, 146 (before Cabranes, Pooler, and Katzmann, JJ.; opinion by Pooler, J.), *rev'd*, 130 S. Ct. 1431 (2010).

10 Currently, Mississippi and Virginia do not have state class action rules, although this is not a matter of statutory enactment banning class actions. *See* Wade v. Danek Med., Inc., 182 F.3d 281, 287 n.7 (4th Cir. 1999) (showing that Virginia does not use a class action mechanism); Janssen Pharmaceutica, Inc. v. Armond, 866 So.2d 1092, 1102 (Miss. 2004) (stating that Mississippi does not use a class action mechanism); *see also* Linda S. Mullenix, *Should Mississippi Adopt a Class Action Rule—Balancing the Equities: Ten Considerations that Mississippi Rulemakers Ought to Take into Account in Evaluating Whether to Adopt a State Class Action Rule*, 24 MISS. C. L. REV. 217 (2005). *See generally* Deborah J. Challener, *Foreword: Love It or Leave It; An Examination of the Need for and Structure of a Class Action Rule in Mississippi*, 24 MISS. C. L. REV. 145, 145 (2005) (discussing how Mississippi does not have a class action rule).

tions based on state law limitations.[11] Under such a precedent, these state limitations effectively would have curbed or eliminated class action practice in both state and federal courts.

The high-stakes nature of the *Shady Grove* appeal was dramatically highlighted by the amici aligned on both sides of the dispute, which additionally illustrated that litigation often can create strange bedfellows. For example, Public Citizen Litigation Group supported Shady Grove in the Supreme Court appeal and, in its briefing to the Court, invoked CAFA in support of its position, even though Public Citizen publicly opposed enactment of CAFA in 2005.[12] Amicus curiae Public Justice, Inc., joined with Shady Grove and Public Citizen to press the case for allowing Rule 23 to override any state laws or rules that would inhibit the ability of state plaintiffs to aggregate their claims in a class action, and to pursue those class action claims in federal court.[13]

To this end, the public interest law advocates in their brief focused on a discussion of the historical role of federal class actions as a vehicle for vindicating the rights of large numbers of injured claimants, especially in small-claims consumer class actions.[14] In the petitioner's view, plaintiffs should be able to choose a federal forum to vindicate rights under state law, and Rule 23 should provide the only procedural yardstick for determining whether a proposed class action should proceed. To permit state procedural rules, including limitations on class actions, to frustrate the ability to pursue a federal class action would be unfair and inequitable.

Allstate Insurance Company, on the other hand, was joined by amici from various business and tort reform organizations, who collectively argued on brief that New York's substantive policy decision to limit the eligibility of certain types of claims from class action treatment should be upheld through application of the *Erie* doctrine when such claims are pursued in federal court under Rule 23.[15] In addition

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11 *See* Brief for Respondent apps. A–B, *Shady Grove*, 130 S. Ct. 1431 (No. 08-1008) (listing representative federal and state statutes limiting the remedy available in a class action, as well as representative state statutes prohibiting class actions for particular claims, respectively) [hereinafter Brief for Respondent].

12 Brief for Petitioner at 11, 49–53, *Shady Grove*, 130 S. Ct. 1431 (No. 08-1008) [hereinafter Brief for Petitioner]; *see also infra* note 103. Public Justice, as amicus curiae, similarly advanced an argument based on CAFA. *See* Brief of Amicus Curiae in Support of Petitioner at 11, 21–24, *Shady Grove*, 130 S. Ct. 1431 (No. 08-1008) [hereinafter Brief of Amicus Curiae Public Citizen].

13 Brief of Amicus Curiae Public Citizen, *supra* note 12, at 9–12.

14 *Id.* at 3–9.

15 Brief of Amicus Curiae The Partnership for New York City, Inc. et al. in Support of

to its *Erie* arguments, the respondent and its amici focused their policy arguments on the potential abusive nature of class action litigation and the unfairness of permitting small penalty fee cases to balloon into exponential liability litigation merely by filing in federal court. Allstate noted the *in terrorem* blackmail effect of class action litigation and argued that state plaintiffs ought not to be able to gain settlement leverage by bringing a penalty class action in federal court, when the plaintiffs otherwise would be barred from doing so in state court.[16]

Allstate and its amici attempted to focus the Court's attention on this problem through its two appendices, which provided a sample list of federal and state statutory provisions that limited certain causes of action and remedies from being litigated as a class action.[17] With regard to state laws limiting the use of the class action to prosecute those claims, the Court effectively would override state legislative determinations if Shady Grove prevailed on its argument that Rule 23 trumps such state law provisions. Were this to occur, then federal court would become a preferred forum for class action plaintiffs to evade state courts, where state law limited certain types of claims from being pursued as class actions.

I. THE UNDERLYING *SHADY GROVE* LITIGATION

A. The Erie *Problem*

Sonia E. Galvez, a Maryland citizen, was injured in an automobile accident.[18] Her automobile was registered in New York.[19] She subsequently received medical treatment from Shady Grove Orthopedic Associates, a Maryland medical practice. Ms. Galvez's automobile was insured by Allstate Insurance Company. Ms. Galvez assigned her medical reimbursement rights under her policy to Shady Grove,[20] and Shady Grove sought payment from Allstate for Ms. Galvez's medical

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Respondent at 3–4, *Shady Grove*, 130 S. Ct. 1431 (No. 08-1008) [hereinafter Brief of Amicus Curiae in Support of Respondent]. This argument is based on the Rules of Decision Act, which directs that "[t]he 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." Rules of Decision Act, 28 U.S.C. § 1652 (2006).

16 Brief for Respondent, *supra* note 11, at 29–30.

17 *See supra* note 11 (appendices setting forth state statutory claim and remedy limitations on state class actions).

18 Shady Grove Orthopedic Assocs., P.A. 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 (2010).

19 Brief for Petitioner, *supra* note 12, at 5–6; Brief for Respondent, *supra* note 11, at 6.

20 *Shady Grove*, 466 F. Supp. 2d at 470.

treatment. Shady Grove contended that Allstate failed to make timely payments to the medical practice.[21]

In April 2006, Ms. Galvez and Shady Grove filed a class action complaint in the United States District Court for the Eastern District of New York, pursuant to the federal court's diversity jurisdiction over proposed class actions.[22] The complaint alleged that Allstate failed to comply with provisions of the New York Insurance Code by failing to pay claims within thirty days. In addition, Shady Grove alleged that Allstate routinely ignored its obligation to pay statutory interest owed in cases where it paid claimants late.[23]

The complaint alleged claims on behalf of Ms. Galvez and all Allstate insureds that had been denied statutory interest payments on the late claims.[24] The class action sought compensatory damages in the amount of interest payments allegedly withheld by Allstate.[25] The plaintiffs alleged that the parties to the dispute were citizens of different states (Maryland and Illinois), that there were at least one hundred members of the class, and that the amount in controversy exceeded $5 million (by aggregating all the late penalty fees).[26] Shady Grove indicated that by its own calculation, its statutory interest penalty amounted to no more than $500.[27]

Allstate moved to dismiss, contending that section 901(b) of the New York State Civil Practice Law and Rules ("N.Y. C.P.L.R.") proscribes class actions for statutory penalties.[28] Section 901(b) states: "Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes recovery thereof in a class action, an action to recover a penalty, or a minimum measure of recovery created or imposed by statute may not be maintained as a

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21 Brief for Petitioner, *supra* note 12, at 6.

22 *Shady Grove*, 466 F. Supp. 2d at 469; *see* 28 U.S.C. § 1332(d)(2) (2006) (diversity jurisdiction over class action litigation). On behalf of the putative class, the plaintiffs sought damages in excess of $5 million, as required to assert federal diversity jurisdiction under 28 U.S.C. § 1332(d). Allstate is an Illinois corporation; Shady Grove is a Maryland corporation. The plaintiffs acknowledged that their individual claim, for approximately $500 in damages, failed to meet the monetary requirement for diversity jurisdiction. *Shady Grove*, 466 F. Supp. 2d at 469.

23 *Shady Grove*, 549 F.3d at 140. A provision of New York state law provides that overdue payments bear interest at a rate of two percent per month. *Id.*

24 *Shady Grove*, 466 F. Supp. 2d at 470.

25 *Id.* The plaintiffs originally sought a declaratory judgment and asserted claims for breach of contract, bad faith breach of contract, and violations of the New York Insurance Code.

26 *Shady Grove*, 549 F.3d at 140.

27 *Id.*

28 *Id.* at 140–41; *Shady Grove*, 466 F. Supp. 2d at 471–72; *see* N.Y. C.P.L.R. 901(b) (McKinney 2006).

class action."[29] Allstate argued that N.Y. C.P.L.R. section 901(b) applied in federal diversity actions and that, therefore, the New York state provision precluded the ability of the federal court to maintain the *Shady Grove* case as a class action.[30] Simply, the court lacked jurisdiction, and Rule 23 did not apply.

B. The District Court and Second Circuit Opinions Dismissing on Erie *Grounds*

The district court agreed with Allstate, finding that the New York interest fee for late payments was a penalty.[31] The court then held that the plaintiffs' rights to bring a federal class action were subject to the limitation imposed by N.Y. C.P.L.R. section 901(b) in penalty cases.[32] The court further held that while the court was bound by Federal Rule of Civil Procedure 23, the strictures of section 901(b) did not contravene any federal rule.[33] In addition, the situation did not warrant invocation of the Supremacy Clause, or a discussion of the overlapping scope of section 901(b) and Rule 23.[34] Evaluating the litigation and its statutory context, the district court indicated that: "It would be patently unfair to allow a plaintiff an attempt at recovery in federal court for a state law claim that would be barred in state court."[35] Consequently, the federal district court dismissed the class action in its entirety.[36]

The Second Circuit affirmed the district court's dismissal of the class action complaint.[37] Construing the problem as a question of *Erie* doctrine,[38] the Second Circuit concluded that there was no conflict between the New York state provision prohibiting class actions in statu-

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29 N.Y. C.P.L.R. 901(b). The district court cited the legislative comment accompanying section 901(b), to the effect that "[t]his subdivision was 'designed to discourage massive class actions for statutory violations where it would be difficult to identify members of the class and where recovery of the statutory minimum by each member results in a 'annihilatory punishment.'" *See Shady Grove*, 466 F. Supp. 2d at 472 (quoting N.Y. C.P.L.R. 901 cmt. C901:11 (McKinney 2005)).

30 *See Shady Grove*, 549 F.3d at 140–41.

31 *Shady Grove*, 466 F. Supp. 2d at 474.

32 *Id.* at 472. The district court indicated that it was persuaded by "several recent federal decisions explicitly and persuasively holding that § 901(b) applies to diversity actions in federal court . . . ." *Id.* at 473.

33 *Id.* at 472.

34 *Id.*

35 *Id.*

36 *Id.* at 476.

37 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 549 F.3d 137, 146 (2d Cir. 2008), *rev'd*, 130 S. Ct. 1431 (2010).

38 *Id.* at 141–46; *see supra* note 15.

tory penalty cases and Rule 23, authorizing class action litigation.[39] The court stated: "Rule 23, fairly construed, is not sufficiently broad to cause a direct collision with C.P.L.R. 901(b)."[40] The appellate court also noted that every district court that had considered the question whether there was a conflict between Rule 23 and N.Y. C.P.L.R. section 901(b) had concluded that there was no conflict.[41] The Second Circuit thus concluded that the facts in the case did not present a problem under the Supreme Court's rulings in *Hanna v. Plumer*,[42] which applies when a federal rule of procedure conflicts with a state rule of procedure.[43]

Instead, the Second Circuit concluded that the problem involved a classic *Erie* question,[44] which requires that the federal court determine whether a state law provision is substantive in nature or merely regulates the procedure of the court. If substantive in nature, then (as every first-year law student understands) the federal district court must apply state law. Applying the *Erie* decision and its progeny, the Second Circuit concluded that section 901(b) was "substantive" for *Erie* purposes.[45] The court held that section 901(b) was analogous to a state statute of limitations, which the Supreme Court historically has held substantive for *Erie* purposes.[46]

In addition, the appellate court also evaluated the issue whether the application of section 901(b) in federal court would serve the twin aims of the *Erie* doctrine.[47] The court concluded that a failure to ap-

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39 *Shady Grove*, 549 F.3d at 142–45.

40 *Id.* at 143.

41 *Id.* at 143 n.5.

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

43 *See id.* at 461. In evaluating whether the New York state statutory provision section 901(b) was in conflict with Rule 23, the appellate court also cited *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1 (1987), *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), and *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). The court held that "there is no unavoidable clash—indeed, there is no clash at all. Rule 23's procedural requirements for class actions can be applied along with the substantive requirement of CPLR 901(b)." *Shady Grove*, 549 F.3d at 144. *Hanna* problems invoke the authority of the Rules Enabling Act, 28 U.S.C. §§ 2071–2072 (2006), which provides the authority for federal courts to promulgate rules of procedure, but mandates that such rules cannot abridge, enlarge, or modify any substantive right.

44 *See Shady Grove*, 549 F.3d at 143–46; *see* Brief of Amicus Curiae in Support of Respondent, *supra* note 15.

45 *Shady Grove*, 549 F.3d at 145 ("We agree with the overwhelming majority of district courts that have concluded that CPLR 901(b) is a substantive law that must be applied in the federal forum, just as it is in state court. Any other conclusion would contravene the mandates of *Erie* by allowing plaintiffs to recover on a class-wide basis in federal court when they are unable to do the same in state court." (internal quotation marks omitted)).

46 *Id.* at 143 (citing *Walker*, 446 U.S. at 746).

47 *Id.* at 145.

ply section 901(b) would encourage forum shopping, in violation of one of the twin aims of the Court's *Erie* decision.[48] The Second Circuit also rejected Shady Grove's contention that the application of the N.Y. C.P.L.R. section 901(b) limitation would raise fundamental concerns of federalism, which would pose a threat to an essential characteristic of the federal court system—to wit, the federal class action mechanism.[49]

II. THE *ERIE* PROBLEM PRESENTED BY STATE LIMITATIONS ON CLASS ACTION PRACTICE: THE SUPREME COURT BRIEFING ARGUMENTS

The *Shady Grove* appeal to the Supreme Court implicated an *Erie* problem familiar to every first-year law student and presented an almost paradigmatic *Erie* examination question. The ultimate outcome in *Shady Grove* hinged on which analytical model—which mode of *Erie* analysis—the Court chose to resolve the issue whether the federal court was obligated to apply the New York limitation on penalty class actions. In their briefing and oral arguments to the Court, the parties fundamentally disagreed concerning the appropriate mode of *Erie* analysis to resolve the issue of state class action law in federal courts. Consequently, the parties also disagreed concerning the appropriate conclusion under *Erie* analysis.

A. The Arguments in Favor of a Hanna *Problem*

On appeal, Shady Grove argued in its brief that the underlying facts raised a *Hanna* problem, and must be controlled by application of *Hanna*.[50] Shady Grove contended that the New York statutory provision, N.Y. C.P.L.R. section 901(b), was a procedural rule that conflicted with Federal Rule of Civil Procedure 23.[51] Both Shady Grove

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48 *Id.* ("A failure 'to apply CPLR 901(b) would clearly encourage forum-shopping, with plaintiffs and their attorneys migrating toward federal court to obtain the 'substantial advantages' of class actions.'").

49 *Id*. Shady Grove advanced this argument in reliance on language in *Gasperini v. Center for Humanities, Inc*., 518 U.S. 415 (1996), and *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537 (1958). In these cases, the Supreme Court suggested that the *Erie* doctrine does not require a federal court to apply a state rule where it would pose a threat to an essential characteristic of the federal court system. In the *Shady Grove* appeal, the Second Circuit concluded Shady Grove "made no argument that the availability of the class action device in all circumstances is an 'essential characteristic' of the federal court system, particularly where the very cause of action that Shady Grove seeks to assert is a creature of New York state statute." *Shady Grove*, 549 F.3d at 145.

50 Brief for Petitioner, *supra* note 12, at 9–10.

51 *Id.* at 19–20.

and Allstate agreed that Rule 23 is validly enacted under the Rules Enabling Act, and neither challenged the constitutionality of the federal class action rule.[52] Shady Grove contended that, because the New York state limitation on class actions, as a procedural rule, was in conflict with Rule 23 authorizing discretionary certification of class actions, Rule 23 therefore trumped the field and had to apply in derogation of any conflicting state provision.[53]

In advancing its *Hanna* argument, Shady Grove suggested that N.Y. C.P.L.R. section 901(b) was a procedural rule because it provided a procedural entitlement (in New York) not to be subject to a class action seeking certain types of relief.[54] The gravamen of Shady Grove's argument was that section 901(b) follows section 901(a), which provided the requirements for certification of a class action in New York state courts.[55] Because of the location of section 901(b)—following the prerequisites for class certification in section 901(a)—section 901(b) was itself part of the procedural scheme for class action litigation in New York state courts.[56] Although the threshold requirements under the New York class action statute reflect similar requirements in Rule 23, the addition of section 901(b) rendered Rule 23 and the New York rule incompatible.[57]

As a fallback argument, Shady Grove contended that, even if the Court applied *Erie* analysis (rather than *Hanna* analysis), the federal court should not apply the New York state limitation on class actions because the rule was not "substantive" for *Erie* purposes.[58] Shady Grove asserted that section 901(b) was not substantive because it did

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52 *Id.* at 10; Brief for Respondent, *supra* note 11, at 22 (arguing, however, that the petitioner gains nothing by recognizing the constitutional validity of Rule 23).

53 Brief for Petitioner, *supra* note 12, at 21–23.

54 *Id.* at 20.

55 *Id.* at 19–20. Section 901(a) of the New York rule sets forth the prerequisites and standards for class certification of a New York state class action, which echo similar standards in Federal Rule 23. However, the New York standards in section 901(a) differ in detail. The New York statute provides for only one type of class action; it does not provide separate categories for injunctive or declaratory relief actions, or limited-fund class actions. Subsection (a) is substantially the same as Federal Rule 23(b)(3), requiring that common questions predominate and that the class action be a superior means for resolving the dispute.

56 Brief for Petitioner, *supra* note 12, at 33–40.

57 *Id.* at 20 (concluding: "Rule 901(b), by contrast, takes a markedly different approach [than Rule 23 to class certification], denying New York courts the discretion to certify a class that lies at the heart of the federal rule. Under *Hanna* and the precedents following it, such incompatibility between a controlling federal procedural rule promulgated under the Rules Enabling Act and a state law 'leaves no room for the operation of [state] law' in the federal courts." (second alteration in original) (citing Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987))).

58 *Id.* at 44–48.

not define the rights and duties of the parties towards each other, did not regulate primary conduct, and did not deny class members the right to recover individually from Allstate.[59] Instead, Shady Grove contended that section 901(b) only dealt with the modes of enforcing substantive rights and therefore was procedural under *Erie* analysis.[60]

Finally, Shady Grove and its amicus Public Justice presented an array of policy arguments in support of their contention that the federal courts should not apply state-law limitations on class actions. First, Shady Grove contended that *Erie*'s concern with forum shopping did not dictate the application of section 901(b) by a federal court.[61] Additionally, Shady Grove argued that the application of such state law limitations would undermine and defeat the underlying policy goals of CAFA, which Shady Grove argued was intended to nationalize class actions to ensure the uniform application of Rule 23 class certification standards.[62] Therefore, applying conflicting state class certification rules would run counter to congressional policy embodied and articulated in CAFA.[63]

In addition, Shady Grove argued that application of state laws limiting class actions would be unworkable and have a floodgates effect, insofar as federal courts would have to apply an array of conflicting or inconsistent state-law provisions on class certification, which would be imported into federal court.[64] This would disrupt the *Hanna* goal of ensuring a uniform set of procedural rules for the federal courts.[65]

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59 *Id.* at 44–46; *id.* at 46 ("The state rule here does not similarly define substantive rights and duties, nor is it otherwise aimed at regulating 'primary conduct'—that is, the way people behave out of court—which is perhaps the truest hallmark of a 'substantive' rule.").

60 *Id.* at 48 ("Class actions . . . are a part of the traditional body of equitable practice and procedure. So long as they are used only to enforce rights created by state law, they are procedural under *Erie* and thus are not governed by state law.").

61 *Id.* at 48–49. According to Shady Grove, a plaintiff who filed in federal court rather than New York state court would not be forum shopping, but merely be expressing a "legitimate preference for the advantages of the Federal Rules of Civil Procedure." *Id.* at 49 (internal quotation marks omitted).

62 *Id.* at 49–53; *id.* at 52 ("CAFA, in short, reflects a congressional policy to enable both class plaintiffs and defendants to choose a federal forum based explicitly on a preference for application of federal class action standards.").

63 *Id.* at 53 ("The congressional policy, reflected in CAFA, of encouraging federal jurisdiction over class actions because of the perceived superiority of federal certification standards displaces any policy that might otherwise favor application of state class action standards to deter 'forum-shopping' under CAFA's jurisdictional provisions.").

64 *Id.* at 54–57.

65 *Id.* at 55. Shady Grove argued that if the Court held that the New York state limitation on penalty class actions were substantive, then federal courts in all diversity actions would be

B. The Arguments in Favor of an Erie *Construct*

Allstate, in response, contended that the district court and Second Circuit decisions were correct and that the Supreme Court should uphold those determinations dismissing the plaintiffs' class action from federal court.[66] In an interesting approach to the underlying problem, Allstate first contended that there is no *Erie* problem implicated in the underlying facts.[67] In Allstate's view, Rule 23 simply established the criteria for certification of a proposed class action, but the Rule itself did not establish the eligibility of certain claims for class action treatment, which is a question antecedent to whether a proposed class action is capable of satisfying the requirements for class certification.[68] Allstate thus initially contended that "[t]he question whether a particular cause of action is eligible for class certification is legally and logically antecedent to the application of the class certification criteria. A court has no discretion under Rule 23 to apply those criteria to causes of action that are categorically ineligible for class certification."[69] The New York state statute, in Allstate's view, established which types of claims are eligible for class treatment, and which types of claims are not eligible for class treatment. In order for Rule 23 to apply, litigants must come to federal court with a claim that is eligible for class certification. Because the New York state legislature made the substantive decision that statutory penalty cases should not be eligible for class action treatment, Rule 23 does not even apply, and there cannot be any conflict of section 901(b) with Rule 23.[70] In the strongest form of this argument, Allstate contended that "any in-

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compelled to look to state rules and decisional law, rather than Rule 23, in making class certification decisions.

> Such a regime would pose great practical difficulties for the federal district courts, which would have to become familiar with multiple procedural standards governing class actions. That result would run headlong into what this Court has called "[t]he cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure."

Id. (alteration in original) (quoting Burlington N. R.R. v. Woods, 480 U.S. 1, 5 (1987)).

66 Brief for Respondent, *supra* note 11, at 8, 10.

67 *Id.* at 8, 12–21.

68 *Id.* at 12 ("Rule 23 establishes the *criteria* for class certification in federal court, but does not address the antecedent question whether any particular cause of action is eligible for the application of those criteria in the first place. Where, as here, a particular cause of action is categorically ineligible for class certification, Rule 23 does not—and, under the Rules Enabling Act, could not—authorize a district court to certify a class.").

69 *Id.* at 13.

70 *Id.* at 18–21; *id.* at 20 ("[W]here, as here, there is no question that the very legislative body that created a particular cause of action has decided that it is categorically ineligible for class certification, Rule 23 does not allow a federal court to override that decision.").

terpretation of Rule 23 that would allow federal courts to override a [state] legislative decision that a particular cause of action is categorically ineligible for class certification would violate the Rules Enabling Act."[71]

Allstate's briefing then addressed the underlying *Erie* debate. In this regard, Allstate argued that the problem presented was not a *Hanna* problem at all, because there is no conflict between New York's section 901(b) and Rule 23.[72] Essentially, the state provision and the federal rule were not in conflict because section 901(b) was a substantive determination by the state legislature to circumscribe the ability of small penalty claims to be recovered in class action litigation. Therefore, because no conflict existed, the Court should not conduct a *Hanna* analysis and could not find that Rule 23 trumped the field of class action litigation.[73] Instead, Allstate argued that the facts presented a classic *Erie* problem, and under *Erie* and its progeny, the New York state provision was a substantive provision that a federal court must apply in a diversity action.[74]

Allstate maintained that no conflict existed between section 901(b) and Rule 23 because "Rule 23 sets forth the criteria for class certification in federal court, but does not address the antecedent question whether any particular cause of action is eligible for [class treatment] in the first place."[75] Hence, as indicated above, Allstate argued that a variety of class actions are categorically ineligible for class certification under Rule 23 and, therefore, these claims (and remedies) never get to step one under Rule 23 class certification requirements.[76] Where a state has made a policy decision to limit the types of claims that are eligible for class treatment, the Rule 23 criteria for class certification never come into play. As such, Allstate argued that New York's limitation on class action penalty cases operates in the same fashion as a state statutory cap on damages, which the Court has upheld under *Erie* doctrine.[77]

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71 *Id.* at 21; *see* 28 U.S.C. § 2072(b) (2006) (stating that the Federal Rules of Civil Procedure "shall not abridge, enlarge, or modify any substantive right").

72 Brief for Respondent, *supra* note 11, at 14 ("This case is . . . a far cry from *Hanna*, on which Shady Grove places such heavy reliance."); *see id.* at 11–21.

73 *Id.* at 13–15.

74 *Id.* at 41–43.

75 *Id.* at 12.

76 *Id.* at 8 ("Where, as here, a legislature has declared particular claims categorically ineligible for class certification, those criteria [for class certification under Rule 23] never come into play.").

77 *Id.* at 27–28; *see* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996) (requiring a federal court to apply a New York state statute, N.Y. C.P.L.R. 5501(c), governing the standard of

The crux of Allstate's argument was: "Where, as here, a particular cause of action is categorically ineligible for class certification, Rule 23 does not—and, under the Rules Enabling Act, could not—authorize a district court to certify a class."[78] Allstate further argued that a court has no discretion under the Rule 23 certification requirements to apply those criteria to a cause of action that is categorically ineligible for class certification.[79]

Allstate and its amici provided the Court with two appendices of federal and state causes of action, as well as remedies, that limit or forbid enforcement through the class action device.[80] Whether a particular type of action (or remedy) is eligible for class treatment, in Allstate's view, reflects a substantive policy decision (either by state or federal legislatures).[81] Under *Erie* doctrine, federal courts must give effect to such state substantive policy choices in cases that arise under state law.[82] Allstate further suggested that to permit Rule 23 to override these substantive decisions limiting class action treatment for certain claims would perhaps violate the Rules Enabling Act, or at least "would take the Rule squarely into forbidden substantive territory beyond the bounds of the Rules Enabling Act."[83]

Allstate also cited recent Supreme Court decisions in which the Court has upheld enforcement of state caps on damages as "substantive" under *Erie* analysis.[84] Analogizing to those decisions, Allstate suggested that section 901(b) of the New York state law effectively capped a defendant's liability in a particular suit and therefore was a matter of substantive law.[85] The limitation on class actions in penalty cases, then, reflected the substantive policy of preventing class certifi-

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judicial review of an award of money damages, and upholding application of a more stringent state standard because it was designed to provide an analogous control to a cap on damages).

78 Brief for Respondent, *supra* note 11, at 12.

79 *Id.* at 13–14.

80 *See id.* apps. A–B.

81 *Id.* at 42–44.

82 *Id.* at 43 ("The Rules of Decision Act, as interpreted and applied in *Erie*, requires federal courts to enforce, not thwart, those substantive decisions."); *see* 28 U.S.C. § 1652 (2006) ("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.").

83 Brief for Respondent, *supra* note 11, at 21.

84 *See supra* note 77.

85 Brief for Respondent, *supra* note 11, at 27–28 ("For all intents and purposes, § 901(b) operates as a cap on the statutory penalty that can be recovered in a class action. . . . Like the statutes listed in Appendix A, § 901(b) caps a defendant's liability in a particular lawsuit.").

cation from distorting statutory penalties by creating a threat of massive liability for a technical violation of the law.[86]

Allstate further refuted Shady Grove's suggestion that if the Court chose not to apply a *Hanna* analysis, then section 901(b) was procedural under *Erie* itself.[87] Allstate contended that the location of section 901(b) in the New York statute, following the section 901(a) state criteria for class certification, did not render the limitation provision itself procedural.[88]

Finally, Allstate argued that a federal court's refusal to apply a limitation on class actions embodied in state law would thwart the twin aims of *Erie*.[89] In Allstate's view, allowing Rule 23 to override such state limitations would encourage forum shopping and engender unfairness; plaintiffs would be encouraged to simply cross the street from state court to federal court in order to leverage a $500 case into a $5 million case.[90] As a consequence, application of Rule 23 to permit state penalty cases to be pursued in the aggregate in federal court would result in the inequitable administration of the law, depending on which forum were to adjudicate the litigation. Citing the Court's decision in *Gasperini v. Center for Humanities, Inc.*,[91] Allstate argued that "*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court."[92]

Allstate also responded to Shady Grove's policy arguments relating to the management difficulties that would arise as a consequence of applying the New York statute proscribing penalty class actions.[93] Allstate pointed out that it was incorrect to suggest that federal courts in the future would have to apply varying state class action criteria. This was not true, Allstate argued, under the command of *Hanna* analysis.[94] Regarding purely procedural class certification criteria, Rule 23 would trump any conflicting or inconsistent state procedural

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86 *Id.* at 28–30.

87 *Id.* at 9, 40–44.

88 *Id.* at 33–39; *id.* at 36 ("[T]he legislature simply chose to enact § 901(b) as a global default rule. The substantive limitation set forth in § 901(b) is no less an integral part of each substantive cause of action to which it applies than if it were embedded in each provision creating such a cause of action.").

89 *Id.* at 44–48.

90 *Id.* at 46 ("If *Erie* means anything, it means that a plaintiff should not be able to turn a $500 case into a $5 million case by simply walking across the street from state to federal court.").

91 Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996).

92 Brief for Respondent, *supra* note 11, at 46 (quoting *Gasperini*, 518 U.S. at 431).

93 *Id.* at 49–53.

94 *Id.* at 52.

criteria.[95] But, according to Allstate, section 901(b) was not a conflicting certification requirement. Allstate simply noted that no one in the litigation was suggesting to the Supreme Court that state class certification criteria should apply in federal court.[96]

Allstate further disputed Shady Grove's contention that failure to apply Rule 23 certification criteria to override the New York state limitation would undermine the goals of CAFA.[97] Allstate suggested that Shady Grove's implied argument that CAFA encourages forum shopping in the federal forum was baseless.[98] Instead, Allstate pointed out that CAFA was not intended to alter the application of *Erie* doctrine.[99] Moreover, Allstate argued that CAFA was motivated by problems with abusive state class actions and intended to address such abuses.[100] Therefore, the goals of CAFA were entirely consistent with the intention embodied in New York State's section 901(b)—that is, to curb abuse of the class action mechanism in state court by aggregating small penalty fee cases.[101]

Finally, for class action watchers, there was some irony in Public Citizen and Public Justice relying on arguments derived from CAFA and CAFA's intent to provide a federal forum for national class actions.[102] Both public interest groups previously opposed congressional enactment of CAFA as legislation in derogation of plaintiffs' rights to pursue class action litigation.[103] Who would have predicted that these

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95 *Id.* at 52–53.

96 *Id.* at 52. Addressing Shady Grove's argument that applying New York's section 901(b) would "plunge federal courts heavily into the business of certifying classes under state procedural rules," Brief for Petitioner, *supra* note 12, at 12, Allstate contended that this argument was a red herring under *Hanna*. Brief for Respondent, *supra* note 11, at 52.

97 *See supra* text accompanying notes 62–63.

98 Brief for Respondent, *supra* note 11, at 46–48 ("Shady Grove insists, however, that Congress blessed such forum shopping in CAFA.").

99 *Id.* at 47 ("But CAFA did not alter the application of the *Erie* doctrine in cases within its reach: 'the Act does not change the application of *Erie* Doctrine, which requires federal courts to apply the substantive law dictated by applicable choice-of-law principles in actions arising under diversity jurisdiction.'" (quoting S. REP. NO. 109-14, at 49 (2005))); *see also* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1528–30 (2008) (noting that federal courts are still required to apply state substantive law).

100 Brief for Respondent, *supra* note 11, at 47 (noting that Shady Grove's CAFA argument turns CAFA on its head: "To the contrary, and this is of course the irony in Shady Grove's position, CAFA was motivated by the same general concerns over abusive class actions that motivated such statutes" rendering particular state-law claims categorically ineligible for class certification).

101 *Id.* at 47–48.

102 *See* Brief of Amicus Curiae Public Citizen, *supra* note 12, at 11, 21–24.

103 During the enactment of CAFA, Public Citizen, a consumer protection group, took a

public interest groups would align in interest to argue that CAFA provided a rationale supporting federal diversity jurisdiction over state-based class actions?

III. READING THE TEA LEAVES: THE SUPREME COURT ORAL ARGUMENT IN *SHADY GROVE*

The Supreme Court heard oral argument in the *Shady Grove* case on November 2, 2009, and the oral argument was noteworthy both for what interested the Justices and what did not.[104] Among the Justices, Justices Ginsburg and Sotomayor dominated the colloquy with the attorneys,[105] and their questions evidenced competing concerns about the practical implications of resolution of the appeal. As will be seen, Justice Ginsburg evinced sympathy for construing the appeal as presenting a pure *Erie* choice, while Justice Sotomayor favored a *Hanna* approach.

The Justices did not seem interested in Allstate's initial framing argument that the litigation did not present an *Erie* question at all, because the New York statute carved out a category of claims not eligible for class action treatment. Thus, Allstate's "antecedent" categorization argument gained no traction with the Court, at least during oral argument. Consequently, the Justices' questioning of counsel focused instead on the *Erie* debate. In addition, the Justices scarcely addressed the petitioner's argument that CAFA provided a rationale

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position against CAFA. *See* PUB. CITIZEN, UNFAIRNESS INCORPORATED: THE CORPORATE CAMPAIGN AGAINST CONSUMER CLASS ACTIONS 1–8 (2003), http://www.citizen.org/documents/ACF2B13.pdf. Public Citizen was one of approximately eighty organizations and public interest law groups that came out against congressional enactment of CAFA. *See* Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1863 (2008). Although Public Citizen's invocation of CAFA in the *Shady Grove* litigation in support of its position seems anomalous, it actually can be reconciled with the organization's general position in support of open access to the courts for the pursuit of consumer-based class actions. The *Shady Grove* litigation, nonetheless, has compelled Public Citizen to support the CAFA legislation that it previously opposed. For a discussion of the political alignments supporting and opposing CAFA's enactment, see Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1659–60 (2006); Purcell, *supra*, at 1861–65.

104 Scott L. Nelson argued on behalf of the petitioner Shady Grove; Christopher Landau argued on behalf of the respondent Allstate Insurance Company. Transcript of Oral Argument at 1, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010) (No. 08-1008).

105 Chief Justice Roberts and Justices Stevens, Scalia, Ginsburg, Breyer, and Sotomayor all asked questions of counsel; Justices Kennedy, Thomas, and Alito did not. *See* Transcript of Oral Argument, *supra* note 104.

for federalization of class action litigation, evincing a policy in support of federal adjudication of diversity class actions.[106]

A. Framing the Issue as a Pure Erie *Choice: Questions to Petitioner*

Justice Ginsburg led the Court's questioning of petitioner's counsel and, from the outset, seemed to view the problem not as a *Hanna* problem (raising a conflict between a state rule and a federal rule of procedure), but rather as an *Erie* problem of characterization.[107] She also indicated, in colloquy with petitioner's counsel, that the issues in *Shady Grove* did not present an *Erie* problem to be resolved under the *Byrd*[108] balancing test.[109]

Justice Ginsburg struck two basic themes in her questioning, asking: "Why should . . . a federal court in a diversity case create a claim . . . that the State never created?"[110] In addition, Justice Ginsburg, the author of the Court's *Gasperini* decision, pointed out that the Court in its recent decisions had "been sensitive to not overriding State limitations, and so has read the Federal rule to avoid the conflict."[111]

Justice Ginsburg pressed petitioner's counsel to distinguish the New York state provision from the security-for-costs provision at issue in *Cohen v. Beneficial Industrial Loan Corp.*,[112] the New York state provision limiting excessive damages in *Gasperini*,[113] and state preclusion principles in *Semtek*[114]—all precedents in which the Court had not found a *Hanna* conflicts problem, but had applied *Erie* doctrine to

106 *But see id.* at 43.

107 *Id.* at 4–6.

108 Byrd v. Blue Ridge Rural Electric Coop., Inc., 356 U.S. 525 (1958).

109 Transcript of Oral Argument, *supra* note 104, at 17–18.

110 *Id.* at 6.

111 *Id.* at 7.

112 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 543–45, 556–57 (1949) (holding that a New Jersey statute making an unsuccessful plaintiff in a shareholder derivative action liable for all expenses and requiring security for payment cannot be disregarded by a federal court as a mere procedural device and is applicable in a federal diversity action). *See* Transcript of Oral Argument, *supra* note 104, at 4–5, 21. (Justice Ginsburg returned to asking counsel to distinguish the situation in *Shady Grove* from the *Cohen* decision regarding security for costs: "How is it different from security for costs? I mean, that's what I started with . . . there's nothing in the Federal rules that say security for costs.")

113 Transcript of Oral Argument, *supra* note 104, at 7; *see* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 419, 431–37 & n.22 (1996) (holding that the *Erie* doctrine precludes a recovery in federal court that is significantly larger than the recovery that would have been tolerated in state court and that Federal Rule of Civil Procedure 59 does not conflict with the New York statute at issue).

114 Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 506, 508–09 (2001) (Scalia, J.) (upholding dismissal of a diversity lawsuit based on Maryland state preclusion principles, relying

uphold state substantive law. Chief Justice Roberts also pursued this line of inquiry, asking whether the outcome should be different if the basis for a restriction was grounded in the additional administrative costs of a class action.[115]

In evaluating whether section 901(b) could be characterized as substantive or procedural, Justice Ginsburg also focused on petitioner's argument concerning the location of section 901(b) in New York's class action statute, which petitioner contended rendered the provision a procedural rule. She queried whether it would make a difference if, instead of having a statute that covered penalties generally, the New York legislature had written a penalty into each separate substantive statute.[116] When counsel persisted in responding that the separate placement of the penalty would not establish a substantive right, Justice Ginsburg—seemingly dissatisfied with counsel's response—rephrased this same basic question four separate times.[117]

Justice Ginsburg also pressed counsel to evaluate whether a statute may simultaneously set forth both a substantive policy as well as a procedural policy, using state statutes of limitations as an example of this.[118] Disagreeing with counsel's response, Justice Ginsburg pointed out that built-in statutes of limitation historically had been characterized by the Court as substantive provisions.[119]

B. Framing the Issue as a Hanna *Conflict: Questions to Respondent*

In counterbalance, Justice Sotomayor led the questioning of Allstate's counsel, and her questions manifested a sympathetic concern for the larger implications for class action practice if the Court upheld the lower court decisions and effectively enforced the New York state limitation on penalty class actions. At the outset of the respondent's argument, Justice Sotomayor asked—in varying formulations, at least six times—whether a state could pass a law that said no cause of ac-

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on *Gasperini*, *Walker*, and *Erie*, and finding the result not dictated by Federal Rule of Civil Procedure 41(b)).

115 Transcript of Oral Argument, *supra* note 104, at 20.

116 *Id.* at 9–10.

117 *Id.* at 9–12. In the fourth iteration of this question, Justice Ginsburg asked: "So you are saying that even if New York didn't use this shorthand, even if they incorporated it into each penalty statute, your answer would be the same?" *Id.* at 12.

118 *Id.* at 16–17.

119 *Id.* at 17. Justice Ginsburg disagreed with counsel's attempt to characterize the case as implicating the *Byrd* balancing test. *See id.* at 17–18; Byrd v. Blue Ridge Rural Electric Coop., Inc., 356 U.S. 525, 538 (1958) (finding that the Seventh Amendment right to jury trial outweighs state policy to accord the question whether an employee is a statutory employee to the judge, rather than the jury).

tion could be brought as a class action ever.[120] Justice Stevens similarly raised this concern about New York enacting a statute to ban class actions entirely, as well as the *Erie* implications of expanding such prohibition to embrace causes of action based on New York common law.[121]

Justice Sotomayor also seemed less persuaded than Justice Ginsburg that the issues underlying the *Shady Grove* appeal implicated a pure *Erie* choice and explored with counsel whether the New York state provision presented a conflict with Rule 23, which would then implicate a *Hanna* analysis for resolving the dispute.[122] Suggesting that Rule 23 embodied a judgment about the efficiency of federal court litigation, Justice Sotomayor queried whether the New York state provision presented a conflict with that federal judgment.[123]

Perhaps concerned with the tenor of Justices Stevens's and Sotomayor's questions, and to cabin the *Shady Grove* appeal to its narrow statutory basis, Justice Ginsburg sought reassurance from respondent's counsel that the New York statutory limitations on penalty cases did not manifest any sweeping anti–class action bias as a procedural policy.[124]

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120 Transcript of Oral Argument, *supra* note 104, at 23–26 ("Under your theory, any State could pass a law that says no cause of action under State law can be brought as a class action ever. That would be your theory because it's substantive, if it's an *Erie* choice.").

121 *Id.* at 33–34. The colloquy between counsel and Justice Stevens went as follows:

> Justice Stevens: Yes, well, let me be—I just say I want—I want to be sure I understood your answer to Justice Sotomayor. Is it your position that, if we follow your view in this case, it would also be true that—if New York had passed a statute saying no cause of action based on New York law may be maintained as a class action?
>
> Mr. Landau: Yes, Your Honor. If New York did that—I guess my answer is—you really would have to look behind that. If it simply said—if Mississippi and Virginia codified their current nonexistence of—nonauthorization of class actions under State law and affirmatively said there may not be a class action—
>
> Justice Stevens: And that would—that would apply not only to statutory causes of action but causes of action based on New York common law.
>
> Mr. Landau: Right.

Id.

122 *Id.* at 23.

123 Justice Sotomayor rephrased this question several times, as well. *See id.* at 23–26.

124 *Id.* at 35–36. Respondent's counsel agreed with Justice Ginsburg that section 901(b) did not embody any global anti–class action determination. *Id.* at 36 ("Mr. Landau: . . . And I think that underscores is why this is substantive or the fact that this reflects a substantive policy decision. It is not about the efficiency or operation of the class action process itself, the judicial process. This is a substantive decision to calibrate the remedy that New York has afforded under its own law . . . .").

C. *Concerns over the Scope of New York Statutory Prohibition: Questions to Both Counsel*

Finally, in questions addressed to both petitioner's and respondent's counsel, Justice Scalia manifested a concern with the extraterritorial application, by New York state courts, of their state prohibition on out-of-state causes of action.[125] Justice Scalia employed this line of questioning to explore the appropriate characterization of the New York statute as either substantive or procedural in nature. Thus, Justice Scalia framed this inquiry by exploring whether a statute could both establish a substantive limitation and also establish a rule of procedure for New York courts.[126] Petitioner's counsel conceded that a statute could be phrased to do both,[127] and respondent's counsel, when asked the same question, agreed that substantive policy concerns and procedural issues could blend in legislative intent and enactment.[128]

Justice Stevens revisited this concern in a more pointed fashion, querying respondent's counsel whether the New York limitation would apply just to statutory causes of action created by New York law, or might apply to a statutory cause of action created by New Mexico law.[129] Chief Justice Roberts seconded this prospect, asking: "But the question is New Mexico causes of action. Can they [New York] decide that they don't want actions from outside of the state to be brought as class actions?"[130]

In response to this line of questioning, Justice Ginsburg sought to refocus the debate by pointing to state statutes of limitations. In such an instance, Justice Ginsburg indicated, New York legitimately could enforce its own statutory constraint.[131]

> A sister state may say, we create the same claim, but we think it has a longer life. New York would say, that's fine. Bring that claim in your own state. Don't clutter up our courts with out-of-state claims when we would not hear the identical claim under our own law. There are policies that do

125 *Id.* at 14–15 (questions to petitioner's counsel); *id.* at 35 (same questions to respondent's counsel).

126 *Id.* at 15.

127 *Id.*

128 *Id.* at 35.

129 *Id.* at 39–40.

130 *Id.* at 41.

131 *Id.* at 42.

> operate as procedural limitations and have a substantive thrust.[132]

The tenor and direction of the questioning at oral argument seemed to suggest that the Justices conceived of the appeal as presenting an *Erie* characterization problem. With Justice Ginsburg dominating the argument, her questioning strongly indicated that she viewed the issue as a classic *Erie* problem, requiring determination whether section 901(b) was substantive or procedural for *Erie* purposes. Based on her repeated citation to *Cohen*, *Gasperini*, and *Semtek*, Justice Ginsburg seemed to be signaling that she believed the New York state statute fell within the purview of those decisions and was substantive for *Erie* purposes.

Justice Sotomayor's questioning, on the other hand, suggested that she viewed the New York statutory provision as in conflict with Rule 23, thus presenting a classic *Hanna* problem.[133] If Justice Sotomayor's view prevailed, and the Court viewed this appeal as presenting a *Hanna* problem, then the New York state statute would have to yield to Rule 23.

Apart from the *Erie* characterization issue, some Justices appeared concerned with the potential reach of their decision and its practical consequences. In the extreme, Justices Stevens and Sotomayor manifested disquiet with the possibility that states could ban class action altogether.[134] Justice Scalia seemed concerned whether New York—or any other state—could extraterritorially limit or ban out-of-state class actions in their state courts.

Against this backdrop, perhaps it is worth noting that a unanimous Court in 2001 upheld application of state preclusion principles under *Erie* doctrine in *Semtek* in an opinion authored by Justice Scalia.[135] The *Gasperini* decision, frequently referred to by Justice Ginsburg in her questioning, was decided by a split Court in a 5–4 decision, authored by Justice Ginsburg.[136] The dissenters included Justices Stevens, Scalia, Thomas, and Chief Justice Rehnquist; the latter three contended that the *Gasperini* majority incorrectly applied *Erie* principles in relation to the underlying appellate review of a jury determination.[137] In their view, the Court had failed to apply the *Byrd*

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132 *Id.*

133 *Id.* at 24–25.

134 *See id.* at 33.

135 Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 498 (2000).

136 Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 418 (1995).

137 *Id.* at 464–65 (Scalia, J., dissenting).

balancing test to an underlying set of facts that implicated a right to trial by jury.[138] Because the *Shady Grove* appeal did not implicate either a Seventh Amendment issue or the *Byrd* balancing test, the *Gasperini* alignment may not be relevant to the Court's decision in *Shady Grove*.

IV. The Supreme Court Decision in *Shady Grove*

The Court's decision in *Shady Grove* was something of a surprise, given the dominant interlocutors during oral argument. Clearly, Justice Ginsburg did not carry the day, nor did Justice Sotomayor (although her policy position prevailed). The Court's four-month delay in issuing a decision, coupled with the array of opinions and partial opinions, suggests the depth of disagreement among the Justices concerning the appropriate disposition of the case.

The *Shady Grove* opinions manifest two separate concerns: first, a disagreement over the appropriate interpretation and application of *Erie* doctrine, and second, a disagreement over the policy implications of the Court's determination. Regarding the first concern, the array of opinions in *Shady Grove* neither enhances nor clarifies our understanding of *Erie* doctrine. In particular, the test for the constitutionality of a federal rule, pursuant to the Rules Enabling Act, has been hopelessly muddled by a heated debate between Justices Stevens and Scalia. Regarding the second concern, the politics of the Court's plurality decision may be more subtle and complex than as first perceived.

A. The Scalia Plurality Opinion

A plurality of the Court disagreed with Allstate's alternative arguments for *Erie* application of the New York state limiting provision.[139] In a fractured opinion authored by Justice Scalia, he indicated in Part II-A that the Court first had to determine whether Rule 23 answered the *Erie* question, and that if it did, then Rule 23 would govern, unless the Rule exceeded statutory authorization or Congress's rulemaking power.[140] Essentially, the plurality viewed the *Shady Grove* situation as a *Hanna* Rules Enabling Act problem: the

138 *Id.* at 462–69 (discussing the majority's "flawed" *Erie* analysis).

139 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010). Justice Scalia announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II-A; an opinion with respect to Parts II-B and II-D, in which Chief Justice Roberts and Justices Thomas and Sotomayor joined; and an opinion with respect to Part II-C, in which Chief Justice Roberts and Justice Thomas joined. *Id.* at 1435.

140 *Id.* at 1437.

tension between a federal and state procedural rule on point. Generally, finding that Rule 23 governed and was not ultra vires, Justice Scalia noted: "We do not wade into *Erie*'s murky waters unless the federal rule is inapplicable or invalid."[141]

Justice Scalia believed that Rule 23 and section 901(b) address the same issue: whether a class action may proceed for a given lawsuit.[142] Thus, Rule 23 sets forth a categorical rule entitling a plaintiff to maintain a class action if certain criteria are satisfied. Section 901(b) attempts to answer the same question, indicating what types of suits *may not* be maintained as class actions.[143] Rule 23 and section 901(b) were in direct conflict, then, because "Rule 23 permits all class actions that meet its requirements, and a State cannot limit that permission by structuring one part of its statute to track Rule 23 and enacting another part that imposes additional requirements."[144]

Moreover, Scalia disagreed with the Second Circuit and Allstate's contention that section 901(b) addressed an "antecedent" question concerning whether certain types of class actions are *eligible* for class treatment at all.[145] Noting that Rule 23 is completely silent on this question of eligibility of certain types of actions for class certification, Justice Scalia opined that the "line between eligibility and certifiability is entirely artificial."[146]

Justice Scalia also deflected any comparison of section 901(b) to state statutory ceilings on damages. In response to the dissent, he contended that section 901(b) says nothing about remedies a court may award, but instead addresses the procedural right to maintain, or not maintain, a class action.[147]

Justice Scalia also refuted the dissenters' contention that the purpose of section 901(b) was to restrict only remedies and, therefore, was substantive in nature. Eschewing such "purpose-driven" *Erie* analysis, he contended that not only was there sparse evidence of the New York legislature's purpose, but the Justices could not rewrite his-

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141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.* at 1439.

145 *Id.* at 1438.

146 *Id.*

147 *Id.* at 1439 & n.4. Presumably Justice Scalia's contention was in response to Justice Ginsburg's *Gasperini* arguments. In a footnote, he suggested: "Contrary to the dissent's implication, we express no view as to whether state laws that set a ceiling on damages recoverable in a single suit . . . are pre-empted." *Id.* at 1439 n.4.

tory to reflect the Justices' "perception of legislative purpose."[148] "The dissent's approach of determining whether state and federal rules conflict based on the subjective intentions of the state legislature is an enterprise destined to produce 'confusion worse confounded.'"[149]

Having determined that Rule 23 and section 901(b) raised a *Hanna* conflict—in which a state rule must give way to the federal rule—Justice Scalia, in Part II-B, next addressed whether Rule 23 fell within statutory authorization; that is, whether the federal rule "really regulate[d] procedure."[150]

In resolving the question of the constitutionality of Rule 23 under the Rules Enabling Act, Justice Scalia chose a simple, brightline test set forth in *Sibbach v. Wilson*.[151] Justice Scalia thus indicated that what really matters is what the rule itself regulates: "If it governs only the 'manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not."[152] Justice Scalia noted that, in applying this test, the Court previously had rejected every statutory Rules Enabling Act challenge to Federal Rules of Procedure.[153]

Justice Stevens, in concurrence, heatedly contested Justice Scalia's interpretation and application of the *Sibbach* test; Justice Stevens instead contended that Justice Scalia misused and misapplied the *Sibbach* decision in an essentially tautological fashion.[154] Justice Stevens eschewed Justice Scalia's reliance on a simplistic, brightline rule adopted from *Sibbach*.[155]

In an extended response to Justice Stevens (Part II-C of the plurality opinion), Justice Scalia defended the simple *Sibbach* construct,[156] suggesting that Justice Stevens was seeking either to overrule

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148 *Id.* at 1440.

149 *Id.* at 1440–41 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

150 *Id.* at 1442.

151 Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

152 *Shady Grove*, 130 S. Ct. at 1442 (quoting Miss. Publ'n Corp. v. Murphree, 326 U.S. 446, 446 (1945)).

153 *Id.*

154 *Id.* at 1451–53 (Stevens, J., concurring in part and concurring in the judgment). Part II-C of Justice Scalia's opinion is an extended response to Justice Stevens's attack on Justice Scalia's invocation and application of the *Sibbach* decision. *See id.* at 1444–47 (plurality opinion). Only Chief Justice Roberts and Justice Thomas joined Part II-C of the plurality decision; Justice Sotomayor did not. *Id.* at 1435.

155 *Id.* at 1454 (Stevens, J., concurring in part and concurring in the judgment).

156 *Id.* at 1445 (plurality opinion) ("*Sibbach* adopted and applied a rule with a single criterion; whether the Federal Rule 'really regulates procedure.'").

or rewrite *Sibbach*.[157] Noting that *Sibbach* had been settled law for nearly seven decades, and that Allstate had not asked the Court to overrule *Sibbach*, Justice Scalia suggested that Justice Stevens's approach was therefore misguided.[158] Furthermore, requiring federal courts to assess the substantive or procedural character of countless state rules would present hundreds of hard questions; therefore, Justice Stevens's approach "does nothing to diminish the difficulty, but rather magnifies it many times over."[159] Justice Scalia concluded: "The more one explores the alternatives to *Sibbach*'s rule, the more its wisdom becomes apparent."[160]

Applying the *Sibbach* test to Rule 23, Justice Scalia concluded that it was obvious that rules allowing multiple claims to be litigated together also are valid.[161] Rule 23 only alters how claims are processed, and thus falls within the authorization of the Rules Enabling Act.[162] Moreover, Justice Scalia rejected Allstate's contention that in permitting aggregation of claims pursuant to the federal rule, Rule 23 violated the Rules Enabling Act by abridging a substantive state right not to be subjected to aggregated class liability.[163] For Justice Scalia, the substantive nature of New York's law, or its substantive purpose, made no difference:

> In sum, it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule. We have held since *Sibbach*, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure. If it does, it is authorized by § 2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights.[164]

Finally, Justice Scalia acknowledged that, by keeping federal courts open to class actions that otherwise could not proceed in state court, the *Shady Grove* decision would produce forum shopping.[165] But this consequence "is the inevitable . . . result of a uniform system

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157 *Id.* at 1445–46.

158 *Id.*

159 *Id.* at 1447.

160 *Id.*

161 *Id.* at 1443.

162 *Id.*

163 *Id.*

164 *Id.* at 1444 (citations omitted).

165 *Id.* at 1447 ("We must acknowledge the reality that keeping the federal court door open to class actions that cannot proceed in state court will produce forum shopping.").

of federal procedure," and Congress "created the possibility that the same case might follow a different course if filed in federal instead of state court."[166]

B. Justice Stevens's Concurrence

Justice Stevens concurred in part and in the judgment, providing a fifth vote for reversal of the Second Circuit's decision.[167] He joined only Parts I and II-A of the Court's opinion.[168] Justice Stevens nonetheless split the baby between the plurality and dissenting Justices. He agreed with the plurality that New York section 901(b) was a procedural rule that was not part of New York's substantive law.[169] Justice Stevens also concluded that Rule 23 "must apply unless its application would abridge, enlarge, or modify New York rights or remedies."[170]

But Justice Stevens also agreed with the dissenting Justices 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."[171] In a more nuanced analysis of the Rules Enabling Act than that postulated by Justice Scalia, Justice Stevens excoriated Justice Scalia's opinion for its reliance on a Rules Enabling Act test from *Sibbach*, suggesting that Justice Scalia had misread and misapplied that opinion.[172] Invoking *Hanna* and *Gasperini*, Justice Stevens instead argued that not every federal rule of procedure displaces state law, and that the federal rules must be interpreted with some degree of "sensitivity to important state interests and regulatory policies," as advocated by dissenting Justice Ginsburg. Justice Stevens suggested that this can be a "tricky balance" to implement.[173]

Almost all of Justice Stevens's concurrence consists of an extended debate with Justice Scalia concerning the appropriate interpretation of the Rules Enabling Act test for the constitutionality of a federal rule of procedure. Justice Stevens's major point of departure from Justice Scalia's analysis, then, is his observation that, under the Rules Enabling Act, not every rule of federal practice and procedure

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166 *Id.* at 1448.

167 *Id.* (Stevens, J., concurring in part and concurring in the judgment).

168 *Id.* Part I of the Court's opinion sets out the factual and procedural history of the underlying litigation. Part II-A sets forth Justice Scalia's understanding of the *Erie* problem.

169 *Id.*

170 *Id.* at 1456.

171 *Id.* at 1448; *see also id.* at 1450, 1452, 1456.

172 *Id.* at 1452–53.

173 *Id.* at 1449.

displaces state law.[174] According to Justice Stevens, by the Rules Enabling Act, Congress commanded that federal procedural rules not alter substantive rights, which requires consideration of the degree to which a federal rule would make the character and result of federal litigation "stray from the course it would follow in state courts."[175]

Calibrating this balance, in turn, requires a careful interpretation and assessment of the nature of the state rule that is being displaced by a federal rule.[176] Not every federal rule of procedure will displace a competing state rule. Justice Stevens suggested that when a state chooses a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, then federal courts must recognize and respect that choice.[177]

Justice Stevens indicated that a proper *Erie* analysis entailed a two-step analysis. Courts first must determine whether the scope of a federal rule is sufficiently broad to control the issue before the court, and to thereby leave no room for the operation of a seemingly conflicting state law.[178] If the court determined that a federal rule was sufficiently broad to control the issue and there was a direct collision between the federal and state rule, then the Rules Enabling Act required that the court determine that the federal rule did not abridge, enlarge, or modify any substantive right.[179]

> A federal rule, therefore, cannot govern in a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.[180]

Justice Stevens rejected Justice Scalia's simplistic approach to the Rules Enabling Act mandate, in distilling that inquiry to the sole question whether the federal rule "really regulates procedure."[181] Justice Stevens noted that it was difficult to understand why a Rules Ena-

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174 *See id.*

175 *Id.* (citing Hanna v. Plumer, 380 U.S. 460, 473 (1965)).

176 *Id.*

177 *Id.* at 1450 (citing Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533 (1949)).

178 *Id.* at 1451.

179 *Id.* Justice Stevens further noted that when a federal rule appears to abridge, enlarge, or modify a substantive right, then federal courts must consider whether the rule reasonably can be interpreted to avoid that impermissible result. *Id.* at 1452. When a "saving" construction is not possible and the federal rule would violate the Rules Enabling Act, then federal courts must not apply the federal rule of procedure. *Id.*

180 *Id.*

181 *Id.* Justice Stevens suggested that Justice Scalia's test was no test at all: "in a sense, it is

bling Act inquiry that looks to state law was necessarily more taxing than Justice Scalia's approach. Additionally, Justice Stevens indicated that the question was not what rule the Court thought would be the easiest to apply by federal courts, but what rule Congress had established in the Rules Enabling Act.[182] Thus, "[a]lthough Justice Scalia may generally prefer easily administrable, bright-line rules, his preference does not give us license to adopt a second-best interpretation of the Rules Enabling Act."[183] And, in a lengthy digression, Justice Stevens also took the plurality opinion to task for misreading the Court's *Sibbach* decision.[184]

Although Justice Stevens rejected Justice Scalia's Rules Enabling Act test, in the final analysis, he also declined to agree with the dissenters' view of section 901(b) as a substantive remedies provision that should be governed by *Erie* analysis.[185] Thus, Justice Stevens declined to apply a Rules of Decision Act *Erie* analysis, because the *Shady Grove* litigation involved a situation with a governing federal rule on point: Rule 23.[186] Justice Stevens suggested that Justice Ginsburg's *Erie* approach would do an end run around Congress's system of uniform federal rules of procedure and the Court's decision in *Hanna*.[187]

And, pursuant to a *Hanna* analysis, Justice Stevens ultimately concluded that applying New York's section 901(b) did not violate the Rules Enabling Act.[188] Justice Stevens suggested that although section 901(b) was procedural in form, it did not serve the function of defining New York's rights or remedies.[189] Justice Stevens also expressed doubt about making recourse to legislative history to define the legislature's intent or purpose.[190]

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little more than the statement that a matter is procedural if, by revelation, it is procedural." *Id.* at 1454 n.10.

182 *Id.* at 1454.

183 *Id.*

184 *Id.* at 1454–55.

185 *Id.* at 1454.

186 *Id.* at 1456–57 ("But '[w]hen a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice.' The question is only whether the Enabling Act is satisfied." (citation omitted) (quoting Hanna v. Plumer, 380 U.S. 460, 473 (1965)).

187 *Id.* at 1457. Justice Stevens suggested that if the dissenters felt strongly that section 901(b) was substantive, then they should have argued within the Rules Enabling Act framework. *Id.*

188 *Id.* at 1457–60.

189 *Id.* at 1457.

190 *Id.* at 1459–60 ("But given that there are two plausible competing narratives, it seems obvious to me that we should respect the plain textual reading of § 901(b), a rule in New York's

C. *Justice Ginsburg's Dissent*

In a fourteen-page dissent, Justice Ginsburg—joined by Justices Kennedy, Breyer, and Alito—noted that the Court approved Shady Grove's attempt to transform a $500 case into a $5 million award, "although the State creating the right to recover has proscribed this alchemy."[191] Nevertheless, Justice Ginsburg failed to command Justice Stevens's vote, which would have created a five-Justice coalition in favor of applying the New York state limiting provision.

Consistent with Justice Ginsburg's opinion in *Gasperini*, the dissenters would interpret federal rules with an awareness of, and sensitivity to, important state regulatory policies.[192] Summarizing the Court's prior decisions, Justice Ginsburg noted that "we have avoided immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest."[193] From a broader policy prospective, Justice Ginsburg disapproved of the plurality's "wooden" approach because, in not seeking to avoid a conflict between a federal rule and state law, the Court unwisely and unnecessarily retreated from the federalism principles undergirding *Erie* doctrine.[194]

As Justice Ginsburg signaled in her questioning during oral argument, she continued to view the *Shady Grove* facts as raising an *Erie* problem that was governed by the Rules of Decision Act.[195] Thus, Justice Ginsburg suggested that, despite Shady Grove's efforts to characterize section 901(b) as simply procedural, the petitioner "cannot successfully elide this fundamental norm: When no federal law or rule is dispositive of an issue, and a state statute is outcome affective in the sense our cases on *Erie* (pre- and post-*Hanna*) develop, the Rules of Decision Act commands application of the State's law in diversity cases."[196]

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procedural code about when to certify class actions brought under any source of law, and respect Congress' decision that Rule 23 governs class certification in federal courts. In order to displace a federal rule, there must be more than a mere possibility that the state rule is different than it appears.").

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

192 *Id.*

193 *Id.* at 1461. Justice Ginsburg's dissent includes an extended discussion of prior decisions respecting state law where the federal rule was not broad enough to preempt the field and create a conflict with state law. *Id.* at 1461–64.

194 *Id.* at 1468.

195 *Id.* at 1471.

196 *Id.*

Justice Ginsburg stated that the Court's jurisprudence required the Court to ask, before undermining state legislation: "Is this conflict necessary?"[197] Answering her own question, she found no conflict between Rule 23 and section 901(b).[198] Application of the *Hanna* analysis, however, is premised on a direct collision between a federal rule and state law—a collision not present on these facts.[199] Justice Ginsburg opined that the Court's plurality decision had veered away from the approach that avoided conflicts with important state regulatory interests, in favor of a mechanical reading of the federal rules, "insensitive to state interests and productive of discord."[200]

Much of Justice Ginsburg's dissent is given over to characterizing New York state section 901(b) as the embodiment of a regulatory policy to prevent excessive damages, and to recasting that provision as a remedy.[201] Thus, Justice Ginsburg suggested—in finding no conflict—that "[t]he fair and efficient *conduct* of class [action] litigation is the legitimate concern of Rule 23; the *remedy* for an infraction of state law, however, is the legitimate concern of the State's lawmakers and not of the federal rulemakers."[202]

Having determined that there was no unavoidable conflict between Rule 23 and section 901(b), Justice Ginsburg indicated that the appropriate test to determine whether a federal court must apply a state rule is "whether application of the [state] rule would have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would be likely to cause a plaintiff to choose the federal court."[203]

Moreover, Justice Ginsburg noted that the Court's plurality decision would undermine the aims of the *Erie* doctrine by causing substantial variations between federal and state monetary judgments in class litigation and encourage forum shopping.[204] Justice Ginsburg reminded her colleagues that the Court previously had suggested that

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197 *Id.* at 1460.

198 *Id.* at 1465 ("Mindful of the history behind § 901(b)'s enactment, the thrust of our precedent, and the substantive-rights limitation in the Rules Enabling Act, I conclude, as did the Second Circuit and every District Court to have considered the question in any detail, that Rule 23 does not collide with § 901(b).").

199 *Id.* at 1461. Justice Ginsburg suggested that the Court, in pre-*Hanna* decisions, "vigilantly read the Federal Rules to avoid conflicts with state laws." *Id.* at 1462.

200 *Id.* at 1463–64.

201 *Id.* at 1464–65, 1472.

202 *Id.* at 1466.

203 *Id.* at 1469 (citing Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 428 (1995); Hanna v. Plumer, 380 U.S. 460, 486 n.9 (1965)).

204 *Id.* at 1471. Justice Ginsburg also noted that the plurality had acknowledged that its

"[t]he accident of diversity of citizenship should not subject a defendant to . . . augmented liability," which the plurality's decision would impose on defendants.[205]

Finally, in light of the congressional intent in enacting CAFA, Justice Ginsburg noted the irony in the plurality's decision.[206] Congress enacted CAFA, Ginsburg pointed out, to curb the overreadiness of state courts to certify class actions; Congress envisioned fewer class actions overall, not more. Thus, "Congress surely never anticipated that CAFA would make federal courts a mecca for suits of the kind Shady Grove has launched: class actions seeking state-created penalties for claims arising under state law—claims that would be barred from class treatment in the State's own courts."[207]

Conclusion

The *Shady Grove* decision is a classic sleeper case that failed to command the attention of the media and the broader public, precisely because of the obscurity of the legal issues entailed in the litigation—much like the original *Erie* decision itself. Nonetheless, the *Shady Grove* decision is vitally important because the Court's resolution of the underlying *Erie* issue has practical implications beyond the reach of this particular case.

If the Court had decided to uphold the New York state limitation on penalty class actions in federal diversity cases, this holding could have determined the legal effect of other existing state statutory limitations on class claims and remedies. Even more important, such a holding would have encouraged the opponents of class action litigation to seek the legislative enactment of additional limiting provisions in state legislatures throughout the country. If applied in federal court under the command of the *Erie* doctrine, such state limiting provisions could have undermined or defeated class litigation in both federal and state courts.

A plurality of the Court eschewed this result. Instead, the plurality determined that Rule 23 survives to govern the certification of class actions filed in federal court, without regard to whether such class actions could be pursued in state court. Over the span of seventy

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decision would encourage forum shopping to seek massive monetary awards in federal court that would be explicitly barred by state law. *Id.*

205 *Id.* at 1471–72 (quoting *Hanna*, 380 U.S. at 467; Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941)) (internal quotation marks and citation omitted).

206 *Id.* at 1473.

207 *Id.*

years, class action litigation has progressed through cycles of enhanced class action activity, often followed by periods of retrenchment. After nearly two decades of revitalized class action litigation in state and federal courts, the Court's decision in *Shady Grove* deflected another possible retrenchment in federal class action litigation at the hands of limiting state statutory provisions. And, ironically, the Court's conservative coalition—joined by two liberal Justices—aligned to save the federal class action from withering away at the hands of state legislative initiatives.

As recognized by most of the Court, this much is certain: the *Shady Grove* decision will encourage federal forum shopping by plaintiffs to avoid the limiting effects of state provisions that prohibit certain types of class actions. In addition, the *Shady Grove* decision may well discourage similar wholesale legislative initiatives in other states to circumscribe class actions. Moreover, Justice Ginsburg correctly noted the ironic collision of the *Shady Grove* plurality decision with the countervailing policy implications of CAFA.

The ideological alignments in *Shady Grove* are entertaining. Justice Sotomayor, a liberal, joined conservative Chief Justice Roberts and Justices Scalia and Thomas in the plurality opinion. The liberal Justice Stevens also supplied the crucial fifth vote to reverse the Second Circuit's decision and, in effect, to save federal class actions from encroachment by state legislatures. On the other hand, the dissent united liberal Justices Kennedy, Ginsburg, and Breyer with their conservative colleague, Justice Alito. What political sense is one to make of these alignments?

As strange as these alignments appear, some logical explanation may underlie these configurations. As champions of the poor and weak, Justices Sotomayor and Stevens joined the conservatives to save federal class actions and access to federal court. And the probusiness conservatives, mindful of CAFA and the disinclination of federal courts to certify class actions, adopted an *Erie* analysis that permitted the federal rule to prevail. The liberal dissenters joined by Justice Alito are more difficult to explain. This coalition united in a states-rights paradigm that would have restricted class actions.

While *Shady Grove*'s practical policy implications seem clear, the Court's doctrinal divisions over *Erie* doctrine have muddied *Erie* jurisprudence even further, if that is possible. Basically, *Shady Grove* sets forth three competing and inconsistent views of *Erie* doctrine, with none sufficiently compelling to command the votes of more than four Justices.

Justice Scalia opted for a brightline *Hanna* doctrine that simply posits that if a federal rule and state law conflict, then the federal rule applies. Justice Scalia's simplistic Rules Enabling Act test—derived from *Sibbach v. Wilson*—asks whether the federal rule really regulates procedure. If it does, then it applies in derogation of competing state law. Justice Scalia's *Sibbach* analytical approach secured three votes; he was joined by Chief Justice Roberts and Justice Thomas, but not by Justice Sotomayor.

Justice Stevens clearly was torn between Justice Scalia's brightline, formalistic approach and Justice Ginsburg's end run around the Rules Enabling Act. As such, Justice Stevens's concurrence represents an attempt to find middle ground between the two opinions, resulting in *Erie* mishmash.

Justice Stevens eschewed Justice Scalia's simplistic Rules Enabling Act test, pointing out that not only is it tautological, but that the test ignores considerable *Erie* jurisprudence since *Sibbach*. Instead, adopting a more nuanced *Hanna* approach, Justice Stevens posited:

> A federal rule . . . cannot govern in a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.[208]

Justice Stevens also would incorporate the federalism concerns undergirding *Gasperini*, which give deference to important state regulatory policies.

Justice Stevens's *Erie* analytical approach melds the *Hanna-Gasperini* line of *Erie* cases. Nonetheless, his application of this approach to the *Shady Grove* facts illustrates the complexity of resolving the "tricky balance" required to determine how intertwined a state procedural rule is with a state-created substantive right. Justice Stevens resolved this balance in favor of the federal rule, so he did not provide the fifth vote to affirm the Second Circuit. Significantly, no Justice joined Justice Stevens's concurring opinion.

Justice Ginsburg supplied the third *Erie* analysis, best characterized as a Rules of Decision *Erie* approach supplemented by the federalism concerns articulated in *Gasperini*, and commanded four votes. Insistent that the *Shady Grove* case presented no conflict between a federal rule and state law, Justice Ginsburg seemingly rejected the *Hanna* analytical model. Nevertheless, her analysis ultimately circles

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208 *Id.* at 1452 (Stevens, J., concurring in part and concurring in the judgment).

back to *Hanna* principles relating to the twin aims of *Erie* doctrine. Justice Ginsburg commanded four votes for her *Erie* approach, but she failed to persuade Justice Stevens, who viewed her *Erie* approach as accomplishing an end run around analysis required by *Hanna* and the Rules Enabling Act.

In the end, *Shady Grove* accomplished two things. First, it saved the federal class action rule. Second, it further muddled *Erie* analysis, providing law professors with a great teaching case and new generations of law students with continued *Erie* angst.