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Kryptonite for CAFA?

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Adam N. Steinman*

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I. INTRODUCTION

Was the Class Action Fairness Act (CAFA) really about fairness? If so, fairness to whom?¹

However one answers these questions, one of CAFA's principal means to accomplishing its ends was forum shopping. Forum shopping is a charge most commonly leveled against plaintiffs. As the "masters of their complaint,"² plaintiffs decide

* Professor of Law & Michael J. Zimmer Fellow, Seton Hall University School of Law. Thanks to the Association of American Law Schools' Section on Litigation for the opportunity to participate in this symposium and on the panel at the AALS 2013 annual meeting, *The Class Action Fairness Act of 2005: Perspectives and Predictions*, and to the Sections on Civil Procedure and Federal Courts for co-sponsoring this panel. I am also grateful to my fellow panelists John Beisner, Elizabeth Cabreser, Rick Marcus, Linda Mullenix, Jay Tidmarsh, and Georgene Vairo for a lively and enlightening discussion. Finally, thanks to the editors of *The Review of Litigation* for their willingness to publish this symposium, and for their excellent editorial work on this article.

1. This question, in fact, was the title of a University of Pennsylvania Law Review symposium that occurred shortly after CAFA was enacted. See Symposium, *Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005*, 156 U. PA. L. REV. 1439 (2008).

2. See, e.g., *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 94 (2005) (noting that the plaintiffs are "masters of their complaint"); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 395 (1987) (same).

where to file their case, and they may craft their claims with an eye toward keeping the case in their most desired forum. Forum shopping can be a two-way street, however. Procedural devices often enable defendants to change the plaintiffs' initial choice of forum—removal from state court to federal court,³ transfer of venue,⁴ dismissal for lack of jurisdiction,⁵ or forum non conveniens dismissal.⁶ Such countermoves by a defendant are also forms of forum shopping.⁷

According to its legislative history, CAFA was particularly concerned with the following scenario: plaintiffs choose to file a class action in state court—particularly a state court that is perceived to be more willing to certify class actions than its federal counterpart.⁸ Defendants, who prefer the federal approach to class certification, seek to remove the class action to federal court. Which side will succeed in getting their desired forum ultimately depends on the intricacies of federal jurisdiction. One of CAFA's primary objectives was to expand the universe of cases where defendants would win these forum-shopping battles; it did so by creating a new form of diversity jurisdiction and eliminating other obstacles to

3. See, e.g., 28 U.S.C. § 1441(a) (2006).

4. *Id.* § 1404(a).

5. FED. R. CIV. P. 12(b)(1)–(2).

6. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (affirming the district court's forum non conveniens dismissal).

7. See, e.g., *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504, 508–09 (2001) (stating that to allow federal and state courts to give different preclusive effects to statute of limitations dismissals “would produce the sort of forum-shopping . . . and . . . inequitable administration of the laws that *Erie* seeks to avoid” because “[o]ut-of-state defendants . . . would systematically remove state-law suits brought against them to federal court”) (internal quotation marks omitted). My use of the term “forum shopping” is not meant to have any derogative connotation. See, e.g., Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 336 (2006) (“Key to the understanding of the appropriate role of forum shopping, however, is a foundational premise: playing by the rules includes the ability of plaintiff's counsel to select which set of rules and the ability of defense counsel to try to counter that choice. Accordingly, disparaging remarks about forum shopping—implying that the practice is a form of cheating because a litigant is attempting to circumvent the rules—misapprehend the ‘rules.’”).

8. See S. REP. NO. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 5 (stating that pre-CAFA law “enables lawyers to ‘game’ the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes . . .”).

removing state court class actions to federal court.⁹ Once in federal court, class certification could be decided by federal judges pursuant to federal law, rather than by state judges pursuant to state law.

*Standard Fire Insurance Co. v. Knowles*¹⁰—a CAFA case recently decided by the Supreme Court—illustrates all too vividly the lengths to which plaintiffs and defendants will go when it comes to this sort of forum shopping. The plaintiff’s state-court complaint in *Standard Fire* voluntarily refused to seek the maximum amount of damages that the class might receive under the governing law, stipulating that the class would not seek damages in excess of \$5 million.¹¹ That figure, of course, is the threshold that would have enabled the defendant to remove under CAFA.¹² The *Standard Fire* defendant, who wished to be in federal court, argued that absent class members should not be bound by the waiver¹³—which in turn

9. See *id.* at 5 (“Thus, [CAFA] makes it harder for plaintiffs’ counsel to ‘game the system’ by trying to defeat diversity jurisdiction.”).

10. 133 S. Ct. 1345 (2013).

11. *Id.* at 1347 (“[T]he complaint says that the Plaintiff and Class stipulate they will seek to recover total aggregate damages of less than five million dollars. An attached affidavit stipulates that Knowles will not at any time during this case seek damages for the class in excess of \$5,000,000 in the aggregate.”) (internal quotation marks and alterations omitted).

12. 28 U.S.C. § 1332(d)(2) (requiring that “the matter in controversy exceeds the sum or value of \$5,000,000”); *id.* § 1332(d)(6) (“In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000 . . .”).

13. Petition for Writ of Cert., *Standard Fire Ins. Co. v. Knowles*, No. 11-1450, 2012 WL 1979957, at *13–14 (May 30, 2012) (“Allowing a named plaintiff to bind absent putative class members to a limitation on damages, and giving effect to such a ‘stipulation’ as of the time of removal, plainly violates basic due process rights of the absent putative class members.”). An amicus curiae brief filed in *Standard Fire* argued that removal was proper, regardless of whether the amount in controversy exceeded \$5 million, because the plain text of CAFA’s removal provision, 28 U.S.C. § 1453, is “a broad authorization of federal removal jurisdiction over class-action suits in which the parties are minimally diverse” that does not incorporate “the criteria for original jurisdiction under § 1332(d).” Brief for the National Association of Manufacturers as Amicus Curiae Suggesting Reversal, *Standard Fire Ins. Co. v. Knowles*, No. 11-1450, 2012 WL 5351709, at *10 (Oct. 29, 2012). For a discussion of the statutory language supporting this argument, which appears to be the result of a drafting mistake, see Adam N. Steinman, *Sausage-Making, Pigs’ Ears, and Congressional Expansions of Federal*

would bring the amount-in-controversy above CAFA's threshold for federal jurisdiction.¹⁴ And the defendant succeeded. The Supreme Court unanimously held that the named plaintiff's stipulation could not bind the absent class members and therefore could not prevent CAFA removal.¹⁵

Did the defendant in *Standard Fire* truly wish to pay the class more than it was asking for? Of course not. The defendant's calculus was that, in federal court, there would be a lower likelihood that a class action would be certified at all, which would take the potential for a large aggregated judgment entirely off the table.¹⁶

Implicit in CAFA's logic—and the strategic machinations it inspires—is a crucial presumption that apparently went unquestioned during the debate leading to CAFA's enactment: namely, that federal courts exercising CAFA's new form of diversity jurisdiction may indeed apply federal class-certification standards in CAFA cases rather than state certification standards. This premise has a potentially significant vulnerability, however. Just as Superman's powers faded in the presence of kryptonite,¹⁷ CAFA's logic may unravel when confronted with the *Erie* doctrine.

Jurisdiction: Exxon Mobil v. Allapattah and Its Lessons for the Class Action Fairness Act, 81 WASH. L. REV. 279 (2006). The *Standard Fire* defendant never asserted this as a basis for removal—either in the courts below or before the Supreme Court—and the Supreme Court's opinion does not address it.

14 See *Standard Fire*, 133 S. Ct. at 1348 (“[T]he District Court found that that the sum or value of the amount in controversy would, in the absence of the stipulation, have fallen just above the \$5 million threshold.” (citations and internal quotation marks omitted)).

15 See *id.* at 1350 (“In sum, the stipulation at issue here can tie Knowles’ hands, but it does not resolve the amount-in-controversy question in light of his inability to bind the rest of the class.”).

16 See, e.g., Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1942–43 (2006) (“The goal of CAFA’s proponents was to ensure that nationwide classes of the sort that some state courts had certified would not be certified at all.”).

17 See *Superman*, IMDB.COM, <http://www.imdb.com/title/tt0078346/synopsis> (last visited Oct. 27, 2013) (detailing a plot synopsis for the movie *Superman* (1978)); see also *Superman Christopher Reeve Defeated by Kryptonite*, YOUTUBE.COM, <http://www.youtube.com/watch?v=OkSaAhbceBk> (last visited Oct. 27, 2013) (depicting Superman being defeated by kryptonite); accord *Spin Doctors – Jimmy Olsen’s Blues*, YOUTUBE.COM, <http://www.youtube.com/watch?v=GrQCro68sRU> (last visited Oct. 27, 2013) (explaining how Jimmy Olsen

Erie “aims” to “discourage[] . . . forum-shopping”—specifically, vertical forum shopping between state courts and federal courts.¹⁸ *Erie* does this by requiring the federal court to act like “the State court a block away.”¹⁹ *Erie* thereby eliminates what otherwise might be an incentive for one side to choose federal court—the desire to avoid a comparatively unfavorable aspect of state law—because that state law will apply in federal court as well. Applied to CAFA, *Erie*’s aims invite an ironic result. CAFA would enable state court class actions to be removed to federal court pursuant to its expansion of diversity jurisdiction.²⁰ But then *Erie* would require the federal court to follow the same state-court approach to class certification that CAFA was meant to evade.²¹

The possibility that *Erie* might require federal courts to follow state class-certification standards garnered fairly little attention until the Supreme Court’s 2010 decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Company*,²² a case that found its way into federal court thanks to CAFA.²³ At first blush,

might have wooed Lois Lane away from Superman if he had a “pocket full of kryptonite”).

18. *Hanna v. Plumer*, 380 U.S. 460, 467–68 (1965).

19. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

20. See S. REP. NO. 109-14, *supra* note 8, at 5 (discussing the primary objectives of CAFA).

21. See, e.g., *Hanna*, 380 U.S. at 468 (stating that *Erie* aims to discourage forum shopping).

22. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Insurance Company*, 130 S. Ct. 1431 (2010).

23. *Id.* at 1437 n.3 (“*Shady Grove* had asserted jurisdiction under 28 U.S.C. § 1332(d)(2) . . .”). Some of my earlier writings—both before and after *Shady Grove*—examine whether the *Erie* doctrine might require federal courts to follow state law on class actions. See Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245 (2008) [hereinafter Steinman, *What Is the Erie Doctrine?*]; Adam N. Steinman, *Our Class Action Federalism: Erie and the Rules Enabling Act After Shady Grove*, 86 NOTRE DAME L. REV. 1131 (2011) [hereinafter Steinman, *Our Class Action Federalism*]. The topic is worth revisiting not only because of the opportunity this symposium provides to reflect on CAFA (and its coincidental timing during *Erie*’s seventy-fifth anniversary), but also because post-*Shady Grove* lower court decisions are beginning to accumulate. See *infra* Part IV.C. The Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), is another significant development, as it may

Shady Grove appears to undermine the idea. By a 5–4 vote, the Court rejected the argument that federal courts were bound to follow New York law on the permissibility of the class action brought in that case.²⁴

On closer analysis, however, parts of the *Shady Grove* decision actually strengthen the *Erie* argument. In particular, all nine Justices agreed that differences between state courts and federal courts with respect to class certification encourage precisely the kind of vertical forum shopping that *Erie* seeks to discourage.²⁵ Ultimately, that unanimous conclusion was not dispositive because of the interplay between *Erie* and the Rules Enabling Act (REA), which imposes a more complex doctrinal framework for issues where a Federal Rule of Civil Procedure (like Rule 23) is in the picture. But as I will explain in more detail below, the application of that framework by the narrow *Shady Grove* majority is hardly the last word on the role of state class action practice in federal court.

II. CAFA AND OUR CLASS ACTION FEDERALISM

Perhaps the most controversial aspect of CAFA was its expansion of federal jurisdiction over high-stakes class actions. CAFA's new form of diversity jurisdiction,²⁶ combined with its elimination of procedural obstacles for defendants wishing to remove class actions,²⁷ made it much easier for defendants to demand a federal forum if that was their preference. And it often was. According to the conventional wisdom, federal judges applying

increase the disparity between the federal approach to class certification and the approach in many state courts. *See infra* notes 29–30 & 156 and accompanying text. That said, federal class-certification standards remain murky, and two even more recent decisions—*Amgen Inc. v. Connecticut Retirement Plans*, 133 S. Ct. 1184 (2013) and *Comcast Corporation v. Behrend*, 133 S. Ct. 1426 (2013)—leave many questions unanswered. *See infra* note 30.

24. *See infra* notes 51–55 and accompanying text.

25. *See infra* notes 73–77 and accompanying text.

26. *See* 28 U.S.C. § 1332(d) (creating federal jurisdiction for class actions for which, among other things, any class member is diverse from any defendant and the aggregate amount in controversy is greater than \$5 million).

27. *See id.* § 1453(b) (allowing any defendant to remove a class action from state court without the consent of the other defendants even if one or more defendants are citizens of the state where the case is filed).

Federal Rule 23 tended to be less willing to certify class actions than state judges applying state law on class certification.²⁸ However strong this perception was when CAFA was enacted in 2005, it may have become even stronger with the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*,²⁹ which found that a nationwide class action alleging employment discrimination failed even to satisfy Rule 23(a)'s requirement that there be a "question[] of law or fact common to the class."³⁰

28. See Steinman, *Our Class Action Federalism*, *supra* note 23, at 1179 ("The conventional wisdom today . . . is that many state courts are more welcoming of class actions than federal courts."); see also, e.g., DEBORAH R. HENSLER ET AL., *CLASS ACTION DILEMMAS* 66 (2000) (discussing interviews with attorneys who noted that they "were filing more state than federal class actions in response to perceived animus towards class actions by federal judges"); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1522–23 (2008) [hereinafter Burbank, *A Preliminary View*] ("Some state courts were certifying multistate classes because they shared the commitments of the federal rulemakers in 1966, because they believed that either one state's law or a manageable group of state laws could and should be applied, and because they otherwise thought certification appropriate under their governing rules."); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 391 n.101 (1992) ("The federal rules for class certification may be more restrictive than those used by many state courts. Hence, defense attorneys may seek removal to limit the possibility of a class action suit." (citations omitted)); Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1528–29 (2005) ("Federal judges are no longer seen as friends of plaintiffs, or at least no longer perceived in damages class actions to be so preferable that lawyers prefer to file in federal rather than state court. . . . [T]here can be little doubt that, in general, defense counsel look on having a federal judge in a case as a plus, whereas counsel for plaintiffs, not surprisingly, take the opposite view."); Martha Neil, *New Route for Class Actions: Proposals Raise Questions About Whether Giving Federal Courts More Power Over Cases Will Cure the System's Ills*, 89 A.B.A. J. 48, 50 (2003) ("Federal judges are widely viewed as being less lenient toward class actions than their colleagues in the state courts, particularly on the key issue of whether to certify a class so the case may proceed."). For additional examples of state courts that adopt a more permissive approach to class certification, see Steinman, *What Is the Erie Doctrine?*, *supra* note 23, at 278–80 & nn.222–24.

29. 131 S. Ct. 2541 (2011).

30. See *id.* at 2550–57 (holding, by a 5–4 vote, that the plaintiffs "have not established the existence of any common question" for purposes of Rule 23(a)). Many have expressed concern that *Wal-Mart* imposes an unduly restrictive

For one example of this federalism dynamic, look no further than *Smith v. Bayer Corp.*,³¹ which the Supreme Court decided just days before *Wal-Mart*. In *Smith*, a federal court sought to block a West Virginia state court from certifying a class action, on the grounds that the federal court had already denied certification of a class that “mirrored” the one being pursued in West Virginia.³² The Supreme Court reversed the injunction, concluding that the injunction did not qualify under the “relitigation exception” to the Anti-Injunction Act.³³

Writing for a unanimous Court, Justice Kagan reasoned that certification of a class action under West Virginia law was not the “same issue” as certification of a class action under federal law. The West Virginia Supreme Court had “declar[ed] its independence from federal courts’ interpretation of the Federal Rules—and particularly

approach to class certification. See, e.g., Mary Kay Kane, *The Supreme Court’s Recent Class Action Jurisprudence: Gazing into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015 (2012); Robert H. Klonoff, *Reflections on the Future of Class Actions*, 44 LOY. U. CHI. L.J. 533 (2012). It is worth noting, however, that two more recent Supreme Court decisions indicate that the contours of federal class-certification standards remain quite murky. In *Amgen Inc. v. Connecticut Retirement Plans*, 133 S. Ct. 1184 (2013), the Supreme Court affirmed (by a 6–3 vote) certification of a securities class action, *id.* at 1194–97, with Justice Thomas arguing in dissent that the majority’s reasoning contravened *Wal-Mart*. See e.g., *id.* at 1211–12 (Thomas, J., dissenting, joined by Scalia & Kennedy, JJ.). In *Comcast Corporation v. Behrend*, 133 S. Ct. 1426 (2013), the Supreme Court reversed (by a 5–4 vote) certification of an antitrust class action, *id.* at 1432–33, with Justices Ginsburg and Breyer arguing in dissent that the plaintiffs’ failure to challenge a key issue meant that “[t]he Court’s ruling is good for this day and case only” and that “it remains the ‘black letter rule’ that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.” *Id.* at 1437 (Ginsburg & Breyer, JJ., dissenting, joined by Sotomayor & Kagan, JJ.) (citations and internal quotation marks omitted).

31. 131 S. Ct. 2368 (2011).

32. *Id.* at 2377 (“The class *Smith* proposed in state court mirrored the class *McCollins* sought to certify in federal court.”).

33. *Id.* at 2375 (“This case involves the last of the Act’s three exceptions, known as the relitigation exception.”); *id.* (quoting 28 U.S.C. § 2283) (“The Anti-Injunction Act, first enacted in 1793, provides that ‘A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.’”).

of Rule 23.”³⁴ In the case of *In re West Virginia Rezulin Litigation*,³⁵ the West Virginia Supreme Court stated explicitly that it sought “to avoid having our legal analysis of our Rules amount to nothing more than Pavlovian responses to federal decisional law.”³⁶ As Justice Kagan noted in her *Smith* opinion:

[T]he West Virginia Supreme Court has disapproved the approach to Rule 23(b)(3)’s predominance requirement that the Federal District Court embraced. Recall that the federal court held that the presence of a single individualized issue—injury from the use of Baycol—prevented class certification. The court did not identify the common issues in the case; nor did it balance these common issues against the need to prove individual injury to determine which predominated. The court instead applied a strict test barring class treatment when proof of each plaintiff’s injury is necessary. By contrast, the West Virginia Supreme Court in *In re Rezulin* adopted an all-things-considered, balancing inquiry in interpreting its Rule 23. Rejecting any “rigid test,” the state court opined that the predominance requirement “contemplates a review of many factors.” Indeed, the court noted, a “single common issue” in a case could outweigh “numerous . . . individual questions.” That meant, the court further explained (quoting what it termed the “leading treatise” on the subject), that even objections to certification “based on . . . causation, or reliance”—which typically involve showings of individual injury—“will not bar predominance satisfaction.” So point for point, the analysis set out in *In re Rezulin* diverged from the District Court’s interpretation of Federal Rule 23.³⁷

34. *Id.* at 2377.

35. 585 S.E.2d 52 (2003).

36. *Id.* at 61 (internal quotation marks omitted).

37. *Smith*, 131 S. Ct. at 2378 (quoting *In re Rezulin*, 585 S.E.2d at 72 (citations and emphasis omitted)).

It has long been a fact of life, then, that the choice between state and federal court can have a significant effect on the likelihood that a class action will be certified.³⁸ And CAFA's legislative history makes clear that its purpose was to allow defendants in high-stakes class actions to choose federal court and thus to have class certification decided by federal judges pursuant to federal law, rather than by state judges pursuant to state law.³⁹ The presumption was that federal courts exercising CAFA's new form of diversity jurisdiction could indeed apply federal class-certification standards rather than state class-certification standards to CAFA cases.⁴⁰ This premise has a potentially potent adversary, however, in the *Erie* doctrine.

Interestingly, CAFA's legislative history recognized that *Erie* and its progeny would apply to CAFA cases, just as *Erie* applies to all cases that end up in federal court based on diversity jurisdiction.⁴¹ The Senate Report states that CAFA "does not change the application of the *Erie* Doctrine."⁴² Yet there is significant tension here. CAFA was purposefully designed to *enable* forum shopping,

38. See *supra* note 28 and accompanying text.

39. S. REP. NO. 109-14, at 5 (2005), reprinted in 2005 U.S.C.C.A.N. 3.

40. *Id.*

41. See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law. Classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor."). Early on, some commentators suggested that CAFA should be read to overrule *Erie*. See Geoffrey C. Hazard, Jr., *Has the Erie Doctrine Been Repealed by Congress?*, 156 U. PA. L. REV. 1629, 1629 (2008) ("The enactment of the Class Action Fairness Act of 2005 (CAFA) is a congressional pronouncement implying that the *Erie* Doctrine is seriously erroneous."). But there is nothing in CAFA's text to suggest such a result. While CAFA expanded federal diversity jurisdiction, "expanding federal jurisdiction does not eliminate the *Erie* problem; it is federal jurisdiction, after all, that creates the potential for an *Erie* problem." Steinman, *What Is the Erie Doctrine?*, *supra* note 23, at 299. And CAFA's legislative history states quite clearly that *Erie* would apply in CAFA cases. See *infra* note 42. In any event, *Shady Grove* confirms that the standard *Erie* analysis applies to CAFA cases as well. See *infra* notes 64–66 and accompanying text (noting that all nine *Shady Grove* Justices applied the *Erie*–REA framework dating back to *Hanna v. Plumer*).

42. S. REP. NO. 109-14, at 49 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 46; see also Burbank, *A Preliminary View*, *supra* note 28 ("CAFA does not purport to change *Erie* jurisprudence.").

while *Erie* explicitly seeks to *discourage* forum shopping.⁴³ The way *Erie* discourages forum shopping, of course, is to require the federal court to act like “a State court a block away.”⁴⁴ Applied to CAFA, that notion would yield an ironic result. CAFA would bring state court class actions into federal court. But then *Erie* would insist that the federal court follow the same state-court approach to class certification that CAFA was meant to evade.

To be sure, the *Erie* doctrine is not exclusively about forum shopping, especially when one turns to the branch of *Erie*'s progeny that deals with Federal Rules promulgated under the Rules Enabling Act (REA). The next Sections of this Article will unpack the *Erie*/REA framework and its potential application to class certification. The Supreme Court began this endeavor in its recent decision in *Shady Grove*, but it generated a fractured decision that leaves many crucial questions still unanswered.

III. *SHADY GROVE*

Shady Grove involved § 901(b) of New York's Civil Practice Law and Rules, which provides that actions to recover certain kinds of statutory penalties “may not be maintained as a class action.”⁴⁵ The plaintiff, Shady Grove Orthopedic Associates, brought a class action in federal court against Allstate for failing to pay insurance benefits in a timely manner, invoking CAFA's expanded form of diversity jurisdiction over class actions.⁴⁶ According to the lower court, the statutory interest penalties sought by the *Shady Grove*

43. See *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (noting “the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws”).

44. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

45. N.Y. C.P.L.R. § 901(b) (McKinney 2009) (“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.”).

46. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 140 (2d Cir. 2008), *rev'd*, 130 S. Ct. 1431 (2010) (“*Shady Grove* invoked the district court's diversity jurisdiction under 28 U.S.C. § 1332(d)(2)(A) . . .”).

class would have triggered § 901(b)'s prohibition on class actions if the case had been in New York state court.⁴⁷

Class certification would have a huge impact on the liability Allstate faced in *Shady Grove*. While Shady Grove's individual claim was worth no more than \$500, the claims on behalf of the entire class could reach more than \$5,000,000.⁴⁸ Allstate argued that New York's § 901(b) was binding in a federal court diversity action under *Erie* and the Rules Enabling Act (REA) and, therefore, precluded class certification.⁴⁹ Shady Grove argued that class certification should be decided in accordance with Federal Rule of Civil Procedure 23; if the elements of Rule 23 were satisfied, the class should be certified regardless of whether a class action would be allowed in state court.⁵⁰

The Supreme Court ultimately held that Federal Rule 23 governed whether the class should be certified; it was not displaced by New York's § 901(b).⁵¹ The Court divided 5–4, and, as explained below, there was no majority opinion as to certain issues. The five Justices in the majority were Chief Justice Roberts and Justices Stevens, Scalia, Thomas, and Sotomayor.⁵² Justice Scalia wrote the majority opinion, which was joined by Chief Justice Roberts and Justices Thomas and Sotomayor.⁵³ Justice Stevens

47. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467, 474 (E.D.N.Y. 2006) (“[Section] 901(b) of the C.P.L.R. disallows maintenance of a class action when the statute under which the action is being brought imposes a penalty. The two percent monthly interest imposed by § 5106(a), and sought by the plaintiffs, is such a penalty . . .”), *rev'd on other grounds*, 130 S. Ct. 1431 (2010).

48. See *Shady Grove*, 130 S. Ct. at 1460 (Ginsburg, J., dissenting) (“If Shady Grove had filed suit in New York state court, the 2% interest payment authorized . . . as a penalty for overdue benefits would, by Shady Grove's own measure, amount to no more than \$500. By instead filing in federal court based on the parties' diverse citizenship and requesting class certification, Shady Grove hopes to recover, for the class, statutory damages of more than \$5,000,000.”).

49. Brief for Respondent, *Shady Grove v. Allstate*, No. 08-1008, 2009 WL 2777648, at *10–12 (Aug. 28, 2009).

50. Brief for Petitioner, *Shady Grove v. Allstate*, No. 08-1008, 2009 WL 2040421, at *9–12 (July 10, 2009).

51. *Shady Grove*, 130 S. Ct. at 1437.

52. *Id.* at 1436.

53. *Id.* Justice Sotomayor did not join Part II-C of Justice Scalia's opinion, which offered “[a] few words in response to [Justice Stevens's] concurrence.” *Id.* at 1444 (Scalia, J., joined by Roberts, C.J., and Thomas, J.).

joined Justice Scalia's opinion in part and wrote a separate concurrence that appeared to be more receptive to state law than Justice Scalia's approach.⁵⁴ In dissent were Justices Kennedy, Ginsburg, Breyer, and Alito, who joined a dissenting opinion authored by Justice Ginsburg that would have required the federal court to follow New York's § 901(b).⁵⁵

Putting aside the nuances of *Erie* and the REA, *Shady Grove* is a fascinating decision. First, it was a case where state law was more hostile to class certification than federal law.⁵⁶ Thus, the posture of *Shady Grove* inverted the conventional wisdom, under which plaintiffs seeking class certification generally wish to avoid the prevailing federal approach. That was certainly the conventional wisdom that prompted CAFA.⁵⁷ In this sense, *Shady Grove* is quite similar to *Erie* itself. One of the great ironies of *Erie* is that its big-business litigant—the Erie Railroad Company—preferred state law over federal common law for that particular case.⁵⁸ Typically, the kind of general federal common law that *Erie* ultimately forbade worked to the advantage of corporate litigants.⁵⁹ So, even though Justice Brandeis was no friend of early twentieth-century corporate America, it came as no surprise that he decided *Erie* the way he did.

A second remarkable characteristic of *Shady Grove* is the Justices' unusual voting pattern. *Shady Grove* is the only decision where this particular 5–4 split ever occurred: Roberts, Scalia, Sotomayor, Stevens, and Thomas in the majority, and Alito, Breyer, Ginsburg, and Kennedy in the dissent.⁶⁰ The most coherent principle

54. See *infra* notes 107–116 and accompanying text.

55. *Shady Grove*, 130 S. Ct. at 1460, 1468–73 (Ginsburg, J., dissenting).

56. See *id.* at 1439 (majority opinion) (noting that § 901(b) prevents certain kinds of class actions “from coming into existence at all”).

57. See *supra* Part II (discussing the logic and goals of CAFA).

58. See Steinman, *What Is the Erie Doctrine?*, *supra* note 23, at 255 (“Erie argued that liability was governed by Pennsylvania law [as defined by] decisions of the Pennsylvania Supreme Court . . .”).

59. See EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 52–55 (2000); THOMAS D. ROWE, JR., SUZANNA SHERRY & JAY TIDMARSH, *CIVIL PROCEDURE* 598 (2d ed. 2008).

60. *SCOTUSblog Final Stats OT09*, SCOTUSBLOG (July 7, 2010), <http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Stats-OT09-0707101.pdf>. These nine Justices were on the Court together only for the October 2009

to explain the *Shady Grove* breakdown may be that the Justices divided along strict alphabetical lines.⁶¹

It is also noteworthy that Justice Scalia—by refusing to apply New York’s categorical bar—took a position that was more favorable to certifying the *Shady Grove* class action. It even led *The Wall Street Journal* to ask: “Is Scalia Getting Soft on Plaintiffs?”⁶² Meanwhile, Justice Ginsburg authored a dissenting opinion that would have blocked the *Shady Grove* class action. One year later, these two Justices would square off on more predictable sides of a 5–4 split in *Wal-Mart*, with Justice Scalia writing a majority opinion rejecting class certification and Justice Ginsburg writing a partial dissent.⁶³

term. Justice Souter (not Justice Sotomayor) was still on the Court for the October 2008 Term, and Justice Kagan replaced Justice Stevens for the October 2010 Term.

61. The five Justices whose last names are in the second half of the alphabet were in the *Shady Grove* majority, while the four whose last names are in the first half of the alphabet dissented. Five-to-four splits along alphabetical lines appear to be a rare occurrence. SCOTUSblog’s StatPack reveals that it did not happen at all during the Court’s 2010 or 2011 Terms. See *SCOTUSblog Final Stats OT11*, SCOTUSBLOG (June 30, 2012), http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SB_five-to-four_OT11_final.pdf; *SCOTUSblog Final Stats OT10*, SCOTUSBLOG (June 28, 2011), http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf.

62. Ashby Jones, *The Shady Grove Case: Is Scalia Getting Soft on Plaintiffs?* WALL ST. J. L. BLOG (Apr. 1, 2010), <http://blogs.wsj.com/law/2010/04/01/the-shady-grove-case-is-scalia-getting-soft-on-plaintiffs>. More recent decisions suggest an answer to this question: no, he is not. See, e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432–35 (2013) (Scalia, J.) (concluding that an antitrust class action was improperly certified under Rule 23(b)(3)); *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2547–61 (2011) (Scalia, J.) (reversing certification of an employment-discrimination class action because there was no question of law or fact common to the class for purposes of FED. R. CIV. P. 23(a)(2)); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744–53 (2011) (Scalia, J.) (holding that the Federal Arbitration Act required enforcement of an arbitration agreement’s class action waiver, even if that provision would be unconscionable under California law); see also *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1 (2010) (Scalia, J., in chambers as Circuit Justice for the Fifth Circuit) (granting stay of execution of a \$250 million class judgment against Philip Morris pending consideration of petition for certiorari challenging the judgment as violating the defendants’ “due-process right to an opportunity to present every available defense” and stating that it was “significantly possible that the judgment below will be reversed”).

63. *Compare Wal-Mart*, 131 S. Ct. at 2547–61 (majority opinion by Scalia, J.), with *id.* at 2561–67 (Ginsburg, J., dissenting with respect to Rule 23(a)(2)).

One possible explanation for these counterintuitive positions is that, as described above, *Shady Grove* was a case where state law was more hostile to class actions than federal law. In insisting on federal law, Justice Scalia may have been thinking ahead to the situation where a plaintiff seeks to transplant a more lenient state court approach to class certification into federal court. And Justice Ginsburg may have been contemplating that scenario as well, just with a different set of policy preferences.

But enough with attitudinalism. Let us turn to how the three *Shady Grove* opinions—Justice Scalia’s opinion (which was a majority opinion on some issues and a plurality on others), Justice Stevens’s concurrence, and Justice Ginsburg’s dissent—navigated the doctrinal waters of *Erie* and the REA. Although the Justices in *Shady Grove* were sharply divided, all agreed on the basic framework for analyzing vertical choice-of-law questions under *Erie* and the REA.⁶⁴ This framework dates back to *Hanna v. Plumer*,⁶⁵ when Chief Justice Warren articulated the bifurcated approach to *Erie* that prevails to this day.⁶⁶

The test for choosing between state and federal law hinges on whether the particular issue is “covered by one of the Federal Rules [of Civil Procedure]” or, alternatively, presents a “typical, relatively unguided *Erie* choice.”⁶⁷ Where an issue “is covered by one of the

AT&T Mobility v. Concepcion is similar in this regard; Justice Scalia wrote a majority opinion allowing arbitration agreements to block access to class-wide relief, while Justice Ginsburg and the *Wal-Mart* dissenters joined a dissent authored by Justice Breyer that would have read the Federal Arbitration Act to permit challenges to such arbitration provisions under state contract law. Compare *Concepcion*, 131 S. Ct. at 1744–53 (majority opinion by Scalia, J.), with *id.* at 1756–62 (Breyer, J., dissenting). The Court’s 2013 decision in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), has the same breakdown. See *supra* note 30.

64. See Steinman, *Our Class Action Federalism*, *supra* note 23, at 1137–38.

65. 380 U.S. 460 (1965).

66. See Steinman, *Our Class Action Federalism*, *supra* note 23, at 1134–35 (“The modern *Erie* doctrine’s basic framework has been fairly well established since the Court’s 1965 decision in *Hanna v. Plumer*.” (footnotes omitted)).

67. *Hanna*, 380 U.S. at 471 (stating that where “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”). Some commentators refer to the former category as the “*Hanna* prong” and the latter category as the “*RDA* prong” (after

Federal Rules,” the federal court must apply that Federal Rule unless the Rule violates either the REA (the statutory authority for the Federal Rules) or the U.S. Constitution.⁶⁸ The REA provides that such rules must be “general rules of practice and procedure”⁶⁹ and “shall not abridge, enlarge or modify any substantive right.”⁷⁰ In the so-called “unguided” *Erie* situation, the court’s choice between state and federal law must vindicate “the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws.”⁷¹ If following the federal standard

the Rules of Decision Act). See, e.g., Richard D. Freer, *Some Thoughts on the State of Erie After Gasperini*, 76 TEX. L. REV. 1637, 1637 (1998).

68. *Hanna*, 380 U.S. at 471. An *Erie* choice might also be guided by a federal statute. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 26 (1988) (“A district court’s decision whether to apply a federal statute . . . involves a considerably less intricate analysis than that which governs the ‘relatively unguided *Erie* choice.’” (quoting *Hanna*, 380 U.S. at 471)); *id.* (“[W]hen the federal law sought to be applied is a congressional statute, the first and chief question for the district court’s determination is whether the statute is ‘sufficiently broad to control the issue before the court.’” (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980))). In such cases, federal courts must follow the federal statute on point unless it is unconstitutional. *Id.* at 27.

69. 28 U.S.C. § 2072(a) (2006).

70. *Id.* § 2072(b). A Federal Rule must also comply with the U.S. Constitution, see *Hanna*, 380 U.S. at 471–72, but the constitutional constraints on rulemaking are generally thought to be no greater than those imposed by the REA itself. See, e.g., Steinman, *What Is the Erie Doctrine?*, *supra* note 23, at 269 n.167 (explaining why the constitutional limits to which *Hanna* referred “place no greater constraint on rulemaking than the Rules Enabling Act’s substantive-rights provision”).

71. *Hanna*, 380 U.S. at 468. Earlier Supreme Court decisions had been read to suggest that an unguided *Erie* choice required federal courts to balance state and federal interests. See, e.g., Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 598 (2001) (“*In Byrd v. Blue Ridge Rural Electric Cooperative*, [356 U.S. 525 (1958),] for example, the Court employed a balancing test, contrasting the federal judicial system’s procedural interest in using its own processes against the state’s interest in having the federal court employ the state’s procedures when enforcing substantive state law.” (footnote omitted)). It is unclear whether such balancing is still a necessary part of the analysis after *Hanna*. See, e.g., Steinman, *What Is the Erie Doctrine?*, *supra* note 23, at 267–69 & n.153 (noting that the interest-balancing “aspect of *Byrd* was ignored by the Supreme Court for the better part of forty years” and questioning whether it had been revived by *Gasperini*’s ambivalent reference to “countervailing federal interests”).

“would disserve these two policies,” then the federal court must follow state law.⁷²

A. *Forum Shopping*

One of the most interesting aspects of *Shady Grove* is the one issue on which the Justices all agreed—that differences between state and federal approaches to class certification do, indeed, lead to the kind of forum shopping that would be forbidden under the “unguided” branch of *Erie*’s framework. Writing for the majority, Justice Scalia stated, “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.”⁷³ Justice Stevens joined that part of Scalia’s opinion, and he also recognized in his concurrence that the availability of a class action “is relevant to the forum shopping considerations that are part of the Rules of Decision Act or *Erie* inquiry.”⁷⁴ Justice Ginsburg, writing for the four dissenters, concluded that “forum shopping will undoubtedly result if a plaintiff need only file in federal instead of state court to seek a massive monetary award explicitly barred by state law.”⁷⁵ Noting that “*Shady Grove* seeks class relief that is ten thousand times greater than the individual remedy available to it in state court,”⁷⁶ Justice Ginsburg reasoned, “It is difficult to imagine a scenario that would promote more forum shopping than one in which the difference between filing in state and federal court is the difference between a potential award of \$500 and one of \$5,000,000.”⁷⁷

The unanimity on this issue should come as no surprise—certainly not to the drafters of CAFA. It was CAFA’s fundamental premise that disparities in how state and federal courts decide class

72. *Stewart*, 487 U.S. at 27 n.6.

73. *Shady Grove Orthopedic Assoc. P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1447 (2010) (Scalia, J.).

74. *Id.* at 1459 (Stevens, J., concurring).

75. *Id.* at 1471 (Ginsburg, J., dissenting).

76. *Id.*

77. *Id.* at 1471 n.13.

certification encouraged forum shopping.⁷⁸ With respect to the *Erie* doctrine, therefore, the dispositive questions in *Shady Grove* were (1) does Rule 23 “control” whether a class action is available; and (2) if so, in what circumstances would it abridge, enlarge, or modify substantive rights to allow Rule 23 to displace state practice?

B. Control, Conflict, and Collision

The threshold question that the *Erie* doctrine poses has been framed in a number of ways: whether the particular issue is “covered by one of the Federal Rules”⁷⁹; “whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court”⁸⁰; whether the Federal Rule “answers the question in dispute”⁸¹; whether there is a “‘direct collision’ between the Federal Rule and the state law”⁸²; whether the “clash” between state law and a Federal Rule is “unavoidable.”⁸³ If the answer to these questions is yes, then the federal court is not making a “typical, relatively unguided *Erie* choice”⁸⁴ and, accordingly, the potential for vertical forum shopping is not sufficient to require the federal court to follow state law. Rather, the applicability of state law will hinge on the REA’s substantive-rights provision, which shows less deference to state law than *Erie*’s “twin aims.”⁸⁵

78. See S. REP. NO. 109-14, *supra* n.8 at 4, 9, 23 (emphasizing that lawyers could “game” state courts, arguing federal forums are more “even-handed,” and criticizing the potential for forum shopping).

79. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965); *accord Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996) (“Concerning matters covered by the Federal Rules of Civil Procedure, the characterization question is usually unproblematic: It is settled that if the Rule in point is consonant with the Rules Enabling Act . . . the Federal Rule applies regardless of contrary state law.” (emphasis added)).

80. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–50 (1980).

81. *Shady Grove Orthopedic Assoc. P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010) (Scalia, J.).

82. *Walker*, 446 U.S. at 749 (quoting *Hanna*, 380 U.S. at 472).

83. *Hanna*, 380 U.S. at 470.

84. *Id.* at 471.

85. See *Shady Grove*, 130 S. Ct. at 1448 (Scalia, J.) (“The short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping. To hold otherwise would be to disembowel either the Constitution’s grant of power over federal procedure or Congress’s exercise of it.” (internal quotation marks omitted));

Indeed, this threshold question is what transformed *Shady Grove* from a 9–0 decision in favor of state law to a 5–4 decision in favor of federal law. Justice Scalia’s opinion garnered a five-Justice majority (which included Justice Stevens) on this issue.⁸⁶ Scalia explained that Federal Rule 23 “answers the question in dispute,”⁸⁷ because “Rule 23 unambiguously authorizes any plaintiff, in any federal civil proceeding, to maintain a class action if the Rule’s prerequisites are met.”⁸⁸ New York’s § 901(b) “undeniably answer[s] the same question as Rule 23: whether a class action may proceed for a given suit.”⁸⁹ Accordingly, Rule 23 and § 901(b) “flatly contradict each other,” meaning that the Court must “confront head-on” whether Rule 23 satisfies the REA.⁹⁰ If Rule 23 passes muster, then it would trump New York law “whether or not it alters the outcome of the case in a way that induces forum shopping.”⁹¹

The four dissenters, however, concluded that “Rule 23 does not collide with § 901(b).”⁹² As Justice Ginsburg explained: “Rule 23 prescribes the considerations relevant to class certification and postcertification proceedings—but it does not command that a particular remedy be available when a party sues in a representative capacity. Section 901(b), in contrast, trains on that latter issue.”⁹³ Phrased another way: “Rule 23 governs procedural aspects of class

Steinman, *What Is the Erie Doctrine?*, *supra* note 23, at 310 (“A guided *Erie* choice—one where the federal standard is set forth in positive federal law such as a Federal Rule of Civil Procedure—is supposed to be more favorable to federal lawmaking than an unguided *Erie* choice.”).

86. *Shady Grove*, 130 S. Ct. at 1436 (noting that Part II-A of Justice Scalia’s opinion was “the opinion of the Court”).

87. *Id.* at 1437.

88. *Id.* at 1442; *see also id.* at 1456 (Stevens, J., concurring in part and concurring in the judgment) (“When the District Court in the case before us was asked to certify a class action, Federal Rule of Civil Procedure 23 squarely governed the determination whether the court should do so. That is the explicit function of Rule 23.”).

89. *Id.* at 1439 (Scalia, J.); *see also id.* at 1437 (holding that § 901(b) “states that *Shady Grove*’s suit ‘may not be maintained as a class action’ because of the relief it seeks” (quoting N.Y. C.P.L.R. 901(b))).

90. *Id.* at 1441–42.

91. *Id.* at 1448.

92. *Id.* at 1465 (Ginsburg, J., dissenting).

93. *Id.* at 1465–66 (citations omitted).

litigation, but allows [§ 901(b)] to control the size of a monetary award a class plaintiff may pursue. . . . Rule 23 describes a method of enforcing a claim for relief, while § 901(b) defines the dimensions of the claim itself.”⁹⁴ For the dissenters, then, there was “no unavoidable conflict between Rule 23 and § 901(b),” and state law must prevail if “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.”⁹⁵

C. *Substantive Rights and the REA*

Because a majority held that *Shady Grove* did not present a “typical, relatively unguided *Erie* choice,”⁹⁶ the unanimous conclusion about the potential for forum shopping did not require the federal court to apply New York law. Rather, the dispositive issue was whether applying Rule 23 would “abridge, enlarge, or modify any substantive rights” in violation of the REA.⁹⁷ There was no majority opinion on the REA, however. The REA portion of Justice Scalia’s opinion was joined only by Chief Justice Roberts and Justices Sotomayor and Thomas. Justice Stevens wrote a separate concurrence on this issue, taking a position that is ostensibly more deferential to state law than the plurality’s approach.⁹⁸ But all five Justices in the majority agreed on the ultimate conclusion: applying Rule 23 in *Shady Grove* did not violate the REA’s substantive-rights provision.⁹⁹

94. *Id.* at 1466.

95. *Id.* at 1469 (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 n.9 (1965) (brackets omitted)).

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

97. 28 U.S.C. § 2072(b) (2006).

98. *See infra* notes 107–115 and accompanying text.

99. Justice Ginsburg and the *Shady Grove* dissenters did not apply the REA’s substantive-rights provision, given their conclusion that Rule 23 and § 901(b) did not conflict. *See supra* notes 92–95 and accompanying text. Accordingly, they “did not confront either the debate between Justices Scalia and Stevens on the proper construction of the REA, or whether it would violate the REA to allow Rule 23 to trump New York’s section 901(b).” Steinman, *Our Class Action Federalism*, *supra* note 23, at 1141.

Justice Scalia's plurality opinion reasoned that a Rule is not invalid simply because it "affects a litigant's substantive rights."¹⁰⁰ Rather, the REA forbids a Federal Rule that "alters the rules of decision by which the court will adjudicate those rights."¹⁰¹ But if the Rule "governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid."¹⁰² Channeling the Court's 1941 decision in *Sibbach v. Wilson & Company*,¹⁰³ Scalia stated that the REA's substantive rights provision "means that the Rule must 'really regulat[e] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.'"¹⁰⁴ It follows from this premise that what matters is "the substantive or procedural nature of the Federal Rule" and "not the substantive or procedural nature or purpose of the affected state law."¹⁰⁵

Applying these principles, Justice Scalia concluded that Rule 23 did not violate the REA:

[W]e think it obvious that rules allowing multiple claims (and claims by or against multiple parties) to be litigated together are . . . valid. Such rules neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed. For the same reason, Rule 23—at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action—falls within § 2072(b)'s authorization. A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once,

100. *Shady Grove*, 130 S. Ct. at 1442 (Scalia, J.) (emphasis added).

101. *Id.* (alterations omitted) (internal quotation marks omitted).

102. *Id.* (quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 446 (1946)).

103. 312 U.S. 1 (1941).

104. *Shady Grove*, 130 S. Ct. at 1442 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)) (alteration in original).

105. *Id.* at 1444.

instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.¹⁰⁶

Justice Stevens sought to contrast his approach with Justice Scalia's.¹⁰⁷ He wrote that, under the REA, a Federal Rule "cannot govern 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."¹⁰⁸ This inquiry requires courts "to distinguish between procedural rules adopted for *some* policy reason and seemingly procedural rules that are intimately bound up in the scope of a substantive right or remedy."¹⁰⁹

Justice Stevens concluded that New York's § 901(b) did not qualify for protection under his approach to the REA. He recognized that some of § 901(b)'s legislative history "can be read to suggest that the New York officials who supported § 901(b) wished to create a limitation on New York's statutory damages,"¹¹⁰ and that "§ 901(b) was 'apparently' adopted in response to fears that the class action procedure, applied to statutory penalties, would lead to 'annihilating punishment of the defendant.'"¹¹¹ But he determined that this was "not particularly strong evidence that § 901(b) serves to define who can obtain a statutory penalty or that certifying such a class would enlarge New York's remedy," noting that "[a]ny device that makes litigation easier makes it easier for plaintiffs to recover

106. *Id.* at 1443 (citation omitted).

107. *Id.* at 1452 (Stevens, J., concurring) ("Justice Scalia believes that the sole Enabling Act question is whether the federal rule 'really regulates procedure,' which means, apparently, whether it regulates 'the manner and the means by which the litigants' rights are enforced.' I respectfully disagree." (citation omitted) (quoting *id.* at 1442, 1444–46 & n.13 (Scalia, J.)); *id.* at 1453 ("Although the plurality appears to agree with much of my interpretation of § 2072, it nonetheless rejects that approach for two reasons, both of which are mistaken." (citation omitted) (citing *id.* at 1445–46 (Scalia, J.)).

108. *Id.* at 1452.

109. *Id.* at 1458 (emphasis in original).

110. *Id.* at 1457 (internal quotation marks omitted).

111. *Id.* at 1458 (quoting V. ALEXANDER, PRACTICE COMMENTARIES, C901:11, reprinted in 7B MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANN. 104 (2006)).

damages.”¹¹² To view § 901(b) as defining a “‘limited’ damages remedy” under New York law would “rest on extensive speculation about what the New York Legislature had in mind when it created § 901(b).”¹¹³ Rather, § 901(b) should be understood as “a classically procedural calibration of making it easier to litigate claims in New York courts (under any source of law) only when it is necessary to do so, and not making it too easy when the class tool is not required.”¹¹⁴ This view would “respect the plain textual reading of § 901(b).”¹¹⁵

IV. AFTER *SHADY GROVE*: THE CONTINUING ROLE OF STATE CLASS ACTION LAW IN FEDERAL COURT

Going forward, there remain two potential ways that federal courts might be required to follow state class action practice, even after *Shady Grove*. First, courts might determine that state law is relevant in a way that does not create a conflict with Rule 23. If so, then *Shady Grove*’s unanimous view that disparate approaches to class certification encourage vertical forum shopping would compel the conclusion that federal courts must follow state law under *Erie*. Second, courts might determine that it would violate the REA to disregard state law, because doing so would abridge, enlarge, or modify substantive rights. Sections A & B of this Part explain how these arguments remain viable after *Shady Grove*.

There is, of course, some debate about whether *Shady Grove* leaves any room for state class-certification standards in federal court.¹¹⁶ But ultimately, the proof of the pudding is in the eating. Or

112. *Id.*

113. *Id.* at 1459.

114. *Id.*

115. *Id.* at 1460.

116. See, e.g., Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987, 1023 (2011) (arguing that “*Shady Grove*, if realistically read, dashed [the] prediction” that “state law would govern . . . class certification” (citing Steinman, *What Is the Erie Doctrine?*, *supra* note 23, at 284–86)). But cf. *id.* at 1023 n.170 (stating that Steinman, *Our Class Action Federalism*, *supra* note 23, at 1144–54, “skillfully salvages the remnants of this approach after *Shady Grove*’s hurricane-force winds”).

to channel Justice Holmes, *Shady Grove* ultimately means what subsequent courts say it means.¹¹⁷ As described in Part C, numerous courts after *Shady Grove* have concluded that *Erie* and the Rules Enabling Act require federal courts to follow state law relating to class actions.

A. *When the Conflict Might Not Be Necessary*

With a hat tip to Roger Traynor, Justice Ginsburg's *Shady Grove* dissent observed that "[o]ur decisions . . . caution us to ask, before undermining state legislation: Is this conflict really necessary?"¹¹⁸ Even the *Shady Grove* majority agreed with the basic premise that Federal Rules should be construed to avoid conflicts if possible.¹¹⁹ The majority ultimately concluded that Rule 23 "answers the question" of "whether a class action may proceed for a given suit."¹²⁰ But it failed to consider—and certainly does not refute—the possibility that conflicts with state law can be avoided by allowing state law to play a role in the application of Rule 23. This argument was not presented in *Shady Grove*,¹²¹ and it remains viable.

117. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

118. 130 S. Ct. at 1460 (Ginsburg, J., dissenting) (citing Roger J. Traynor, *Is This Conflict Really Necessary?* 37 TEX. L. REV. 657 (1959)).

119. See *Shady Grove*, 130 S. Ct. at 1441 n.7 (majority opinion) (stating that "we entirely agree" that "we should read an ambiguous Federal Rule to avoid 'substantial variations [in outcomes] between state and federal litigation'" (alteration in original) (quoting *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001)); see also *id.* at 1449 (Stevens, J., concurring in part and concurring in the judgment) ("[F]ederal rules must be interpreted with some degree of 'sensitivity to important state interests and regulatory policies.'" (quoting *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7)); *id.* at 1456 ("I agree with Justice Ginsburg that courts should 'avoi[d] immoderate interpretations of the Federal Rules that would trench on state prerogatives' and should in some instances 'interpre[t] the federal rules to avoid conflict with important state regulatory policies.'" (alterations in original) (citations omitted) (quoting *id.* at 1461–62 (Ginsburg, J., dissenting))).

120. *Shady Grove*, 130 S. Ct. at 1437–39.

121. See Steinman, *Our Class Action Federalism*, *supra* note 23, at 1161 ("[S]tate class action law can be relevant in ways that *Shady Grove* did not consider and that would not create the kind of direct conflict with Rule 23 that was

Rule 23 requires all class actions to satisfy the four elements listed in Rule 23(a)—“numerosity, commonality, typicality, and adequacy of representation”¹²²—and at least one of the conditions set forth in Rule 23(b). Many of today’s most controversial class actions (including *Shady Grove*) invoke Rule 23(b)(3), which requires that “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”¹²³

Rule 23(b)(3)’s elements often prove dispositive in class-certification decisions.¹²⁴ The Supreme Court’s *Wal-Mart* decision appears to make Rule 23(a)’s commonality requirement a more formidable obstacle to class certification as well.¹²⁵ But the generalized language of Rule 23 provides no precise formula for assessing these requirements.¹²⁶ To be sure, federal courts—

the foundation of the *Shady Grove* majority’s decision. Questions remain, therefore, whether the Court would reach the same result in a case where the litigant invoked state class action law . . . in applying Rule 23.”)

122. *Shady Grove*, 130 S. Ct. at 1437. These elements are shorthand for Rule 23(a)’s requirements that “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a).

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

124. See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740–41 (5th Cir. 1996) (“The district court erred in its analysis in two distinct ways. First, it failed to consider how variations in state law affect predominance and superiority. Second, its predominance inquiry did not include consideration of how a trial on the merits would be conducted. Each of these defects mandates reversal. Moreover, at this time, while the tort is immature, the class complaint must be dismissed, as class certification cannot be found to be a superior method of adjudication.”); see also Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1475–76, 1479 n.17 (2005) (noting that “Rule 23(b)(3) is the reef upon which most class certification efforts flounder” and arguing that federal courts have “transformed [Rule] 23(b)(3)’s ‘superiority’ requirement into a mandate of perfection”).

125. See *supra* notes 29–30 and accompanying text.

126. Rule 23 does provide a nonexhaustive list of factors that are “pertinent” to the superiority inquiry: “(A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature

including the Supreme Court—might attempt to define these vague terms more precisely and thereby constrain the leeway federal courts have going forward. Or, in any given case, a federal court might apply those ambiguous terms in ways that are more or less receptive toward class certification. To what extent does the *Erie*–REA framework prevent federal courts from making these choices in ways that would override state class action law?

Supreme Court case law indicates that a federal court's decision to interpret or apply a vague Federal Rule in a way that would displace state law is, in *Hanna's* words, a "relatively unguided *Erie* choice."¹²⁷ There is a difference, therefore, between state law conflicting with a Federal Rule of Civil Procedure (which triggers the REA's "substantive rights" standard) and state law conflicting with the federal judiciary's gloss on a Federal Rule whose text provides only a vague or ambiguous standard (which triggers the more state-friendly "twin-aims" standard). If the vague standard set forth in the Federal Rule can be applied in a way that is consistent with state law, then the Federal Rule does not truly collide with state law.

The strongest example of this idea is *Gasperini v. Center for Humanities, Inc.*¹²⁸ The issue in *Gasperini* was whether a federal court must follow New York's standard for determining whether a federal jury's damage award was so excessive as to require a new trial.¹²⁹ There was no doubt that Federal Rule 59 governed a post-trial motion challenging a damage award as excessive.¹³⁰ And

of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." FED. R. CIV. P. 23(b)(3). These open-ended considerations do not foreclose the incorporation of state law into the superiority analysis. See Steinman, *Our Class Action Federalism*, *supra* note 23, at 1150–51.

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

128. 518 U.S. 415 (1996).

129. See *id.* at 418–19 (noting that New York law allows courts "to order new trials when the jury's award deviates materially from what would be reasonable compensation" and stating that "the issue we confront in this case" is whether that provision applies "in an action based on New York law but tried in federal court by reason of the parties' diverse citizenship").

130. See *id.* at 437 n.22 ("Rule 59(a) is as encompassing as it is uncontroversial."); see also *id.* at 420 (noting that the defendant had "[moved] for a new trial under Federal Rule of Civil Procedure 59").

federal courts had read Rule 59 to authorize new trials where a damage award was so excessive as to “shock the conscience.”¹³¹

Gasperini, however, held that Rule 59 itself did not impose the shock-the-conscience standard that had long applied in federal court: “Whether damages are excessive for the claim-in-suit must be governed by some law. And there is no candidate for that governance other than the law that gives rise to the claim for relief—here, the law of New York.”¹³² It thus rejected the idea that Rule 59 created “a ‘federal standard’ for new trial motions in ‘direct collision’ with, and ‘leaving no room for the operation of,’ a state law like [New York’s].”¹³³ The shock-the-conscience standard was a kind of federal procedural common law, not a standard dictated by Rule 59 itself.¹³⁴ Therefore, the choice between the federal shock-the-conscience standard and the applicable state standard was an unguided one. And in *Gasperini*, the Court held that federal courts hearing a claim arising under New York law must follow New York’s standard, because to do otherwise would contravene *Erie*’s twin aims by generating “substantial variations between state and federal [money judgments].”¹³⁵

Gasperini’s reasoning applies with equal force to the relationship between Rule 23 and state class action law. Although Rule 23 governs class certification in federal court, the *Erie* doctrine may constrain the federal judiciary’s ability to interpret Rule 23 in ways that would displace state class action law in any given case. Rule 23 itself does not dictate what qualify as “questions of law or fact common to the class” for purposes of Rule 23(a),¹³⁶ how to assess whether those common issues “predominate” over individual ones,¹³⁷ or how to balance the costs and benefits of class treatment to

131. *Id.* at 429–30 & n.10.

132. *Id.* at 437 n.22.

133. *Id.* (quoting *id.* at 468 (Scalia, J., dissenting)).

134. See Steinman, *Our Class Action Federalism*, *supra* note 23, at 1146 (“*Gasperini* . . . held that Rule 59 itself did not impose the shock-the-conscience standard that had long applied in federal court.”).

135. *Gasperini*, 518 U.S. at 430 (alteration in original) (internal quotation marks omitted) (quoting *Hanna v. Plumer*, 380 U.S. 460, 467–68 (1965)).

136. FED. R. CIV. P. 23(a)(2).

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

determine whether a class action would be “superior” in any given case.¹³⁸ For a state law claim, state law could inform these inquiries, just as it informs whether damages are so excessive as to justify a new trial. To follow state law in this situation would not displace a Federal Rule of Civil Procedure; it would only displace the federal judiciary’s gloss on a Federal Rule of Civil Procedure. That choice, therefore, does not implicate the REA’s substantive-rights provision, but rather the more state-friendly test for “unguided” *Erie* choices.¹³⁹

Elsewhere, I have described these arguments as recognizing that a Federal Rule of Civil Procedure has two dimensions—width and depth.¹⁴⁰ These dimensions refer to two distinct situations where state law and a Federal Rule might coexist and, thereby, avoid the kind of conflict, collision, or clash that triggers a REA analysis. The more traditional example is where the Federal Rule is not wide enough to displace state law. Consider *Walker v. Armco Steel Corporation*,¹⁴¹ where the Supreme Court considered a potential conflict between Rule 3’s command that “[a] civil action is commenced by filing a complaint with the court”¹⁴² and Oklahoma’s rule that merely filing a complaint did not toll the Oklahoma statute of limitations.¹⁴³ *Walker* held that Rule 3 was too narrow to displace state law on this issue: “Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations.”¹⁴⁴

Gasperini confirms that a conflict between a Federal Rule and state law can also be avoided when the Federal Rule is too shallow to displace state law. Rule 59 was unquestionably wide enough to cover a post-trial motion challenging a damage award as excessive—it authorized a new trial “for any reason for which a new trial has heretofore been granted in an action at law in federal

138. *Id.*

139. See *supra* note 85 and accompanying text (explaining that the REA’s substantive rights provision gives less deference to state law than the “twin aims” test for unguided *Erie* choices); see also Steinman, *Our Class Action Federalism*, *supra* note 23, at 1146–47 (describing how the “logic of *Gasperini*” would apply to Rule 23 and state class action law).

140. *Id.* at 1148.

141. 446 U.S. 740 (1980).

142. *Id.* at 750 (alteration in original) (quoting FED. R. CIV. P. 3).

143. *Id.* at 742–43.

144. *Id.* at 751.

court.”¹⁴⁵ But Rule 59 was not *deep* enough to displace the state law standard for assessing whether a damage award was impermissibly excessive.¹⁴⁶ Likewise, Rule 23(b)(3)’s vague requirements of commonality, predominance, and superiority are not necessarily deep enough to displace state law on whether a particular class action is permissible.¹⁴⁷

This argument applies even if binding federal judicial precedents mandate particular approaches to commonality,

145. FED. R. CIV. P. 59(a)(1)(A).

146. See *supra* notes 128–30 and accompanying notes.

147. As I have explained elsewhere, to ignore the “depth” dimension could eviscerate the entire distinction between “guided” and “unguided” *Erie* choices. See Steinman, *Our Class Action Federalism*, *supra* note 23, at 1152–53. Rule 83(b) of the Federal Rules of Civil Procedure provides: “A judge may regulate practice in any manner consistent with federal law, rules adopted under [the Rules Enabling Act], and the district’s local rules.” *Id.* at 1152. Rule 1 requires that the Federal Rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” *Id.* Taken together, REA-approved Federal Rules 1 and 83 mean that even if an issue does not fall within the “width” of Federal Rules 2 through 80 (or some other federal law), a federal court may regulate that issue subject only to the standard that its approach secure the action’s “just, speedy, and inexpensive determination.” *Id.* at 1152–53. Thus, every issue would become a “guided” *Erie* choice governed by the REA prong of *Hanna*’s bifurcated approach. *Id.* When an issue falls within the ambit of Federal Rules 2 through 80, any judicial gloss on that Federal Rule is given the same preemptive effect as the Rule itself. When an issue is not within the ambit of these Federal Rules, that issue is necessarily “covered by” Federal Rules 1 and 83, which themselves would grant any judicial approach to that issue the preemptive power of the Federal Rules. *Id.*

This approach would turn cases like *Walker* upside-down. See *supra* notes 141–144 and accompanying text. Rule 3 may not have covered whether filing of the complaint “commenced” the action for limitations purposes. But absent some other federal law to the contrary, Rule 3’s silence would simply leave the court free to regulate the issue pursuant to Rule 83 and Rule 1. Thus, a federal court could choose tolling-by-filing as best suited to secure the action’s “just, speedy, and inexpensive determination,” and that federal approach could be set aside only if it abridges, enlarges, or modifies substantive rights in violation of the REA. The understanding of *Gasperini* that I propose, on the other hand, would leave the logic of *Walker* intact. Neither Rule 1 nor Rule 83 has sufficient depth to displace state law, so the choice between tolling-by-filing and tolling-by-service would remain an unguided *Erie* choice. A federal court would simply construe Rules 1 and 83 to avoid any conflict with state law by adopting the state law’s tolling principle, as *Walker* requires.

predominance, or superiority. The shock-the-conscience standard for new-trial motions had also been well established by federal case law.¹⁴⁸ The operative question for *Erie* purposes is whether that “law” is dictated by the Rule or by the judiciary’s gloss on the Rule’s indeterminate text. If it is the latter, then the federal court is making a “relatively, unguided *Erie* choice,”¹⁴⁹ not one where applying state law would conflict, clash, or collide with the Federal Rule itself.¹⁵⁰

Indeed, Justice Scalia’s *Shady Grove* majority opinion endorses the proposition that “we should read an ambiguous Federal Rule to avoid substantial variations in outcomes between state and federal litigation.”¹⁵¹ We know that different approaches to class certifications create the kind of “substantial variations” that run afoul of *Erie*’s twin aims—every *Shady Grove* Justice agreed on that point.¹⁵² Accordingly, ambiguous language in Rule 23 must be read in ways to accommodate state-law approaches to class certification. The contrast between the federal and West Virginia approaches to class certification, which the Court outlined in *Smith v. Bayer Corp.*,¹⁵³ provides just one example. The federal court had concluded that Rule 23(b)(3) was not satisfied by “appl[ying] a strict test barring class treatment when proof of each plaintiff’s injury is necessary.”¹⁵⁴ But West Virginia’s approach to predominance “[r]eject[s] any ‘rigid test,’” noting that even “a ‘single common

148. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 422 (1996) (noting the “judge-made formulation in responding to excessiveness attacks on jury verdicts” according to which “courts would not disturb an award unless the amount was so exorbitant that it ‘shocked the conscience of the court’” (citation omitted)).

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

150. See Steinman, *What Is the Erie Doctrine?*, *supra* note 23, at 284 (arguing that “state law may dictate the precise contours of” a Federal Rule’s “generalized standard[] . . . even where federal courts have developed their own interpretation of the generalized standard . . . , as federal courts had done with the shock-the-conscience test for excessive verdicts”).

151. *Shady Grove Orthopedic Assoc. P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1441 n.7 (2010) (Scalia, J.) (internal alterations, citations, and quotation marks omitted).

152. See *supra* notes 73–77 and accompanying text.

153. See *supra* notes 31–37 and accompanying text (discussing how West Virginia’s approach to class certification differs from those of some federal courts).

154. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2378 (2011).

issue' in a case could outweigh 'numerous . . . individual questions.'"¹⁵⁵ The upshot of the argument outlined above is that a federal court considering a class action arising under West Virginia law must read Rule 23's textually-ambiguous predominance requirement as a West Virginia court would. One could imagine similar arguments with respect to commonality, superiority, or other aspects of Rule 23.¹⁵⁶

B. *Substantive Rights and the REA*

Even if a conflict is unavoidable, *Shady Grove* leaves considerable room for courts to decide that state class action law implicates substantive rights to such an extent that it would violate the REA to disregard it. Most significantly here, neither Justice Scalia's nor Justice Stevens's approaches to the REA garner a majority of Justices. And Justice Stevens's opinion empowers courts to inquire whether "a state law that is procedural in the ordinary use of the term" is nonetheless "so intertwined with a state right or remedy that it functions to define the scope of the state-created right."¹⁵⁷ If so, it would violate the REA to allow Rule 23 to displace state law on class actions. Although Justice Stevens writes that "the bar for finding an Enabling Act problem is a high one,"¹⁵⁸

155. *Id.* (citing and quoting *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 72 (2003) (internal citations omitted)).

156. Many state courts, for example, take a quite lenient approach to the "common question" requirement when it comes to their state's class action rules. *See, e.g.*, *North Dakota Human Rights Coalition v. Bertsch*, 697 N.W.2d 1, 4 (N.D. 2005) ("[T]he requirement for common questions of law or fact is easily satisfied."); *Philip Morris Inc. v. Angeletti*, 752 A.2d 200, 225 (Md. 2000) ("The threshold of commonality is not a high one and is easily met in most cases."); *Berry v. Fed. Kemper Life Assurance Co.*, 99 P.3d 1166, 1180 (N.M. App. 2004) ("The commonality requirement of Rule 1-023(A)(2) is relatively easily met."). The approaches of these states seem a far cry from the *Wal-Mart* majority's view of commonality for purposes of Federal Rule 23(a). *See, e.g.*, *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2556 (2011) (concluding that "dissimilarities" among class members meant that there was not "even a single common question" for purposes of Rule 23(a)(2)) (brackets omitted).

157. *Shady Grove Orthopedic Assoc. P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1452 (2010) (Stevens, J., concurring).

158. *Id.* at 1457.

his approach invites a fairly open-ended examination of state law. As described below, many federal courts have employed Justice Stevens's approach to conclude that it would violate the REA to disregard state class action law.¹⁵⁹

In any event, both Justice Scalia and Justice Stevens leave unaddressed other arguments that allowing Rule 23 to displace state class action law would impermissibly abridge, enlarge, or modify substantive rights. One argument that *Shady Grove* never considered is based on the inextricable link between class certification and preclusion. Preclusion standards have long been viewed as beyond the bounds of REA rulemaking.¹⁶⁰ Of particular note is Justice Scalia's opinion in *Semtek International Incorporated v. Lockheed Martin Corporation*.¹⁶¹ The defendant in *Semtek* had argued that Federal Rule 41(b) required particular dismissals by federal district courts to have claim-preclusive effect on subsequent litigation.¹⁶² Writing for a unanimous Court, Justice Scalia noted that it "would seem to violate" the REA if a Federal Rule of Civil Procedure imposed different preclusion consequences than state law would.¹⁶³

159. See *infra* notes 188–195 and accompanying text. For purposes of this Article, it does not matter whether Justice Stevens's concurrence is *Shady Grove*'s binding holding under the so-called *Marks* rule, which provides that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)); see *infra* notes 189–190 and accompanying text (citing federal courts that have found Justice Stevens's opinion to be the *Shady Grove* holding). Whether one follows Justice Stevens's opinion as the holding, or simply concludes that the lack of a majority on this issue means there is no "holding" on the proper approach to the REA, lower courts have considerable flexibility to conclude that particular aspects of state class action law create substantive rights for purposes of the REA.

160. See, e.g., Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 764 (1986) ("[T]he Rules Enabling Act does not authorize Federal Rules of preclusion.").

161. 531 U.S. 497 (2001).

162. *Id.* at 501.

163. See *id.* at 503–04 ("In the present case, for example, if California law left petitioner free to sue on this claim in Maryland even after the California statute of limitations had expired, the federal court's extinguishment of that right (through

What makes class actions such a powerful device (and one that inspires such tenacious vertical forum shopping) is preclusion. A class action judgment will bind the defendant vis-à-vis the entire plaintiff class, regardless of whether each individual member of that class has affirmatively stepped forward to pursue his or her claim.¹⁶⁴ When a class is not certified, on the other hand, res judicata will bind the defendant only as to the named plaintiffs who join the action.¹⁶⁵ To allow class certification via Rule 23 in a case like *Shady Grove* (where state law would forbid a class action) would give the ultimate judgment much wider preclusive effect than it would have under a state law that forbade such class actions. And to refuse class certification via Federal Rule 23 in the more typical CAFA scenario (where state law would permit a class action) would give the ultimate judgment narrower preclusive effect than it would have under state law.

Shady Grove does not speak to whether Rule 23 might violate the REA because of its effect on state preclusion principles, and it certainly does not foreclose this kind of argument. Even Justice Scalia—whose REA analysis appears to give less deference to state laws than Justice Stevens’s—considers only the role of class actions as a *joinder* device. Justice Scalia found that Rule 23 was

Rule 41(b)’s mandated claim-preclusive effect of its judgment) would seem to violate [the REA.]”). Justice Stevens joined Justice Scalia’s *Semtek* opinion. Justice Stevens also cited *Semtek* favorably in his *Shady Grove* concurrence. *Shady Grove Orthopedic Assoc. P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1452 (2010) (Stevens, J., concurring).

164. See Steinman, *Our Class Action Federalism*, *supra* note 23, at 1163.

165. My focus here is res judicata (claim preclusion) because a defendant who successfully thwarts class certification might not be entirely free from other forms of preclusion. Depending on the circumstances, a judgment against a defendant as to a single plaintiff could be binding on that same defendant in future lawsuits via collateral estoppel (issue preclusion) with respect to particular issues that were decided against the defendant. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (recognizing the availability of offensive nonmutual issue preclusion in federal court). Such preclusion is not automatic, however. For example, if the first action seeks only “small or nominal damages” (as might be the case if individual claims are not of particularly high value), future courts can conclude that offensive nonmutual issue preclusion is inappropriate. See *id.* at 330 (“If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously.”).

permissible “insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action.”¹⁶⁶ In this sense, according to Scalia, Rule 23 was no different than other “rules allowing multiple claims (and claims by or against multiple parties) to be litigated together,” such as Rules 18, 20, and 42(a).¹⁶⁷

The focus on class actions as a joinder device leaves us with an incomplete picture of a class action’s potential impact on substantive rights. The ability of mass aggregation to spread costs and make litigation less expensive for plaintiffs is an important reason why plaintiffs usually invoke, and defendants usually fight, the class action device.¹⁶⁸ But the preclusion consequences of class certification are arguably distinct from the potential cost efficiencies of aggregation. Indeed, Justice Scalia’s caveat that Rule 23 is permissible only “insofar as it allows *willing plaintiffs* to join their separate claims against the same defendants in a class action” might be particularly significant with respect to preclusion principles.¹⁶⁹ An important feature of the class action device is that it yields judgments that bind defendants even as to plaintiffs who have yet to “willing[ly]” step forward.¹⁷⁰

Of course, some have criticized class actions precisely because they treat as full-fledged litigants “an entirely comatose class of plaintiffs, who have never chosen to enforce their private rights and are even unaware that a suit has been brought on their behalf.”¹⁷¹ Others, however, have argued that enabling litigation on behalf of passive class members serves the valuable function of “compelling corporate defendants to internalize the social costs of their actions.”¹⁷² Whatever the merits of these arguments as a policy matter, there is no question about the ability of class actions to bind a

166. *Shady Grove*, 130 S. Ct. at 1443 (Scalia, J.).

167. *Id.*

168. Steinman, *Our Class Action Federalism*, *supra* note 23, at 1164.

169. *Shady Grove*, 130 S. Ct. at 1443 (Scalia, J.) (emphasis added).

170. Steinman, *Our Class Action Federalism*, *supra* note 23, at 1164 n.162 (quoting *Shady Grove*, 130 S. Ct. at 1443 (Scalia, J.)).

171. Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 129 (2003).

172. Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 139 (2006).

defendant even as to class members who have not taken the initiative of filing suits themselves. Justice Scalia's treatment of class actions as merely another joinder device for purposes of the REA overlooks this crucial aspect of class actions.¹⁷³ *Shady Grove*, therefore, fails to consider the potential ramifications of class certification on preclusion,¹⁷⁴ an area that Justice Scalia—among others—has recognized as likely beyond the permissible bounds of federal rulemaking.¹⁷⁵

C. *The Lower Federal Courts After Shady Grove*

For the reasons set forth above, strong arguments remain—even after *Shady Grove*—that state-law approaches to class actions should apply in federal court under the doctrine surrounding *Erie* and the REA. And federal courts are doing just that. So far, the most successful arguments in this regard have been based on the substantive-rights provision of the REA, as described below.¹⁷⁶

Post-*Shady Grove* cases have yet to embrace the idea that a conflict with Rule 23 can be avoided by accommodating state class-certification principles when applying the elements set out in Rule 23(a) and 23(b). One federal court of appeals, however, has taken a

173. See *supra* notes 166–167 and accompanying text.

174. This is not to say that the effect of class actions on preclusion necessarily makes it problematic for purposes of the REA's substantive-rights provision. For example, one might argue that when it comes to preclusion “[t]he substantive right is merely the right not to be bound as against non-parties,” and therefore “[t]he Federal Rules may permissibly regulate the procedural issue of whether, in a given case, it should certify a class and thereby deem an absent litigant a ‘party’ for preclusion purposes.” Steinman, *Our Class Action Federalism*, *supra* note 23, at 1178. My point here is simply that this is an open question that *Shady Grove* does not resolve.

175. Justice Stevens's logic in *Shady Grove* is also consistent with an argument that the REA must protect state approaches to class certification because of their impact on preclusion. Given the strong suggestion in *Semtek* that preclusion is a matter of substantive law, it is no leap to argue that class certification is “procedural in the ordinary use of the term”; but it is “so intertwined with the state right or remedy” created by the preclusive effect of a judgment “that it functions to define the scope of the state-created right.” *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring).

176. See *infra* notes 190–198 and accompanying text.

similar approach when considering the impact of state law on class action settlements. In the ubiquitously named case, *All Plaintiffs v. All Defendants*,¹⁷⁷ a federal district court approved a class action settlement in an antitrust case, but several settlement checks that were mailed to class members were returned as undeliverable.¹⁷⁸ The State of Texas intervened, claiming that state law gave it the right to take custody of unclaimed funds allocated to class members whose last known address was in Texas.¹⁷⁹ The federal district court concluded that Federal Rule 23(e)—which authorizes courts to approve class action settlements that are “fair, reasonable, and adequate”¹⁸⁰—allowed it to distribute the unclaimed funds through the doctrine of *cy pres* to an academic center at the University of Texas.¹⁸¹

The Fifth Circuit held that Rule 23(e) did not “cause a direct collision with [Texas] law,”¹⁸² because nothing in the Rule 23(e) inquiry “implies an authority to disregard state property laws.”¹⁸³ “Rule 23(e) only ‘collides’ with the Act in this case if one construes the Rule to include a blanket authorization to disregard state property laws in the context of administering a settlement.”¹⁸⁴ But the Court concluded that “[n]othing in the Rule’s text or structure leads us to adopt such an aggressive construction.”¹⁸⁵ Indeed, Rule 23(e)’s requirement that the settlement be “fair, reasonable, and adequate” provides plenty of leeway for courts to heed state laws relating to unclaimed property.¹⁸⁶ Along the same lines, the certification

177. 645 F.3d 329 (5th Cir. 2011).

178. *Id.* at 330.

179. *Id.* at 331.

180. FED. R. CIV. P. 23(e)(2).

181. *In re Lease Oil Antitrust Litig.* (No. II), No. MDL 1206, 2009 WL 5195977, at *7–10 (Dec. 22, 2009), *rev’d sub nom.*, *All Plaintiffs*, 645 F.3d at 337.

182. *All Plaintiffs*, 645 F.3d at 333 (citations and internal quotation marks omitted).

183. *Id.* at 334–35.

184. *Id.* at 335.

185. *Id.*

186. One interesting aspect of the *All Plaintiffs v. All Defendants* case is that it involved a class action arising under federal antitrust law, whereas the *Erie* doctrine is commonly viewed as a feature of cases arising under state law that find their way into federal court because of diversity jurisdiction. See, e.g., Steinman, *What Is the Erie Doctrine?*, *supra* note 23, at 311 & n.360 (noting “the oft-stated assumption that *Erie* governs only cases subject to diversity jurisdiction and,

requirements in Rule 23(a) and 23(b) provide plenty of leeway for courts to heed state laws on whether a class action is appropriate in any given situation, particularly if we take seriously the view of all nine *Shady Grove* Justices that, for *Erie* purposes, the Federal Rules should be construed to avoid substantial variations in outcomes between state and federal cases.¹⁸⁷

Even where federal courts do not take this approach to determining whether Rule 23 conflicts, clashes, or collides with state law, several post-*Shady Grove* decisions have concluded that it would abridge, enlarge, or modify substantive rights to disregard certain state class action laws.¹⁸⁸ As an initial matter, several lower courts have concluded that Justice Stevens's concurring opinion—which is ostensibly more deferential to state law than Justice Scalia's opinion¹⁸⁹—constitutes *Shady Grove*'s holding with respect to the REA's substantive-rights provision. As one federal district court explained:

Under the rule announced in *Marks v. United States*, when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

therefore, does not apply in federal question cases"). I do not examine here whether this fact alone casts doubt on the Fifth Circuit's use of Texas law in this case. It should be noted, however, that *Erie* and the REA are not categorically limited to diversity cases and can apply in federal question cases as well. *See, e.g., id.* at 311–12 (describing problems with viewing *Erie* and the REA as applying only to diversity cases); *see also* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 737 n.226 (1974) ("The Enabling Act, in limiting Federal Rules promulgated for civil actions, indicates no distinction between diversity and federal question cases."); Henry Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408–09 n.122 (1964) (stating that the idea that "the *Erie* decision was limited to diversity cases" is an "oft-encountered heresy" and that "[t]he correct view" is that "the *Erie* doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law").

187. *See supra* notes 118–119 and accompanying text.

188. *See infra* notes 191–195 and accompanying text.

189. *See supra* notes 107–109 and accompanying text.

Here, that means that Justice Stevens's concurrence is the controlling opinion.¹⁹⁰

Using Justice Stevens's *Shady Grove* analysis, some federal courts have concluded that it would violate the REA to disregard certain state laws in favor of Federal Rule 23.¹⁹¹ One example involves a provision of Ohio law that, just like the New York provision at issue in *Shady Grove*, forbids class actions for certain kinds of claims. Multiple courts have held that § 1345.09 of the Ohio Revised Code—which precludes class actions for some consumer claims unless the challenged conduct was “previously declared to be deceptive”¹⁹²—must block such a class action in federal court as well.¹⁹³ One court put it as follows:

Rule 23 is ultra vires under the approach of Justice Stevens (the crucial fifth vote in *Shady Grove*) because it “would abridge, enlarge, or modify [Ohio’s] rights or remedies, and thereby violate the [Rules] Enabling Act.” Here, O.R.C. § 1345.09 purports to define Ohio’s substantive rights and

190. *Bearden v. Honeywell Int’l Inc.*, No. 3:09-1035, 2010 WL 3239285, at *10 (M.D. Tenn. Aug. 16, 2010) (citing *Marks v. United States*, 430 U.S. 188 (1977)) (brackets, other citations, and internal quotation marks omitted); *accord Driscoll v. George Washington University*, ___ F. Supp. 2d ___, No. 12-0690 (ESH), 2012 WL 3900716, at *6 n.5 (D.D.C. Sep. 10, 2012) (“[B]ecause Justice Stevens’s concurrence sets forth a narrower ground as to the second step of the *Shady Grove* analysis than does Justice Scalia’s opinion, this Court agrees with the parties that Justice Stevens’s concurrence controls for that step.” (citations omitted)); *McKinney v. Bayer Corp.*, 744 F. Supp. 2d 733, 747 (N.D. Ohio 2010); *Leonard v. Abbott Labs., Inc.*, No. 10-CV-4676, 2012 WL 764199, at *12 (E.D.N.Y. Mar. 5, 2012). One lower court concluded that *Shady Grove* was a case “where *Marks* breaks down,” but it nonetheless held that Justice Stevens’s opinion “should be deemed controlling” with respect to the REA because it “occupies a middle ground of sorts” between the plurality and the dissent. *Jones v. Corr. Med. Servs., Inc.*, 845 F. Supp. 2d 824, 853 (W.D. Mich. 2012) (quoting *United States v. Cundiff*, 555 F.3d 200, 209 (6th Cir. 2009)); *see also In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, No. 1:08-WL-65000, 2010 WL 2756947, at *2 (N.D. Ohio July 12, 2010) (calling Justice Stevens “the crucial fifth vote” in *Shady Grove*).

191. *See infra* notes 193–195 and accompanying text.

192. OHIO REV. CODE ANN. § 1345.09 (2012).

193. *See infra* note 194 and accompanying text.

remedies by creating a cause of action for defrauded consumers and declaring the relief available to them. The class action restriction in O.R.C. § 1345.09(B) is intimately interwoven with the substantive remedies available under the OCSPA.¹⁹⁴

Federal courts have reached similar conclusions with regard to other states' restrictions on class actions.¹⁹⁵

These kinds of decisions confirm that—notwithstanding *Shady Grove*—certain aspects of state law on class actions may be binding in federal court. What is interesting about the examples so far is that they exclusively involve aspects of state law that, as in *Shady Grove*, are less favorable to class actions than Rule 23. Yet the conventional wisdom described above—as confirmed by the debate surrounding CAFA¹⁹⁶—is that many state courts are more willing to certify class actions than their federal counterparts. As far as *Erie* and the REA are concerned, what is good for the goose should be good for the gander. There is no reason why the argument should be any weaker for state laws that are more tolerant of class actions.

194. *Whirlpool*, 2010 WL 2756947, at *2 (alterations in original) (citations omitted) (quoting *Shady Grove*, 130 S. Ct. at 1457 (Stevens, J., concurring)). *Accord McKinney*, 744 F. Supp. 2d at 748–49 (“Because application of Rule 23 would ‘abridge, enlarge, or modify’ Ohio’s rights and remedies by permitting class actions even when the requirements in § 1345.09 are not satisfied, it is ultra vires under the Rules Enabling Act.” (citing *Whirlpool*, 2010 WL 2756947, at *2–3)).

195. *See, e.g., In re MI Windows and Doors, Inc. Prod. Liab. Litig.*, No. 2:11-cv-00167-DCN, 2012 WL 5408563, at *5 n.3 (D.S.C. Nov. 6, 2012) (applying South Carolina law); *In re Wellbutrin XL Antitrust Litig.*, 756 F. Supp. 2d 670, 676–77 (E.D. Pa. 2010) (applying Illinois law); *Bearden*, 2010 WL 3239285, at *10 (applying Tennessee law); *see also Driscoll*, 2012 WL 3900716, at *17 (“DCMWA’s opt-in mechanism confers substantive rights such that application of Rule 23 in these circumstances would violate the Rules Enabling Act.”).

196. *See supra* nn. 28, 156 and accompanying text.

V. CONCLUSION

For critics of CAFA, the arguments outlined in this Article may provide one way to mitigate the effects of expanded federal jurisdiction over high-stakes class actions that are founded on state law. While *Shady Grove* seems at first glance to undermine these arguments, a closer analysis of the *Shady Grove* opinions reveals that they remain viable. Indeed, federal courts have continued to read *Erie* and the REA to require federal courts to follow aspects of state law regarding class actions.

Predicting how the relationship between CAFA, *Erie*, the REA, and *Shady Grove* will unfold in the future is a challenging endeavor. The surprising split among the Justices in *Shady Grove* confirms as much. Thus, it is hard to say with confidence how the current Justices would address these particular questions if they find their way back to One First Street. Anyone who is counting heads, of course, should not overlook the one change to the Court's membership since *Shady Grove*: Justice Stevens—who cast the deciding vote against state law in *Shady Grove*—has been replaced by Justice Kagan. Although she has yet to weigh in on *Erie* and the REA as a Justice, her other votes and opinions on class actions—some with strong federalism dimensions—suggest it would not be shocking if she sided with Justice Ginsburg and the *Shady Grove* dissenters when these issues return to the Court.¹⁹⁷

197. See, e.g., *Smith v. Bayer*, 131 S. Ct. 2368, 2373 (2011) (Justice Kagan writing for a unanimous Court that a federal court that had denied certification of a class action pursuant to Federal Rule 23 could not enjoin certification of a state court class action that would be subject to state certification standards); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1756–63 (2010) (Justice Kagan joining Justice Breyer's dissenting opinion (along with Justice Ginsburg) arguing that the Federal Arbitration Act did not preempt California law making an arbitration agreement's class action waiver unconscionable); see also *Comcast Corporation v. Behrend*, 133 S. Ct. 1426, 1435–37 (2013) (discussed *supra* note 30) (Justice Kagan joining a dissenting opinion authored by Justices Ginsburg and Breyer); *Amgen Inc. v. Conn. Ret. Plans*, 133 S. Ct. 1184, 1190–97 (2013) (discussed *supra* note 30) (Justice Kagan joining majority opinion authored by Justice Ginsburg); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561–65 (2011) (Justice Kagan joining Justice Ginsburg's dissenting opinion arguing that the class action against Wal-Mart satisfied Rule 23(a)(2)). Adherents to the alphabetical theory described earlier should also take note that Justice Kagan's

In the meantime, the vertical forum shopping that motivated CAFA—and that CAFA itself now inspires—will surely continue. The question of which forum will adjudicate high-stakes class actions (and will therefore decide whether such cases may be certified as class actions at all) is what I have called the first focus of Our Class Action Federalism.¹⁹⁸ By expanding the universe of class actions that will ultimately end up in federal court, CAFA places an even greater emphasis on a second question: once a putative class action is pending in federal court, what role does state class action law play? *Shady Grove* is the beginning of that discussion, but it is far from the last word.

replacement of Justice Stevens tips the Court's balance in favor of the first half of the alphabet. See *supra* note 61 and accompanying text (noting that in *Shady Grove* the Justices whose last names begin with letters in the first half of the alphabet argued for the application of state law).

198. See Steinman, *Our Class Action Federalism*, *supra* note 23, at 1132 (“At first, the focus was which forum—state court or federal court—was better suited to adjudicate high-stakes class actions. This was the principal subject of the 2005 Class Action Fairness Act, which expanded federal diversity jurisdiction to encompass a wider range of class actions, even when the class’s claims arise exclusively under state law.”).