7-2011

Our Class Action Federalism: Erie and the Rules Enabling Act after Shady Grove

Adam N. Steinman

OUR CLASS ACTION FEDERALISM: *ERIE* AND THE RULES ENABLING ACT AFTER *SHADY GROVE*

*Adam N. Steinman**

* Professor of Law and Michael J. Zimmer Fellow, Seton Hall University School of Law. Thanks to Jenny Carroll, Kevin Clermont, Brooke Coleman, Richard Freer, Richard Nagareda, and Charles Sullivan for their helpful comments and suggestions. In addition, this Article has benefitted from comments received during presentations at Seattle University School of Law and at the Federal Courts Workshop sponsored by the University of Illinois College of Law.

INTRODUCTION

"Our Federalism," as Justice Black described it, "is a system in which there is sensitivity to the legitimate interests of both State and National Governments."[1] During the first decade of the twenty-first century, class action litigation has been a significant and contentious aspect of Our Federalism. 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.[2]

With this Term's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[3] the Supreme Court began to confront the logical next question: once a putative class action is pending in federal court, what role does state class action law play? Put another way: if state law assesses the propriety of a class action differently than a federal court would, when (if ever) must the federal court follow state law rather than the prevailing federal approach? The answer to this question lies in the so-called *Erie* doctrine—the thorny patch of jurisprudence that, when the Federal Rules of Civil Procedure are involved, encompasses both the limits on federal rulemaking enshrined in the

1 Younger v. Harris, 401 U.S. 37, 44 (1971). He added that "[i]t should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future." *Id.* at 44–45.

2 *See* 28 U.S.C. § 1332(d) (2006).

3 130 S. Ct. 1431 (2010).

Rules Enabling Act (REA)[4] and the venerable line of cases that began with *Erie Railroad Co. v. Tompkins*.[5] In a 5-4 decision authored by Justice Scalia, *Shady Grove* held that New York's bar on class actions for certain statutory-damages claims does not displace the framework set forth in Federal Rule 23 for determining whether a class action may be maintained in federal court, even when the action arose under New York's substantive law.[6]

Thus *Shady Grove* begins the next chapter in what one might call "Our Class Action Federalism."[7] Some have read *Shady Grove* as making state class action law irrelevant to lawsuits pending in federal court. This would be a drastic overreading, however. In fact, many open questions remain about the role of state class action law in federal court. Under several lines of argument that were neither made nor considered in *Shady Grove*, the *Erie* doctrine and the REA may require federal courts to apply state class action law, whether state law is more or less tolerant of class actions than the prevailing federal approach.

The goal of this Article is not to advocate that state class action law *should* be binding in federal court via the *Erie* doctrine and the REA. Although I will address some of the normative and doctrinal concerns relevant to the choice between state and federal class action law, my principal purpose is to identify the many fundamental, unresolved questions that remain after *Shady Grove*. At the end of the day, *Shady Grove* may be best remembered for the questions it failed to answer rather than the ones that it did. As courts, litigants, and the

---

4 *See* 28 U.S.C. § 2072.

5 304 U.S. 64 (1938).

6 *See Shady Grove*, 130 S. Ct. at 1437–38 (citing and describing N.Y. C.P.L.R. 901(b) (McKinney 2009)); *id.* at 1442.

7 Although Justice Black's *Younger* opinion appears to be the first to capitalize "Our Federalism" and place it in quotes, the phrase has figured prominently in decisions applying the *Erie* doctrine, both before and after *Younger*. *See* Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) ("I have always regarded [*Erie*] as one of the modern cornerstones of *our federalism*, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems." (emphasis added)); *see also Shady Grove*, 130 S. Ct. at 1460 (Ginsburg, J., dissenting) ("Justice Harlan aptly conveyed the importance of the doctrine; he described *Erie* as 'one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems.'" (quoting *Hanna*, 380 U.S. at 474 (Harlan, J., concurring))). It has played a role in other important civil procedure decisions as well. *See, e.g.*, Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 586–87 (1999) (quoting *Younger*'s "Our Federalism" language and stating "federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design.").

academy begin to make sense of *Shady Grove*, it is crucial to consider these continued areas of uncertainty.

Part I of this Article summarizes the black-letter basics of the *Erie* doctrine and the REA. Part II describes the Court's fractured decision in *Shady Grove*. Part III considers *Shady Grove*'s handling of the *Erie* doctrine's threshold question: whether an issue is controlled by a Federal Rule of Civil Procedure. It explains how *Shady Grove*'s holding that Rule 23 "answers the question in dispute"[8] still leaves considerable room for the operation of state class action law, both in *applying* Rule 23 and in resolving certain issues that may arise *after* a class is certified. Part IV considers *Shady Grove*'s handling of Rule 23's validity under the REA. It argues that *Shady Grove* has not ruled out the possibility that ignoring state class action law can impermissibly "abridge, enlarge or modify [a] substantive right"[9] in violation of the REA. Part V situates these arguments into a conceptual framework that brings into focus the three issues that courts will need to confront in assessing the role of state class action law under *Erie* and the REA. Finally, Part VI offers some thoughts on the unusual split between the Justices in *Shady Grove*, emphasizing that the choice between state and federal class action law can confound the ideological labels that are often assigned to each Justice.

I. *ERIE* AND THE RULES ENABLING ACT

The modern *Erie* doctrine's basic framework[10] has been fairly well established since the Court's 1965 decision in *Hanna v. Plumer*.[11] In *Hanna*, Chief Justice Warren enshrined a bifurcated approach that hinged on whether the particular issue was "covered by one of the Federal Rules [of Civil Procedure]" or, alternatively, presented a "typical, relatively *unguided Erie* choice."[12] Thus, the *Erie* doctrine's threshold inquiry is which of these two modes of analysis—"unguided" or

8 *Shady Grove*, 130 S. Ct. at 1437; *see id.* at 1439 (holding that Rule 23 "answer[s] the . . . question . . . whether a class action may proceed for a given suit").

9 28 U.S.C. § 2072(b) (2006).

10 For a more detailed description of this framework, see, for example, 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, 261–73 (2008).

11 380 U.S. 460 (1965).

12 *Id.* at 471 (emphasis added) (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"). An *Erie* choice might also be guided by a federal statute. *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 26 (1988). In such cases, federal courts must follow the federal statute on point unless it is unconstitutional. *See id.* at 27.

"guided"—applies to a given issue. Because of the different standards that apply to each kind of *Erie* choice,[13] this initial characterization is crucial, and it was at the core of the disagreement between the majority and dissenting Justices in *Shady Grove*.[14]

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."[15] If following the federal standard "would disserve these two policies," then the federal court must follow state law.[16] On the other hand, where an issue "is covered by one of the Federal Rules," the federal court must apply that Federal Rule unless the Rule violates either the Rules Enabling Act (the statutory authority for the Federal Rules) or the U.S. Constitution.[17] The Rules Enabling Act (REA) provides that such rules must be "general rules of practice and procedure"[18] and "shall not abridge, enlarge or modify any substantive right."[19]

As important as the distinction between "guided" and "unguided" *Erie* choices is, the Supreme Court has yet to concretely demarcate the line between the two.[20] It has also used an array of different phrases to articulate the standard for categorizing such choices:

– whether the issue "is covered by one of the Federal Rules"[21]

---

13 *See infra* notes 15–19 and accompanying text.

14 *See infra* Part II.A.

15 *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, after Hanna, such balancing is still a necessary part of the analysis. *See, e.g.*, Steinman, *supra* note 10, at 267–69 & n.153.

16 *Stewart Org.*, 487 U.S. at 27 n.6.

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

18 28 U.S.C. § 2072(a) (2006).

19 28 U.S.C. § 2072(b). Although compliance with the U.S. Constitution is also required, *see supra* note 17, the constitutional constraints on rulemaking are generally thought to be no greater than those imposed by the REA itself. *See* Steinman, *supra* note 10, at 269 n.167.

20 *See* Steinman, *supra* note 10, at 262–63.

21 *Hanna*, 380 U.S. at 471; *accord* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996).

- whether a Federal rule "answers the question in dispute"[22]
- whether there is a "'direct collision' between the Federal Rule and the state law"[23]
- whether the "clash" between state law and a Federal Rule is "unavoidable"[24]
- "whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court"[25]
- whether following state law would "command[ ] displacement of a Federal Rule by an inconsistent state rule"[26]
- whether the Federal Rule "leav[es] no room for the operation of [state] law"[27]
- whether the Federal Rule and state law "can exist side by side, . . . each controlling its own intended sphere of coverage without conflict"[28]
- whether "the purposes underlying the [Federal] Rule are sufficiently coextensive with the asserted purposes of the [state law] to indicate that the Rule occupies the [state law's] field of operation."[29]

Likewise, precise guidance has been lacking for both the "twin aims" standard that governs unguided *Erie* choices and the REA's substantive-rights provision that governs the validity of a Federal Rule. It is clear, however, that the REA is relatively more favorable to federal law, while the twin-aims test is relatively more favorable to state law.[30] Indeed, no Supreme Court decision has ever refused to apply a Federal Rule of Civil Procedure on the ground that it violated the REA.[31]

22 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010).

23 Walker v. Armco Steel Corp., 446 U.S. 740, 749 (1980) (quoting *Hanna*, 380 U.S. at 472).

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

25 *Walker*, 446 U.S. at 749–50.

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

27 Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987).

28 *Walker*, 446 U.S. at 752.

29 *Burlington*, 480 U.S. at 7.

30 *Shady Grove* illustrates this quite nicely. The majority held that applying Rule 23 did not violate the REA, but it conceded that under the twin-aims test, New York law would apply. *See infra* notes 64–65 and accompanying text.

31 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442–43 (2010) (plurality opinion) ("[W]e have rejected every statutory challenge to a Federal Rule that has come before us. We have found to be in compliance with § 2072(b) rules prescribing methods for serving process and requiring litigants whose mental or physical condition is in dispute to submit to examinations. Likewise, we have upheld rules authorizing imposition of sanctions upon those who file frivolous

II. THE *SHADY GROVE* DECISION

At issue in *Shady Grove* was section 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."[32] 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, basing federal jurisdiction on the expanded form of diversity jurisdiction set forth in the 2005 Class Action Fairness Act (CAFA).[33] According to the lower court, the statutory interest penalties sought by Shady Grove and its putative plaintiff class would be covered by section 901(b) if the case had been in New York state court.[34]

Allstate argued that New York's section 901(b) was binding in a federal court diversity action and, therefore, precluded certification of Shady Grove's class action. Shady Grove argued that the court must decide the propriety of a class action 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. There was no dispute that certifying a class action would have a considerable impact: 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.[35]

The case found its way to the Supreme Court, where a fractured Court held that Rule 23 governed whether the class should be certified; it was not displaced by New York's section 901(b). Although all

---

appeals or who sign court papers without a reasonable inquiry into the facts asserted." (citations omitted)).

32 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.").

33 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 549 F.3d 137, 140 (2d Cir. 2008) ("Shady Grove invoked the district court's diversity jurisdiction under 28 U.S.C. § 1332(d)(2)(A), which provides that '[t]he district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant.'" (alterations in original)), *rev'd by* 130 S. Ct. 1431. Section 1332(d)'s new form of federal diversity jurisdiction was among CAFA's most controversial provisions. *See, e.g.*, Steinman, *supra* note 10, at 249.

34 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 466 F. Supp. 2d 467, 474–75 (E.D.N.Y. 2006), *aff'd*, 549 F.3d 137, *rev'd by* 130 S. Ct. 1431.

35 *See Shady Grove*, 130 S. Ct. at 1459 n.18 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 1460 (Ginsburg, J., dissenting).

nine Justices employed the *Erie*/REA framework described above, there was little common ground beyond that. Three separate opinions were written, and only one section of Justice Scalia's Opinion of the Court garnered a five-Justice majority. As the saying goes, you need a scorecard. This Part summarizes how the various opinions handled the three steps of the *Erie*/REA framework: (1) whether a Federal Rule of Civil Procedure controls the issue; (2) if so, whether applying the Federal Rule would "abridge, enlarge or modify substantive rights"; and (3) if a Federal Rule does not control, whether disregarding state law would run afoul of *Erie*'s "twin aims."

A. Does a Federal Rule Control?

The first issue the Justices confronted in *Shady Grove* was the *Erie* doctrine's threshold question: whether the choice between state and federal law was a "relatively unguided *Erie* choice"[36] or, alternatively, one governed by a Federal Rule of Civil Procedure.[37] On this question, Part II-A of Justice Scalia's opinion garnered a five-Justice majority (it was joined by Chief Justice Roberts and Justices Stevens, Thomas, and Sotomayor) holding that Federal Rule 23 "answers the question in dispute."[38] As Justice Scalia explained, "Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met."[39] New York's section 901(b), according to Scalia, "undeniably answer[s] the same question as Rule 23: whether a class action may proceed for a given suit."[40]

---

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

37 *See Shady Grove*, 130 S. Ct. at 1437 ("We must first determine whether Rule 23 answers the question in dispute.").

38 *Id.*

39 *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."). Justice Scalia acknowledged that Rule 23 "states that '[a] class action *may* be maintained' if [the Rule's] two conditions are met," *id.* at 1437 (majority opinion) (first alteration in original) (emphasis added) (quoting FED. R. CIV. P. 23), but he noted that "[t]he Federal Rules regularly use 'may' to confer categorical permission, as do federal statutes that establish procedural entitlements." *Id.* (citations omitted) (citing FED. R. CIV. P. 8(d)(2)–(3), 14(a)(1), 18(a)–(b), 20(a)(1)–(2), 27(a)(1), 30(a)(1); 29 U.S.C. § 626(c)(1) (2006); 42 U.S.C. § 2000e-5(f)(1) (2006)).

40 *Id.* at 1439; *see also id.* at 1437 (holding that section 901(b) "states that Shady Grove's suit 'may *not* be maintained as a class action' because of the relief it seeks" (emphasis added) (quoting N.Y. C.P.L.R. 901(b) (McKinney 2009))).

The remaining four Justices dissented on this issue. Justice Ginsburg, in an opinion joined by Justices Kennedy, Breyer, and Alito, reasoned that "Rule 23 does not collide with § 901(b)."[41] She 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."[42] Thus, "Rule 23 governs procedural aspects of class litigation, but allows [section 901(b)] to control the size of a monetary award a class plaintiff may pursue."[43]

None of the Justices, however, were persuaded by Allstate's primary argument on this issue. It had argued that Rule 23 "concerns only the criteria for determining whether a given class can and should be certified," whereas section 901(b) "addresses an antecedent question: whether the particular type of claim is eligible for class treatment in the first place—a question on which Rule 23 is silent."[44] Justice Scalia and the majority held that "the line between eligibility and certifiability is entirely artificial. Both are preconditions for maintaining a class action."[45] Justice Ginsburg and the dissenters, as explained above, based their reasoning on the distinction between class certification itself and the remedies available in class action lawsuits.[46]

B. The REA's Substantive-Rights Provision

Turning to the next step in the *Erie*/REA analysis, the five Justices in the majority agreed that applying Rule 23 would not violate the REA's command that a Federal Rule "shall not abridge, enlarge or modify any substantive right."[47] There was no majority opinion on this issue, however, because Justice Stevens did not join this part of Justice Scalia's opinion.

Of the two approaches, Justice Scalia's view of the REA appeared more likely to uphold the validity of a Federal Rule.[48] Quoting from

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

42 *Id.* at 1465–66 (citing Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 549 F.3d 137, 143 (2d Cir. 2008)).

43 *Id.* at 1466; *see also id.* ("Rule 23 describes a method of enforcing a claim for relief, while section 901(b) defines the dimensions of the claim itself.").

44 *Id.* at 1438 (majority opinion).

45 *Id.*

46 *See supra* notes 41–43 and accompanying text.

47 28 U.S.C. § 2072(b) (2006).

48 As explained *infra* Part V.C.1, there may be more common ground between Scalia and Stevens on this issue than meets the eye.

the Court's 1941 decision in *Sibbach v. Wilson & Co.*,[49] he wrote: "We have long held that this limitation 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.'"[50] The mere fact that a Rule "*affects* a litigant's substantive rights"[51] does not render it invalid; "[i]f it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not."[52] Justice Scalia concluded:

> Applying that criterion, we think it obvious that rules allowing multiple claims (and claims by or against multiple parties) to be litigated together are also 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, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.[53]

Justice Stevens's approach to the REA is ostensibly more deferential to state law: 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."[54] In undertaking this inquiry, "it is necessary 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."[55] While Stevens acknowledged that this

---

49 312 U.S. 1 (1941).

50 *Shady Grove*, 130 S. Ct. at 1442 (plurality opinion) (alteration in original) (emphasis added) (quoting *Sibbach*, 312 U.S. at 14).

51 *Id.* (emphasis added).

52 *Id.* (second and third alterations in original) (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 446 (1946)). According to Justice Scalia, 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." *Id.* at 1444.

53 *Id.* at 1443 (citations omitted).

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

55 *Id.* at 1458.

inquiry does not always yield precise answers,[56] he urged that "the bar for finding an Enabling Act problem is a high one."[57]

Turning to section 901(b), Justice Stevens reasoned: "Although one can argue that class certification would enlarge New York's 'limited' damages remedy, such arguments rest on extensive speculation about what the New York Legislature had in mind when it created § 901(b)."[58] In fact, the legislative history "does not clearly describe a judgment that § 901(b) would operate as a limitation on New York's statutory damages."[59] Rather, it "reveals 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."[60] Accordingly, "we should respect the plain textual reading of § 901(b) . . . . In order to displace a federal rule, there must be more than just a possibility that the state rule is different than it appears."[61]

Justice Ginsburg and the dissenters did not apply the REA's substantive-rights provision in *Shady Grove*. Having concluded that there was "no unavoidable conflict between Rule 23 and § 901(b),"[62] there was no need for Justice Ginsburg to consider whether Federal Rule 23 violated the REA. Although she recognized the possibility that Rule 23 could impermissibly "enlarge" a substantive right,[63] Justice Ginsburg and the dissenters 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).

C. *Forum Shopping and* Erie *'s Twin Aims*

There was one issue on which the Justices were unanimous. All nine agreed that *if* the issue was treated as a "relatively unguided *Erie*

56 *Id.* at 1457 ("Faced with a federal rule that dictates an answer to a traditionally procedural question and that displaces a state rule, one can often argue that the state rule was *really* some part of the State's definition of its rights or remedies.").

57 *Id.*

58 *Id.* at 1459 (citations omitted).

59 *Id.* at 1458.

60 *Id.* at 1459 (first emphasis added).

61 *Id.* at 1459–60.

62 *Id.* at 1469 (Ginsburg, J., dissenting).

63 *Id.* at 1466 & n.7 (positing a hypothetical state statute providing that "a suit to recover more than $1,000,000 may not be maintained as a class action," and stating that "if Rule 23 can be read to increase a plaintiff's recovery from $1,000,000 to some greater amount, the Rule has arguably 'enlarge[d] . . . [a] substantive right' in violation of the Rules Enabling Act" (alterations in original) (quoting 28 U.S.C. § 2072(b) (2006))).

choice," then section 901(b) would apply in federal court, because to disregard it would encourage forum shopping in violation of *Erie*'s "twin aims."[64] For Justice Scalia and the majority, this fact was irrelevant because Federal Rule 23 "answers the question in dispute."[65] Thus there was no need to "wade into *Erie*'s murky waters."[66] In the opinion of Justice Ginsburg and the dissenters, however, "Rule 23 does not collide with § 901(b),"[67] so the need to avoid forum shopping was dispositive.[68]

* * * *

Thus, the two decisive issues in *Shady Grove*—and the most challenging ones going forward—are (1) when does a Federal Rule "answer[ ] the question in dispute" and (2) when does a Federal Rule

64 *See id.* at 1447 (plurality opinion) ("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."); *id.* at 1471 (Ginsburg, J., dissenting) ("As the plurality acknowledges, 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." (citation omitted)); *see also id.* at 1459 (Stevens, J., concurring in part and concurring in the judgment) (recognizing that class certification "is relevant to the forum shopping considerations that are part of the Rules of Decision Act or *Erie* inquiry").

65 *Id.* at 1437 (majority opinion).

66 *Id.*; *see also id.* at 1447–48 (plurality opinion) ("[Forum shopping] is unacceptable when it comes as the consequence of judge-made rules created to fill supposed 'gaps' in positive federal law. . . . But divergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure. . . . 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." (citation omitted)). Justice Stevens's concurring opinion expresses the same sentiment. *See id.* at 1459 (Stevens, J., concurring in part and concurring in the judgment) ("If the applicable federal rule did not govern the particular question at issue (or could be fairly read not to do so), then [forum shopping] considerations would matter, for precisely the reasons given by the dissent. But that is not *this* case. As the Court explained in *Hanna*, it is an 'incorrect assumption that the rule of *Erie R. Co. v. Tompkins* constitutes the appropriate test of . . . the applicability of a Federal Rule of Civil Procedure.'" (second alteration in original) (citation omitted) (quoting Hanna v. Plumer, 380 U.S. 460, 469–70 (1965)).

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

68 *Id.* at 1469 ("Because I perceive no unavoidable conflict between Rule 23 and § 901(b), I would decide this case by inquiring 'whether application of the [state] rule would have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would be likely to cause a plaintiff to choose the federal court.'" (alterations in original) (quoting *Hanna*, 380 U.S. at 468 n.9)).

"abridge, enlarge or modify a substantive right" for purposes of the REA. This Article now turns to these topics in Parts III and IV.

III. CONTROL, CONFLICT, AND COLLISION: CATEGORIZING *ERIE* CHOICES AFTER *SHADY GROVE*

Shady Grove confirms how crucial *Erie*'s threshold question can be. If the choice between federal and state class action law had been categorized as an unguided *Erie* choice, then *Shady Grove* would have been a 9-0 decision that federal class action standards must yield to New York's section 901(b).[69] *Shady Grove* became a 5-4 decision the other way because only four Justices (led by Justice Ginsburg) were able to reconcile Federal Rule 23 and section 901(b).[70] For Justice Scalia and the majority, the conflict between Federal Rule 23 and section 901(b) was unavoidable.[71]

Although Scalia and Ginsburg reach different conclusions on this issue, it is not because they endorse fundamentally different approaches to categorizing *Erie* choices. Most significantly, both recognize that Federal Rules should be construed to avoid conflicts if possible.[72] They simply disagree on whether Rule 23 can be so construed.[73] Justice Scalia's approach is the Court's majority opinion, of

---

69 *See supra* Part II.C.

70 *See supra* notes 41–43 and accompanying text.

71 *See supra* notes 36–40 and accompanying text.

72 *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'" (second alteration in original) (quoting Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 504 (2001))); *id.* at 1463 (Ginsburg, J., dissenting) ("[B]oth before and after *Hanna*, . . . federal courts have been cautioned by this Court to 'interpre[t] the Federal Rules . . . with sensitivity to important state interests' and a will 'to avoid conflict with important state regulatory policies.'" (alterations in original) (citations omitted) (citing Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7, 438 n.22 (1996))); *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 *Gasperini*, 518 U.S. at 427 n.7)); *id.* at 1451 n.5 ("[A] federal rule, like any federal law, must be interpreted in light of many different considerations, including 'sensitivity to important state interests' and 'regulatory policies.'" (citations omitted) (quoting *id.* at 1463, 1460 (Ginsburg, J., dissenting))); *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 'interpret[t] the federal rules to avoid conflict with important state regulatory policies.'" (alterations in original) (citation omitted) (quoting *id.* at 1461–62 (Ginsburg, J., dissenting))).

73 *See id.* at 1441 n.7, 1442 (majority opinion) (stating that "there is only one reasonable reading of Rule 23" and "[w]e cannot contort its text, even to avert a

course. But two crucial questions remain unresolved by the *Shady Grove* decision. The first is whether state class action law can play a role in the *application* of Rule 23 to a class action whose claims arise under state law. The second is whether state class action law can be relevant to issues that the parties might raise *after* certification. Under either line of argument, state law would not necessarily conflict with Rule 23.

A. *The Role of State Class Action Law in Applying Federal Rule 23*

The *Shady Grove* majority is intuitively (if not tautologically) correct in saying that Rule 23 "answers the question" of "whether a class action may proceed for a given suit."[74] But this conclusion alone fails to shed light on *how* that "question" might be "answer[ed]" under Rule 23. *Shady Grove*'s holding that Rule 23 applies to class-certification decisions does not foreclose the possibility that state law can play a role in Rule 23's application.

Consider the requirements that Rule 23 imposes on putative class actions. Rule 23(a) mandates that all class actions must satisfy four elements: "numerosity, commonality, typicality, and adequacy of representation."[75] In addition, a class action must satisfy 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

collision with state law that might render it invalid"); *id.* at 1465–66 (Ginsburg, J., dissenting) ("The Court, I am convinced, finds conflict where none is necessary. . . . Sensibly read, Rule 23 governs procedural aspects of class litigation, but allows state law to control the size of a monetary award a class plaintiff may pursue."); *see also id.* at 1451 n.5 (Stevens, J., concurring in part and concurring in the judgment) ("I disagree with Justice Ginsburg, however, about the degree to which the meaning of federal rules may be contorted, absent congressional authorization to do so, to accommodate state policy goals."); *id.* at 1457 ("[E]ven when 'state interests . . . warrant our respectful consideration,' federal courts cannot rewrite the rules." (second alteration in original) (citation omitted) (quoting *id.* at 1464 (Ginsburg, J., dissenting)).

74 *Id.* at 1437, 1439 (majority opinion); *see* FED. R. CIV. P. 23(b) ("*A class action may be maintained* if Rule 23(a) is satisfied and if [it falls into one of Rule 23(b)'s three categories]." (emphasis added)).

75 *Shady Grove*, 130 S. Ct. at 1437. These four 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).

fairly and efficiently adjudicating the controversy."[76] Rule 23(b)(3)'s elements often prove dispositive in class certification decisions.[77] But Rule 23(b)(3)'s generalized language gives courts considerable leeway in deciding whether any particular class action passes muster. No precise formula is provided for how a court should measure whether common issues "predominate," or how a court should balance the costs and benefits of class treatment to decide whether a class action would be "superior." These are hotly contested questions, and the text of Rule 23 provides no answers.[78]

In any given case, a federal court might reasonably construe these vague terms either to allow *or* to forbid a class action. Relatedly, federal courts might develop legal principles that define these vague terms more precisely and thereby constrain the leeway federal courts have going forward. In either of these situations, a federal court might take a more hostile posture toward class actions than state law;[79] or it might take a more tolerant posture toward class actions than state law.[80] The question is, to what extent does the *Erie*/REA framework prevent federal courts from making these choices in ways that would override state class action law? As explained below, Supreme Court case law instructs 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."[81] Put simply, there is a difference 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

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

77 *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995).

78 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 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). As explained *infra* notes 109–13 and accompanying text, these factors do not foreclose the incorporation of state law into the superiority analysis.

79 *See infra* note 227 and accompanying text.

80 *Shady Grove* would be an example of this. State law forbade the kind of class action at issue in *Shady Grove*, while the federal approach left open the possibility that such a class action might be certified.

81 Hanna v. Plumer, 380 U.S. 460, 471 (1964).

that is consistent with state law, then the Federal Rule does not truly collide with state law.

1. The Lesson of *Gasperini*

The clearest example of this idea is the Supreme Court's 1996 decision in *Gasperini v. Center for Humanities, Inc.*[82] The question 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.[83] Rule 59 of the Federal Rules of Civil Procedure unquestionably governed a posttrial motion challenging a damage award as excessive.[84] Rule 59 empowers federal district courts to order a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court,"[85] and federal courts had read this Rule to authorize new trials where a damage award was so excessive as to "shock the conscience."[86] *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."[87] Accordingly, *Gasperini* 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]."[88] It therefore required federal courts hearing a claim arising under New York law to 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]."[89]

The logic of *Gasperini* applies with equal force to the relationship between Rule 23 and state class action law. Even if we accept *Shady Grove*'s holding that Rule 23 governs class certification in federal court, the *Erie* doctrine may constrain the federal judiciary's ability to interpret (for example) Rule 23(b)(3)'s superiority requirement in a

82 518 U.S. 415 (1996).

83 *See id.* at 418–19.

84 *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 "[m]ov[ed] for a new trial under Federal Rule of Civil Procedure 59").

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

86 *Gasperini*, 518 U.S. at 429–30 & n.10.

87 *Id.* at 437 n.22.

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

89 *Id.* at 430 (alteration in original) (quoting Hanna v. Plumer, 380 U.S. 460, 467–68 (1964)) (internal quotation marks omitted).

way that would displace state class action law. How federal courts balance the costs and benefits of class treatment to decide whether a class action would be "superior" in any given case is not dictated by Rule 23 itself. For a state law claim, then, state law might inform whether class treatment is superior for class-certification purposes, just as it informed whether damages were excessive for new-trial purposes. In both cases, following state law would not displace a Federal Rule of Civil Procedure. It would, at most, displace the federal judiciary's gloss on a Federal Rule of Civil Procedure. A conflict with this sort of procedural common law does not implicate the REA's substantive-rights provision, but rather the more state-friendly "twin aims" test.

The facts of *Shady Grove* illustrate how this would work. New York's law barring statutory-damages class actions does not unavoidably clash with Rule 23, because Rule 23's superiority requirement can be interpreted consistently with New York law. Federal courts need only adopt New York's conclusion that the danger of remedial overkill makes statutory-damages class actions a bad idea and, therefore, *not* "superior to other available methods for fairly and efficiently adjudicating the controversy."[90] While reasonable minds might differ over whether the remedial-overkill concern outweighs the potential benefits of class actions, it would hardly be an unreasonable interpretation of Rule 23 to conclude that a class action is not superior in this situation.[91] This logic would also apply when (unlike in *Shady Grove*) state law is more *permissive* of class actions.[92] Where the class asserts claims arising under such a state's law, the state's view that a class action is superior to individual adjudication could legitimately displace the federal judiciary's often more hostile approach.[93] Either way, a federal court would be prohibited from deviating from state class action law if doing so would run afoul of *Erie*'s twin aims, such as by encouraging forum shopping. And all nine Justices in *Shady Grove* agreed that the availability (or unavailability) of a class action would indeed lead to vertical forum shopping.[94]

---

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

91 For a detailed analysis of why statutory-damages class actions could fail Rule 23(b)(3)'s superiority requirement even if federal courts were to examine the issue independently, see Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069 (2011).

92 As explained *infra* note 227 and accompanying text, some state courts are more welcoming of class actions than federal courts.

93 *See* Steinman, *supra* note 10, at 282–87.

94 *See supra* Part II.C.

2. Our Two-Dimensional Federal Rules

The insights above confirm that there are 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 first is where the Federal Rule is not *wide* enough to displace state law. A good example is *Walker v. Armco Steel Corp.*,[95] 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"[96] and Oklahoma's rule that mere filing of a complaint did not toll the Oklahoma statute of limitations.[97] The Court 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."[98]

Gasperini recognizes that a conflict between state law and a Federal Rule can also be avoided when the Federal Rule is too *shallow* to displace state law. Rule 59 was unquestionably *wide* enough to cover a posttrial 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 court."[99] But it was not *deep* enough to displace the state law standard for assessing whether a damage award was impermissibly excessive.[100] Likewise, Rule 23(b)(3)'s vague "superiority" requirement is not deep enough to displace state law on the permissibility of a class action in a particular set of circumstances.[101]

---

95 446 U.S. 740 (1980).

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

97 *Id.* at 742–43. Oklahoma law required that a complaint be served on the defendant within the relevant statutory period. *See id.*

98 *Id.* at 751. This holding was consistent with the Court's pre-*Hanna* decision in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532–34 (1949), which held that Kansas' rule requiring that service occur within the limitations period was binding in federal court.

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

100 *See supra* notes 84–88 and accompanying text.

101 In an earlier article, I set forth a similar argument regarding federal pleading and summary judgment standards:

> Rule 56 authorizes summary judgment upon a "show[ing] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." But the language of Rule 56 does not dictate a particular approach to determining how a party "show[s]" that no genuine issue of material fact exists, nor does it specify any particular approach to gauging whether evidence is sufficient to create a "genuine issue" as to any given fact. *Gasperini*, therefore, indicates that the standards a federal court should use to evaluate whether a moving defendant has made the requisite

Thus, *Gasperini* confirms that the preemptive scope of a Federal Rule is two dimensional, not one dimensional. *Shady Grove* does not call this aspect of *Gasperini* into question. In fact, Justice Scalia's *Shady Grove* opinion explicitly recognized *Gasperini* as a case that "involved a Federal Rule that we concluded could fairly be read not to 'control the issue' addressed by the pertinent state law, thus avoiding a 'direct collision' between federal and state law."[102] The *Shady Grove* majority surely does not overrule *Gasperini*, and the Supreme Court has repeatedly made clear that only *it* has "the prerogative of overruling its own decisions."[103] So unless and until the Supreme Court says otherwise, the lower federal courts must continue to accept *Gasperini* as binding precedent on characterizing *Erie* choices. Moreover, Justice Scalia himself instructs that an ambiguous Federal Rule should be read to avoid a conflict with state law where such a conflict could implicate *Erie*'s twin aims.[104] The ambiguity surrounding Rule 23's superiority

---

"show[ing]" and whether a plaintiff's evidence is sufficient to create a "genuine issue" are not dictated by the Rules themselves. If so, whether state or federal law governs these matters should be viewed as an unguided *Erie* choice.

Federal pleading standards are similar in this regard. The Rules require that a plaintiff's complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief"; the Rules then authorize dismissal of a lawsuit where the complaint "fail[s] to state a claim upon which relief can be granted." *Gasperini* again indicates that the standard a federal court should use to evaluate whether a plaintiff has made the necessary "short and plain statement" is not dictated by the Rules themselves. Accordingly, the applicability of state law pleading standards should be treated as an unguided *Erie* choice, even if federal courts (as the Supreme Court arguably did in *Twombly*) develop particular approaches to pleading within the rubric of the Federal Rules.

Steinman, *supra* note 10, at 284–85 (alterations in original) (footnotes omitted).

102 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 n.8 (2010) (referring to "[t]he cases chronicled by the dissent [at pages] 1461–1464"); *id.* at 1463–64 (Ginsburg, J., dissenting) (discussing *Gasperini*).

103 Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)); *see also id.* at 238 (noting that the district court was "correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent"); Scheiber v. Dolby Labs., Inc., 293 F.3d 1014, 1018 (7th Cir. 2002) ("[W]e have no authority to overrule a Supreme Court decision no matter . . . how out of touch with the Supreme Court's current thinking the decision seems."); Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 58 (1st Cir. 1999) ("Scholarly debate about the continuing viability of a Supreme Court opinion does not, of course, excuse the lower federal courts from applying that opinion."), *aff'd sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

104 *See Shady Grove*, 130 S. Ct. at 1441 n.7 (recognizing that "we should read an ambiguous Federal Rule to avoid 'substantial variations [in outcomes] between state

requirement allows Rule 23 to avoid any such conflict with section 901(b), while still adhering to *Shady Grove*'s holding that Rule 23 "answers the question" of "whether a class action may proceed for a given suit."[105]

The argument outlined here is not without controversy. *Gasperini*'s approach to the Federal Rules has been criticized,[106] perhaps most notably by Justice Scalia in his *Gasperini* dissent.[107] *Gasperini* remains good law, however, and many of the arguments against *Gasperini* are either incomplete or problematic. One doctrinal argument against *Gasperini*, for example, is that it conflicts with some language the Supreme Court has used in describing the test for categorizing *Erie* choices. In *Hanna* and even *Gasperini* itself, the Court framed the question as whether the issue "is covered by one of the Federal Rules."[108] Surely Justice Scalia is correct that whether a class action "may be maintained" is an issue that is "covered by" the Federal

---

and federal litigation'" (alteration in original) (quoting Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 504 (2001))).

105 *Id.* at 1437, 1439. Admittedly, none of the Justices in *Shady Grove* considered this possibility. But there was no reason for them to. Neither the parties nor the lower courts in *Shady Grove* ever addressed this issue, because no court was called upon to decide how Rule 23 should be applied. The lower courts had held that section 901(b) trumped Rule 23 entirely. And Allstate's argument for avoiding a conflict between Rule 23 and section 901(b) was about Rule 23's *width*, not its *depth*. Allstate contended that "eligibility" for class certification was an antecedent issue on which Rule 23 was silent. *See supra* notes 44–45 and accompanying text. *Shady Grove*'s rejection of this argument says nothing at all about whether, on remand, New York law might be incorporated into Rule 23's superiority inquiry.

106 *See, e.g.*, Kevin M. Clermont, *The Repressible Myth of* Shady Grove, 86 NOTRE DAME L. REV. 987, 1012 & n.112 (2011); J. Benjamin King, Note, *Clarification and Disruption: The Effect of* Gasperini v. Center for Humanities, Inc. *on the* Erie *Doctrine*, 83 CORNELL L. REV. 161, 189 (1997) (criticizing *Gasperini*'s failure to read Rule 59 as imposing a federal standard and fearing that under *Gasperini* "[t]he Federal Rules, when not explicit, would serve as mere empty containers waiting to be filled by state procedural rules").

107 *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 467 (1996) (Scalia, J., dissenting) ("The *principle* that the state standard governs . . . bears the potential to destroy the uniformity of federal practice and the integrity of the federal court system."); *id.* at 467–68 ("The standard to be applied by a district court in ruling on a motion for a new trial is set forth in Rule 59 of the Federal Rules of Civil Procedure, which . . . is undeniably a federal standard."). *But see* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 49 (2010) ("[T]he *Gasperini* Court was right in refusing, and Justice Scalia was quite wrong in seeking, to assimilate to Rule 59 a policy choice that its drafters did not make and that federal common law could not make for state law diversity cases.").

108 Hanna v. Plumer, 380 U.S. 460, 471 (1965); *Gasperini*, 518 U.S. at 427 n.7.

Rules.[109] But to stop the analysis here would beg the question of what *issue* is truly at stake. We might also characterize the critical issue as whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" for purposes of Rule 23.[110] *This* issue is not "covered by one of the Federal Rules," except insofar as Rule 23(b)(3) provides several open-ended and nonexhaustive factors for a court to consider.[111] It surely cannot be said that the text of Rule 23 "leav[es] no room for the operation of [state] law."[112] As explained above, Rule 23 enables a federal court to vindicate state law by incorporating the state's view that a class action is (or is not) superior in a particular situation.[113]

Another potential downside to *Gasperini* that is often invoked is that incorporating state law into the application of the Federal Rules can undermine the uniform application of procedural rules by the federal courts.[114] But such lack of uniformity is the unavoidable consequence of federalism. As *Erie* itself recognizes, horizontal uniformity is only one of many competing values.[115] Vertical uniformity between state and federal courts "a block away"[116] is also important,[117] and the *Gasperini* approach facilitates such uniformity.

One could also imagine an argument against *Gasperini* that would go something like this. When the Federal Rules provide only a vague, generalized standard (such as Rule 23(b)(3)'s superiority requirement), they implicitly grant the federal courts power to develop more precise approaches that, for *Erie* doctrine purposes, must be deemed to have the same preemptive force over state law as the Federal Rule itself. Essentially, common law made *pursuant* to a Federal Rule enjoys the same deference that the REA gives to the Federal Rules *themselves*. Thus a federal court is free to impose such common law unless it abridges, enlarges, or modifies substantive rights.

---

109 *See supra* note 74 and accompanying text.

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

111 *See supra* note 78.

112 Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987).

113 *See supra* Part III.A.1–2.

114 *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 467 (1996) (Scalia, J., dissenting) ("The *principle* that the state standard governs . . . bears the potential to destroy the uniformity of federal practice and the integrity of the federal court system."); Clermont, *supra* note 106, at 991.

115 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–77 (1938) (describing the "mischievous results" of allowing federal courts to develop general federal common law).

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

117 *Erie*, 304 U.S. at 75 ("In attempting to promote uniformity of law throughout the United States, the [*Swift*] doctrine had prevented uniformity in the administration of the law of the State.").

One might call this the "fruit of the REA tree" approach. The decisionally created fruit of an REA-promulgated Federal Rule must also be treated as being in the REA category for *Erie* purposes. This is a plausible position, but on closer analysis it simply proves too much. If taken to its logical extent, the fruit-of-the-REA-tree approach could obliterate completely the bifurcated framework enshrined by *Hanna*. Consider Rule 83(b) of the Federal Rules of Civil Procedure, which 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."[118] Rule 1, of course, requires that the Federal Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[119] Taken together, REA-approved Federal Rules 1 and 83 mean that even if an issue does not fall within the "width"[120] 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."[121] Thus, *every* issue would become a "guided" *Erie* choice governed by the REA prong of *Hanna*'s bifurcated approach. 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.

Consider what this would mean for a case like *Walker*.[122] Rule 3 may not have covered whether filing of the complaint "commenced"[123] the action for limitations purposes.[124] 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."[125] Under the fruit-of-the-REA-tree approach, this federal approach could

118 FED. R. CIV. P. 83(b).

119 *Id.* R. 1.

120 *See supra* notes 95–101 and accompanying text (contrasting the "width" and "depth" of a Federal Rule).

121 FED. R. CIV. P. 1.

122 *See supra* notes 95–98 and accompanying text.

123 FED. R. CIV. P. 3 ("A civil action is commenced by filing a complaint with the court.").

124 *See* Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980).

125 FED. R. CIV. P. 1.

be set aside only if it abridges, enlarges, or modifies substantive rights. Merely running afoul of *Erie*'s twin aims (which was the basis for the holding in *Walker*[126]) would not be enough.[127] Heeding *Gasperini*, 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 subject to the twin-aims test. A federal court can easily construe Rules 1 and 83 to avoid any conflict with state law simply by adopting the state law's tolling principle, as *Walker* required.[128]

126 *See Walker*, 446 U.S. at 752–53.

127 One might argue that it would *not* be "consistent with federal law," FED. R. CIV. P. 83(b), for a federal court to displace state law via Rule 83 when doing so would violate *Erie*'s twin aims. Although this is a textually conceivable reading, it is more likely that requiring Rule 83(b) common law to be "consistent with federal law" simply ensures that federal courts do not "regulate practice" under Rule 83(b) in a way that would contravene an Act of Congress that *already* "regulate[s]" that particular area of "practice." In other words, the phrase merely ensures that common law rules made pursuant to Rule 83(b) are below Acts of Congress in the federal law hierarchy. Without this provision, the REA's Supersession Clause might be read to allow a common law rule developed under Rule 83(b) to trump an Act of Congress, *see* 28 U.S.C. § 2072(b) (2006) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."), especially if one subscribes to the fruit-of-the-REA-tree approach described and critiqued here.

While it is beyond the scope of this Article to explore this question in depth, there are several reasons why it would be problematic to read Rule 83(b)'s reference to "federal law" as *itself* requiring federal courts to heed *Erie*'s "twin aims" when developing common law rules that would displace state law. First, the Advisory Committee Notes state that Rule 83(b)'s reference to "federal law" is to Acts of Congress, not to judicially developed principles such as the twin aims of *Erie*. *See* FED. R. CIV. P. 83 advisory committee's note (1995) ("[Rule 83(b)] permits the court to regulate practice in any manner consistent with *Acts of Congress*, with rules adopted under 28 U.S.C. §§ 2072 and 2075, and with the district local rules." (emphasis added)). Although some view the twin-aims test as compelled by the Rules of Decision Act (which *is* an Act of Congress), this is a contestable proposition. *See* Clermont, *supra* note 106, at 1002; Steinman, *supra* note 10, at 326–27. In any event, there would be some surprising results if Federal Rules that explicitly defer to "federal law" must also defer to state law via the "federal" twin-aims test. Rule 4, for example, authorizes various methods of service "unless federal law provides otherwise." FED. R. CIV. P. 4(e), (f), (h). *Hanna* would have been a very different case if such language required federal courts to follow state law service requirements whenever mandated by the *Erie* doctrine's "unguided" choice-of-law framework. Contrary to *Hanna*'s holding, Rule 4's mere compliance with the REA's substantive-rights provision would not have been sufficient to avoid state law; it would need to inquire whether "federal law"—in the form of the twin-aims test—"provides otherwise." (*Hanna* made this inquiry anyway, of course, *see* Hanna v. Plumer, 380 U.S. 460, 468–49 (1965), but then proceeded to explain why it was unnecessary. *Id.* at 469–70.).

128 The *Gasperini* approach also preserves the Enabling Act's process for approving policy choices made by the Federal Rules, a process that includes an opportunity

B. The Relevance of State Class Action Law to Post-Certification Issues

Assuming courts do not embrace the argument described in the previous Section, there is another area of uncertainty that might make state class action law relevant: whether such state law impacts federal court practice *after* a class is certified pursuant to Rule 23. Three possible areas are the availability of particular remedies in a class action, the preclusive effect of the ultimate judgment reached in the class action, and the extent to which the limitations period will be tolled for the entire class. All of these issues arguably present unguided *Erie* choices because they are not addressed by the Federal Rules themselves.

1. State Class Action Law and Remedies

As for the first possibility, consider the debate between Justices Scalia and Ginsburg over whether Rule 23 and section 901(b) can be reconciled. Justice Ginsburg attempts to avoid a conflict between the two by reading section 901(b) as defining the *remedies* that are available in a class action.[129] She writes that Rule 23 "prescribes the considerations relevant to class certification and postcertification proceedings," while section 901(b) addresses whether "a particular remedy [is] available when a party sues in a representative capacity."[130]

Justice Ginsburg's argument is a bit of a non sequitur if her point is that New York law forbids class certification. If section 901(b) merely "control[s] the size of a monetary award a class plaintiff may

---

for Congress to review and veto those choices. As Professors Stephen Burbank and Tobias Wolff argue in their recent article:

> Unless a Federal Rule alleged to violate the Enabling Act actually makes a policy choice that Congress has had an opportunity to review (and since the 1980s, that would have been the subject of an elaborate, multistage process involving notice, the opportunity for comment, and other requirements designed to enhance transparency and accountability), the role that federal common law plays in providing content that the rulemakers did not prospectively entertain should be recognized and analyzed accordingly. Thus, the *Gasperini* Court was right in refusing, and Justice Scalia was quite wrong in seeking, to assimilate to Rule 59 a policy choice that its drafters did not make and that federal common law could not make for state law diversity cases.

Burbank & Wolff, *supra* note 107, at 48–49 (footnotes omitted).

129 *See supra* notes 41–43 and accompanying text.

130 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1465 (2010) (Ginsburg, J., dissenting).

pursue,"[131] then it does *not* foreclose certification of the class itself. The logical consequence of Ginsburg's argument is that Rule 23 *would* govern whether a class action may be certified, but section 901(b) would make statutory penalties unavailable upon certification. Justice Ginsburg and the dissenters might be perfectly happy with this result, but a defendant like Allstate would need to follow a slightly different procedural path to get there. It would file a motion, *after* the class action is certified, arguing that New York law forbids the award of statutory damages in any case that proceeds as a class action.[132] Justice Stevens explicitly recognizes this possibility in his concurrence.[133]

If Allstate filed such a motion, how would we characterize the *Erie* choice between state and federal law? Rule 23 is silent on which *remedies* are available in a class action. In this hypothetical procedural posture, then, a court could reconcile New York law and the Federal Rules along the lines suggested by Justice Ginsburg (and by Justice Stevens in his concurrence). Rule 23 governs whether a class action should be certified, but state law tells us which remedies are available in that class action.

How would Justice Scalia respond? He might embrace the same sort of textualist reasoning he used in rejecting Justice Ginsburg's argument in *Shady Grove* itself:

> By its terms, [section 901(b)] precludes a plaintiff from "maintain[ing]" a class action seeking statutory penalties. Unlike a law that sets a ceiling on damages (or puts other remedies out of reach) in properly filed class actions, § 901(b) says nothing about what remedies a court may award; it prevents the class actions it covers from coming into existence at all.[134]

The problem, however, is that Scalia's textualism does not work in reverse. He may be right that section 901(b) "says nothing about what remedies a court may award."[135] But it does not follow that New York *law* has nothing to say about this question. That existing sources of state law do not explicitly address an issue is no excuse to ignore

131 *Id.* at 1466; *see also id.* ("Rule 23 describes a method of enforcing a claim for relief, while § 901(b) defines the dimensions of the claim itself.").

132 Such a motion might take the form of a motion for judgment on the pleadings, *see* FED. R. CIV. P. 12(c), or a motion for summary judgment, *see* FED. R. CIV. P. 56(a), directed at any claims for statutory damages.

133 *See Shady Gove*, 130 S. Ct. at 1456 n.15 (Stevens, J., concurring in part and concurring in the judgment) ("§ 901(b) would be relevant only to determine whether [the plaintiffs], at the conclusion of a class-action lawsuit, may collect statutory damages.").

134 *Id.* at 1439 (majority opinion) (alteration in original).

135 *Id.*

state law. It simply means that federal courts must make an *Erie*-guess about how the state's highest courts would resolve that particular issue.[136] Perhaps Scalia felt no need to make this inquiry because Allstate rested its argument exclusively on section 901(b). But if we are to understand the broader implications of *Erie*/REA on the role of state class action law in federal court, we must consider this possibility. It would be no stretch at all to "guess" that New York's highest court, if confronted with the question, would indeed hold that statutory-penalty remedies are unavailable in a class action under New York law. Even if section 901(b) itself is silent on this question, its effect is to prevent entirely the award of statutory penalties to class action plaintiffs. The greater (forbidding the class action) necessarily includes the lesser (preventing the remedy from being awarded in a class action). Surely section 901(b) reflects a policy judgment by the New

136 *See, e.g.*, Beavers v. Metro. Life Ins. Co., 556 F.3d 436, 439 (5th Cir. 2009); Combs v. Int'l Ins. Co., 354 F.3d 568, 577 (6th Cir. 2004); Pehle v. Farm Bureau Life Ins. Co., 397 F.3d 897, 901 (10th Cir. 2005); Steinman, *supra* note 10, at 305 (noting that a federal court determines the content of a state's law based on "the state's positive law (statutes, constitutions, etc.) and decisions of the state's highest court" but "[w]hen these sources are indeterminate, federal courts must make a so-called '*Erie*-guess' about how the state's highest court would resolve the issue"); *see also, e.g.*, King v. Order of United Commercial Travelers of Am., 333 U.S. 153, 160–61 (1948) (recognizing that a federal court must "make its own determination" of what the state's highest court would decide); Meredith v. City of Winter Haven, 320 U.S. 228, 237 (1943) ("[T]his Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain."); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology As "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1927 & n.90 (2011) ("[M]ost federal courts take the position that they must 'predict' the result that the state supreme court would reach."). For examples of *Erie*-guesses, see 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4507 n.30 (Supp. 2010), citing cases, and Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 135 n.232 (2006), same. An *Erie*-guess might not be necessary if the relevant state has a "[c]ertification procedure" that "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court." Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997); *see also* 17A WRIGHT ET AL., *supra*, § 4248 & n.30 (3d ed. 2006 & Supp. 2010) (noting that "[m]any states have now adopted certification procedures" and citing the relevant statutes). Even where such a procedure exists, the state court typically has discretion to refuse to answer the certified question. *See, e.g.*, Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 397 (5th Cir. 1986) (noting after the Mississippi Supreme Court refused to accept the certified question that "[t]he denial of certification forces us to make the *Erie*-guess which we sought to avoid").

York legislature that statutory damages are not appropriate remedies in class actions.[137]

This *Erie*-guess means that New York would not need to revise its statute to exclude statutory damages from being awarded in a class action.[138] Although Justice Scalia's opinion explicitly leaves open the possible effect of such a statute,[139] it would be a perverse doctrine that would require a state to rewrite its statute to accomplish what it already plainly accomplishes. By providing in section 901(b) that a class action "may not be maintained" if statutory damages are sought, New York put statutory damages definitively out of reach in cases brought as a class action.

2. State Class Action Law and Preclusion

Perhaps the most significant reason class actions are such a powerful procedural device is that the preclusive effect of a class action judgment will typically cover the entire class.[140] Preclusion poses risks for plaintiff class members, of course, because even absent class members can be bound by an adverse judgment. But the broad preclusive effect can also be quite unsettling for the defendant, because it means that a victory for the class 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. Without such preclusion, in fact, it is hard to see why class certification would encourage the sort of forum shopping that all nine Justices in *Shady Grove* agreed would occur.[141] It is only because of preclusion

137 *See, e.g.*, *Shady Grove*, 130 S. Ct. at 1458–59 (Stevens, J., concurring in part and concurring in the judgment) (citing section 901(b)'s legislative history); *id.* at 1464–66 (Ginsburg, J., dissenting) (same); *see also, e.g.*, Weiss v. United States, 787 F.2d 518, 525 (10th Cir. 1986) ("In predicting how a state's highest court would rule, federal courts must follow [among other things] policies underlying the applicable legal principles . . . .").

138 *Cf.* Joseph P. Bauer, *Shedding Light on* Shady Grove*: Further Reflections on the* Erie *Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939 (2011) (inquiring whether the Court would reach a different result if a statute like New York's were revised to expressly limit remedies); Clermont, *supra* note 106, at 1029 (same).

139 *See Shady Grove*, 130 S. Ct. at 1439 ("We need not decide whether a state law that limits the remedies available in an existing class action would conflict with Rule 23; that is not what § 901(b) does.").

140 *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 884 (2008) ("In a class action, for example, a person not named as a party may be bound by a judgment on the merits of the action, if she was adequately represented by a party who actively participated in the litigation.").

141 *See supra* Part II.C (noting the Justices unanimity on this issue).

that class certification would, in Justice Ginsburg's words, "transform a $500 case into a $5,000,000 award."[142]

Accordingly, the real concern for many litigants—and the one that potentially implicates *Erie*'s twin aims—is not whether a class action is certified, but whether the ultimate judgment will bind the defendant vis-à-vis the entire class. The text of Rule 23, however, does not dictate what the preclusive effect of a class action judgment will be.[143] So even if Rule 23 tells courts that the *Shady Grove* lawsuit may proceed as a class action, it does not tell courts whether the judgment in that class action will preclude the defendant vis-à-vis all class members.

Thus a defendant like Allstate, at some point after the class is certified, could make an argument about preclusion similar to the one outlined above about remedies. Because Rule 23 itself does not "answer the question" of whether the class judgment will bind Allstate as to the entire class, the preclusive effect of that judgment is an unguided *Erie* choice. And the same concerns about forum shopping that all nine Justices recognized in *Shady Grove* apply with equal force

---

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

143 *See* Burbank & Wolff, *supra* note 107, at 55–56. It is true that Rule 23(c) requires that the judgment in a class action must "include" and "describe" those "whom the court finds to be class members." FED. R. CIV. P. 23(c)(3). But as the Reporter for Rule 23's 1966 revision explained, "This is a statement of how the judgment shall read, not an attempted prescription of its subsequent res judicata effect." Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pt. 1), 81 HARV. L. REV. 356, 393 (1967); *see also id.* at 378 ("It would indeed have been awkward to attempt to predetermine in a blanket way the binding effects of class action judgments."); Proceedings of Meeting of Advisory Committee on Rules of Civil Procedure of the Supreme Court of the United States 49 (Oct. 31–Nov. 2, 1963), *in* RECORDS OF THE JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-7105-4 (Cong. Info. Serv.) (comments of Benjamin Kaplan) (stating that Rule 23 "does not attempt to solve the question of res judicata, although it points in that direction"). Likewise, although Rule 23 requires that the notice given to absent members of a Rule 23(b)(3) class must "clearly and concisely state . . . the binding effect of a class judgment on members," FED. R. CIV. P. 23(c)(2)(B)(vii), it does not dictate what that binding effect is.

To contemporary sensibilities, it may seem strange even to think of a class action whose preclusive effect does *not* extend to the entire class. But that was precisely the situation facing the drafters of the 1966 amendments to Rule 23. *See* Kaplan, *supra*, at 381–82 (noting federal courts' inconsistent treatment of whether so-called "spurious" class actions were binding on absent class members as well as those who had appeared in the action). To be clear, I am not arguing *against* class actions generally having preclusive effect as to all class members. My point is simply that the preclusive effect of a class action is not dictated by the text of Rule 23.

to the preclusion question, because it is *only* that preclusive effect that compounds the size of the ultimate recovery.

As above, this argument is not necessarily lost simply because New York's section 901(b) defines whether a class action seeking statutory damages may be "maintain[ed]" rather than the preclusive effect of a judgment in a case seeking statutory damages. Section 901(b)'s silence on preclusion *per se* would simply require federal courts to make an *Erie*-guess as to the content of New York's preclusion law. Allstate could argue that, under New York law, a judgment awarding statutory damages shall have res judicata effect on a defendant *only* as to those plaintiffs who individually appeared in the action.[144] This is the practical effect of section 901(b). Because a class action would be the method under New York law by which the res judicata effect of a judgment would *extend* to absent parties, section 901(b)'s prohibition on class actions seeking statutory damages effectively answers the res judicata question as well.

3. State Class Action Law and Statutes of Limitations

Another reason class actions are often feared by defendants and embraced by plaintiffs is their effect on statutes of limitations. Under the so-called *American Pipe* rule, the filing of a class action in federal court (and many state courts) tolls the applicable statute of limitations for the entire class.[145] This allows a single plaintiff to satisfy the limitations period for a vast group of yet unidentified potential plaintiffs who have, in many instances, taken no action at all to pursue their claims.

---

144 I frame this principle in terms of 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 could be binding on that same defendant in lawsuits by future plaintiffs via collateral estoppel (issue preclusion) as 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 *Shady Grove* were a $500 lawsuit by a single plaintiff rather than a five million dollar class action), 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.").

145 *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552–53 (1974); *see also* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353–54 (1983); Wade v. Danek Med., Inc., 182 F.3d 281, 286 (4th Cir. 1999) ("A number of other states—some looking to the Supreme Court's decision in *American Pipe*—have adopted a rule allowing equitable tolling during the pendency of a class action in their own courts.").

Imagine this scenario: *Shady Grove* is ultimately certified as a class action. Eventually the case proceeds to a favorable judgment for the plaintiff class, at which point ten thousand class members[146] step forward to claim the statutory damages to which they are entitled. Allstate moves to dismiss the vast majority of these claims as time-barred, arguing that the limitations period expired while the litigation was still pending. Under the *American Pipe* rule, that motion would fail. But Rule 23, however, does not address the extent to which a class action tolls the limitations period for unnamed class members. Thus a federal court would face a relatively unguided *Erie* choice.

What does New York law have to say about this issue? Again, it is not necessarily fatal that section 901(b) addresses whether a class action for statutory damages may be "maintain[ed]" rather than the tolling of the relevant limitations period. The federal court must make an *Erie*-guess about what New York's highest court would decide if squarely confronted with the issue. And Allstate would frame the issue this way: must a plaintiff litigate as a named party in order to satisfy the limitations period for a statutory damages claim? A federal court could conclude that the answer would be yes. The practical effect of section 901(b) is to require plaintiffs seeking statutory damages to come forward individually in order to avoid a time bar. This is not because section 901(b) constitutes a rejection of the federal *American Pipe* rule. It is because even if New York would also toll the limitations period upon the *filing* of a putative class action, the clock would resume running *after* the state court refused to certify the class under section 901(b); the claims of plaintiffs who remain absent would eventually expire.[147]

---

146 If each class member's claim were roughly the size of Shady Grove's, it would take 10,000 class members to reach Shady Grove's asserted $5,000,000 amount in controversy. *See, e.g.*, *Shady Grove*, 130 S. Ct. at 1471 (Ginsburg, J., dissenting) ("Shady Grove seeks class relief that is *ten thousand times* greater than the individual remedy available to it in state court.").

147 Thus, my point is distinct from the hotly debated question of whether *Erie*/REA tolerates applying the federal *American Pipe* rule to claims arising under the law of a state that does *not* follow *American Pipe*. *Compare, e.g.*, Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 317–19 (arguing that the *American Pipe* rule derives from Rule 23 and does not violate the REA), *with* Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's* "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 1012, 1027–29 (arguing that "Rule 23 does not provide a rule for tolling the applicable limitations period, state or federal, in a class action brought in federal court" and that it would violate the REA if it did). The REA concern raised here is present even when state law also follows *American Pipe* but simply would not allow the class to be certified in the first instance The *American Pipe* rule would, admittedly, allow an individual plaintiff to gain some

On this understanding, federal courts would be presented with an unguided *Erie* choice between (a) federal law that would allow the certified class action to preserve the statutory-damages claims of all absent class members en masse and (b) state law that would require each plaintiff to preserve his or her claim individually. As in the remedies context,[148] requiring such an *Erie*-guess avoids forcing a state like New York to go through the superfluous exercise of revising its laws to address tolling explicitly, rather than addressing the class action device that would be the basis for that tolling in the first place. New York has already banned all class actions seeking statutory damages claims, effectively declaring that plaintiffs must personally step forward and assert their claims in order to satisfy limitations period. As a functional matter, there would be no need for New York to say anything more than it already has, unless of course the *Erie* doctrine required such magic words to make the law applicable in federal court.

* * * *

The scenarios considered in this Part illustrate that state 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 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 either in applying Rule 23 or in the context of issues raised after certification of the class.

IV. THE RULES ENABLING ACT AFTER *SHADY GROVE*

Assuming federal courts reject the arguments outlined in Part III, the question would shift to whether allowing Rule 23 to trump state class action law would violate the REA. To its credit, *Shady Grove* provides the most direct and thorough exploration of the REA that a

benefit from another plaintiff's filing of a putative class action that is ultimately thwarted by a state law such as section 901(b). The limitations period would at least be tolled during the period between the filing of that class action and the decision denying class certification. *See Crown Cork & Seal*, 462 U.S. at 354 ("Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied."). Although such tolling would extend somewhat the deadline for such a plaintiff to file his or her individual claim for statutory damages, the futility of seeking class certification in light of adverse state law means that, at the end of the day, a plaintiff will be required to pursue his or her claim individually in order to avoid being time-barred.

148 *See supra* note 130 and accompanying text.

Supreme Court decision has ever provided. Unfortunately for those hoping for conclusive guidance, neither Justice Scalia's nor Justice Stevens's approaches to the REA garner a majority of Justices. In any event, Justices Scalia and Stevens leave unaddressed a number of significant ways that Rule 23 might impermissibly abridge, enlarge, or modify substantive rights. Subpart A of this Part outlines these arguments; subparts B and C explain why they remain viable under either Justice Scalia's or Justice Stevens's reasoning.

A. Class Actions and the REA: Unanswered Questions

Although Justices Scalia and Stevens spar in *Shady Grove* over the proper interpretation of the REA, they each conclude that applying Rule 23 to the lawsuit in *Shady Grove* does not violate the REA's substantive-rights provision. We should not assume, however, that the relationship between "substantive rights" under the REA and state class action law is fully resolved. In particular, both Scalia and Stevens fail to confront Rule 23's impact on two areas that have long been recognized as substantive and potentially beyond the scope of REA rulemaking: preclusion principles and statutes of limitations.[149]

Preclusion standards are considered by many (including Justice Scalia, it seems) to be beyond the bounds of REA rulemaking.[150] The most relevant Supreme Court decision on this issue is *Semtek International Inc. v. Lockheed Martin Corp.*[151] 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 litiga-

149 In addition, one might plausibly argue that the availability of particular substantive *remedies* in a class action is a substantive right. What remedies are appropriate for a particular violation of state law would seem to be a quintessential part of that state's "substantive rights." Both Scalia and Stevens reject this idea in *Shady Grove*, however. They each reason that the remedies themselves are plainly available under New York law; a class action simply allows multiple litigants to join their individual claims for those remedies into a single action. *See Shady Grove*, 130 S. Ct. at 1443 (plurality opinion) ("[L]ike traditional joinder, [a class action] leaves the parties' legal rights and duties intact and the rules of decision unchanged."); *id.* at 1459 n.18 (Stevens, J., concurring in part and concurring in the judgment) ("Justice Ginsburg asserts that class certification in this matter would 'transform a $500 case into a $5,000,000 award.' But in fact, class certification would transform 10,000 $500 cases into one $5,000,000 case." (quoting *id.* at 1460 (Ginsburg, J., dissenting))).

150 *See infra* notes 151–52 and accompanying text (discussing Justice Scalia's opinion for a unanimous Court in Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001)); *see also, 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.").

151 531 U.S. 497 (2001).

tion.[152] Writing for a unanimous Court, Justice Scalia held that to read Rule 41(b) as mandating the preclusive effect of such dismissals "would seem to violate" the REA if, under state law, such a dismissal would not foreclose future litigation.[153]

Certification of a class action that could not proceed as such under state law can significantly expand the preclusive effect of any ultimate judgment. What makes a class action judgment so threatening to a defendant is the fact that it 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. 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.[154] To allow class certification via Rule 23 in a case like *Shady Grove* would give the ultimate judgment much wider preclusive effect than it would have under a law that, like New York's, forbade such class actions. This argument was never made to the Court in *Shady Grove*. And *Semtek* raises serious questions about whether a Federal Rule may permissibly expand the preclusive effect of a judgment to cover an entire class, when state law would prevent such a class action from ever coming into being.

A class action can also have a powerful effect on statutes of limitations. As discussed above, the general rule in federal court (and many state courts) is that the filing of a class action tolls the applicable statute of limitations for the entire class.[155] In this way, the class action device can preserve many claims that would likely expire otherwise.[156]

Limitations periods—and the methods by which they are tolled—have long been viewed as a sensitive area for Federal Rulemaking.[157] In *Shady Grove*, both Scalia and Stevens recognize that limitations periods might be beyond the scope of permissible Federal Rulemaking

152 *Id.* at 501.

153 *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 Rule 41(b)'s mandated claim-preclusive effect of its judgment) would seem to violate [the REA].").

154 As discussed *supra* note 144, a defendant might be subject to issue preclusion (collateral estoppel) even if no class action is certified, but this is by no means certain.

155 *See supra* note 145 and accompanying text (citing Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974)).

156 *See supra* text accompanying notes 146–47.

157 *See, e.g.*, John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 726–27 (1974) (arguing that a Federal Rule–based statute of limitations "would satisfy the Enabling Act's first sentence" but "should not get by the second sentence").

authority.[158] If a Federal Rule permits a class action that would be forbidden under state law, it tolls the statute of limitations for claims that, if state law were followed, would become time-barred.[159] Neither Scalia nor Stevens considered the potential effect of class certification on state limitations periods. Whether that effect is permissible under the REA remains an open question.

B. Openings in Justice Scalia's Reasoning

Justice Scalia's REA analysis does not necessarily foreclose the arguments outlined above, because his holding was explicitly confined to class actions as a joinder device. Justice Scalia found that Rule 23 was permissible at least "insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action."[160] In this sense, he reasoned, 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).[161]

It is understandable that Justice Scalia focused on the aggregation aspects of class certification, because that was how Allstate framed its REA arguments. The result, however, is an incomplete picture of a class action's potential impact on substantive rights. To be sure, the potential for mass aggregation to spread costs and make litigation less expensive for plaintiffs to pursue claims is an important reason why plaintiffs usually invoke, and defendants usually fight, the class action device. But the limitations and preclusion consequences of class certification are distinct from the potential cost efficiencies of aggregation.[162] To allow Rule 23 to dictate particular consequences for

158 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1446 n.13 (2010) (plurality opinion) (recognizing that "statutes of limitations" are an area for which "it may be difficult to determine whether a rule 'really regulates' procedure or substance"); *id.* at 1453 n.9 (Stevens, J., concurring in part and concurring in the judgment) (writing that "statutes of limitations" are examples of "procedural rules [that] may displace a State's formulation of its substantive law").

159 As explained *supra* text accompanying note 147, the disparity between state and federal law would exist even if state law would follow the federal *American Pipe* rule, because the clock would resume running *after* the state court refused to certify the class.

160 *Shady Grove*, 130 S. Ct. at 1443 (plurality opinion).

161 *Id.*

162 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," *id.* (emphasis added), might be particularly significant with respect to preclusion principles and limitations periods. Two reasons why the class action device is so powerful are (1) it yields judgments that bind defendants even as to plaintiffs who have yet to "willing[ly]" step forward, and (2) it saves claims by such plaintiffs from a

preclusion and limitations principles in this manner could impact "substantive rights" in ways that the *Shady Grove* Court was never asked to consider.

C. *Openings in Justice Stevens's Reasoning*

Unlike Justice Scalia, Justice Stevens's REA analysis focuses on the Federal Rules' effect on the state law that would otherwise be displaced.[163] Justice Stevens's analysis, however, fixates entirely on one piece of New York law: section 901(b). He finds it "hard to see how § 901(b) could be understood as a rule that, though procedural in form, serves the function of defining New York's rights or remedies."[164] While Justice Stevens acknowledges "legislative history that 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,'" he stresses that "that is not the law that New York adopted."[165] Moreover, he argues, this legislative history "does not clearly describe a judgment that § 901(b) would operate as a limitation on New York's statutory damages."[166] Rather, section 901(b)'s legislative history "reveals 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."[167]

It is not surprising that Justice Stevens dealt exclusively with New York law as codified in section 901(b), because that was Allstate's sole argument.[168] But if we look at the issue more generally, it is not

---

possible limitations bar. Indeed, 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." 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.

163 *See, e.g.*, *Shady Grove*, 130 S. Ct. at 1454 n.10 (Stevens, J., concurring in part and concurring in the judgment) (arguing that courts should "consider[ ] the nature and functions of the state law that the federal rule will displace").

164 *Id.* at 1457.

165 *Id.*

166 *Id.* at 1458.

167 *Id.* at 1459.

168 *See id.* at 1443 ("Allstate argues that . . . § 901(b)[ ] creates a right that [Rule 23] abridges—namely, a 'substantive right . . . not to be subjected to aggregated class-action liability' in a single suit. . . . As a fallback argument, Allstate argues that even if § 901(b) is a procedural provision, it was enacted 'for substantive reasons.'" (fourth alteration in original) (emphasis omitted) (quoting Brief for Respondent at 24, 31, *Shady Grove*, 130 S. Ct. 1431 (No. 08-1008))).

enough to say that section 901(b) involves solely "a classically procedural calibration" of when the claim-facilitating benefits of the class action device are appropriate. That simply means that federal courts must make an *Erie*-guess about what New York law *would* be on the arguably more substantive issues that section 901(b) does not explicitly cover.[169] Thus, Justice Stevens's conclusion fails to consider the possibility that *other* principles of New York law exist that (while not codified in a statute like section 901(b)) target the limitations and preclusion implications of class actions seeking statutory damages.

A federal court could quite easily guess that New York's highest court, if confronted with the question, would endorse the following principles as New York law: (1) a judgment awarding statutory damages shall have res judicata effect on a defendant only as to those plaintiffs who individually appeared in the action and (2) a plaintiff must litigate as a named party in order to satisfy the limitations period for a statutory damages claim. The first one follows directly from the fact that, in New York, a class action is not available to extend the res judicata effect of a judgment to parties who have not formally appeared. The second also follows from the fact that statutory-damages class actions are not permitted; without the class action device, plaintiffs must individually appear in an action in order to satisfy the limitations period.[170] Stevens fails to consider the possibility that these state law principles exist *in addition to* section 901(b). His reasoning in *Shady Grove* thus leaves open the question of whether a Federal Rule like Rule 23 can permissibly override such state law principles.

* * * *

Given the Supreme Court's recognition that preclusion and limitations law are areas of substantive concern,[171] allowing a Federal Rule like Rule 23 to impose its own preclusion and limitations principles could reasonably be found to abridge, enlarge, or modify substantive rights in ways that the *Shady Grove* majority was never asked to consider. As courts begin to grapple with these questions, it must be kept in mind that the polarity of Our Class Action Federalism is not unidirectional. Sometimes state law is better for plaintiffs and worse for defendants; sometimes it is better for defendants and worse for plaintiffs. So the REA argument outlined here can cut both ways. In a case like *Shady Grove*, state law would deprive plaintiffs of a class action's

169 *See supra* notes 136–37 and accompanying text.

170 *See supra* text accompanying note 147.

171 *See supra* notes 150–53, 157–58 and accompanying text.

favorable preclusion and limitations consequences; we would expect the *defendant* to argue that certifying a class action would abridge, enlarge, or modify substantive rights with regard to the preclusive effect of the judgment and the limitations period. In other cases, however, state law may be more favorable to class certification than the federal approach.[172] In that circumstance, we would expect the *plaintiffs* to argue that refusing to certify a class action would abridge substantive rights relating to preclusion and the statute of limitations.

V. FRAMING THE ISSUES: HOW COURTS SHOULD CONCEPTUALIZE THE ROLE OF STATE CLASS ACTION LAW UNDER *ERIE*/REA

The arguments outlined in Parts III and IV would all tilt strongly toward the incorporation of state law into federal court—a result that will not be universally embraced. My primary point in this Article is not to persuade readers that courts should be accepting these arguments as normatively ideal. Rather, it is to show that the choice between state and federal class action law can arise in a number of ways that the *Shady Grove* Justices did not consider.

Even after *Shady Grove*, then, several arguments remain that would make state class action law relevant in federal court. This Part situates these arguments into a conceptual framework that brings into focus the three critical issues that courts will need to confront going forward in assessing the role of state class action law under *Erie* and the REA: (1) courts must identify the relevant principles of state law; (2) they must determine the preemptive scope of the relevant Federal Rule, here, Rule 23; and (3) they must determine whether following the Federal Rule is permissible under the REA. Obviously, the third issue is necessary only if the relevant principle of state law (step one) is preempted by Rule 23 (step two). If it is not, the dispositive issue will be *Erie*'s twin aims, particularly the likelihood that refusing to apply the state law will encourage forum shopping. On that issue, the *Shady Grove* Justices unanimously concluded that disregarding state class action law would indeed run afoul of *Erie*'s twin aims—a conclusion that would require federal courts to apply state law.[173]

A. *Step One: Identify the Relevant State Law Principles*

The first step in this framework is to identify and validate the state law principles being invoked. Let's use the facts of *Shady Grove* as an example. Allstate might propose any (or all) of the following as prin-

172 *See infra* note 227 and accompanying text.

173 *See supra* Part II.C.

ciples of New York law: (1) lawsuits seeking statutory damages cannot be certified as a class action; (2) statutory damages are not available remedies in class actions; (3) a plaintiff must litigate as a named party in order to satisfy the limitations period for a statutory-damages claim; (4) a judgment awarding statutory damages shall have res judicata effect on a defendant only as to those plaintiffs who individually appeared in the action.

The federal court must then decide whether the proposed principles are accurate statements of state law. Of the options discussed above, only number one is explicitly enshrined in the positive law of New York state, namely, section 901(b). But that fact alone is not grounds to ignore the other four options. The federal court would be required to make an *Erie*-guess whether New York's highest court *would* endorse these other principles if it were confronted with the question.[174]

Given that section 901(b) forbids altogether any class action that seeks statutory damages, principles two through four follow almost as a matter of logical necessity. Because a case seeking statutory damages may not be "maintained as a class action," it is an unavoidable fact that, under New York law, statutory-damages remedies are unavailable in class actions (principle two).[175] With the class action device off the table, it also follows that a plaintiff must litigate as a named party in order to satisfy the limitations period for a statutory damages claim (principle three).[176] And because a class action is not available to extend the res judicata effect of a judgment to parties who have not individually appeared, section 901(b) also compels the conclusion that a judgment awarding statutory damages shall have res judicata effect on a defendant only as to those plaintiffs who litigate their claims individually (principle four).[177]

Again, it does not matter that New York's section 901(b) is not phrased in terms of remedies, limitations, or preclusion. From the standpoint of New York's law, the words in section 901(b) were already sufficient to accomplish everything that these other principles would accomplish. So it is not unreasonable to say that these other principles are *also* part of New York law. Thus, there is no need for a state like New York to revise its laws to include certain magic words, solely for the purpose of avoiding a conflict with a Federal Rule.[178] As

174 *See supra* notes 136–37, 147, 169 and accompanying text.

175 *See supra* notes 132–38 and accompanying text.

176 *See supra* text accompanying note 147.

177 It would remain possible, however, for nonmutual collateral estoppel to apply even if no class action is certified. *See supra* note 144.

178 *See supra* notes 138–38, 148 and accompanying text.

the next subpart demonstrates, however, merely articulating these principles will not necessarily answer the *Erie* question in favor of state law. A court must then determine whether the state law principles are nonetheless preempted by the Federal Rules.

B. Step Two: Determine the Preemptive Scope of the Federal Rule

The second step is to determine whether any of these state law principles are preempted by the Federal Rules. This step essentially embodies the threshold *Erie* question of whether state law and the Federal Rule "conflict," "clash," or "collide" with each other.[179] But it sharpens the inquiry in a way that avoids some of the circularity inherent in the current approach. To ask in the abstract whether there is a conflict, clash, or collision between state law and a Federal Rule is to beg the ultimate question of what the Federal Rule, in fact, requires. Conceptualizing this in terms of preemption would focus courts on this crucial issue.

Admittedly, traditional preemption doctrine is the subject of considerable criticism, precisely because of its uncertainty and seemingly *ad hoc* application in many cases.[180] But this may be the unavoidable consequence of a shared characteristic. In difficult *Erie* cases and difficult preemption cases, the text of federal positive law is silent on the ultimate question of how that piece of federal law relates to potentially overlapping state law. Without a textual answer, courts must invariably look elsewhere, and it becomes more difficult to find sound purchase for any particular result. I readily admit (and the analysis below will demonstrate) that determining the preemptive scope of a Federal Rule might ultimately be no less ad hoc than determining the preemptive scope of a federal statute. But approaching this as a preemption issue will at least focus courts on what should be the dispositive issue: whether Federal Rule *X* ought to be construed to override state principle *Y*.

If the *Shady Grove* opinions are taken at their word, federal courts assessing the preemptive scope of a Federal Rule are significantly constrained by what appears to be an antipreemption canon. Justice Scalia's majority opinion states that "we entirely agree" that "we should read an ambiguous Federal Rule to avoid substantial variations

179 *See supra* notes 20–29 and accompanying text.

180 *See, e.g.*, Geoffrey C. Hazard, Jr., *Quasi-Preemption: Nervous Breakdown in Our Constitutional System*, 84 TUL. L. REV. 1143, 1154–55 (2010) (noting that "issues of federal preemption are . . . badly handled" in the courts).

in outcomes between state and federal litigation."[181] Justice Ginsburg's dissent adds that federal courts must "interpret the Federal Rules with sensitivity to important state interests and a will to avoid conflict with important state regulatory policies."[182] Applying these principles, it is hard to see why Rule 23 is not sufficiently ambiguous to avoid a preemptive clash with state policies regarding class actions. Rule 23(b)(3)'s superiority requirement is flexible enough to accommodate a state law that, like in *Shady Grove*, forbids lawsuits seeking statutory damages from being certified as a class action.[183] In the terminology articulated above, that ambiguity means that Rule 23 is not necessarily "deep" enough to displace a state's policy judgment with respect to class actions.[184]

The text of Rule 23 is also ambiguous enough to accommodate the other three state law principles[185] a litigant like Allstate might assert. Rule 23 does not necessarily preempt a state law that forbids statutory remedies from being awarded in a class action, because Rule 23 is silent on remedies.[186] Rule 23 does not necessarily preempt a state law requiring a plaintiff to litigate as a named party in order to satisfy the limitations period for a statutory-damages claim, because Rule 23 does not address limitations periods.[187] And Rule 23 does not necessarily preempt a state law that gives judgments awarding statutory damages res judicata effect only as to plaintiffs who individually appeared in the action, because Rule 23 does not dictate the preclusive effect of a class action judgment.[188] With respect to these state law principles, Rule 23 can be construed such that it is not "wide" enough to resolve issues relating to remedies, limitations, and preclusion.[189]

---

181 *Shady Grove*, 130 S. Ct. at 1441 n.7 (citing Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 504 (2001) (alteration omitted) (internal quotation marks omitted)); *see also supra* note 72 (citing to language in Justice Stevens's concurring opinion).

182 *Shady Grove*, 130 S. Ct. at 1463 (Ginsburg, J., dissenting) (internal quotation marks omitted) (citing Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7, 438 n.22 (1996)).

183 *See supra* notes 104–05 and accompanying text. Likewise, Rule 23(b)(3)'s superiority requirement is flexible enough to accommodate state law that *would* certify a class action under a given set of circumstances. *See infra* note 227 (citing authorities that state courts are often more likely to certify class actions than federal courts).

184 *See supra* notes 99–101 (describing the concept of a Federal Rule's depth).

185 *See supra* Part V.A.

186 *See supra* Part III.B.1.

187 *See supra* Part III.B.3.

188 *See supra* Part III.B.2.

189 *See supra* notes 95–99 (describing the concept of a Federal Rule's width).

Accordingly, *Shady Grove*'s instructions on how to read "ambiguous" Federal Rules indicate that Rule 23 would not preempt state class action law in these contexts. That said, the Court's *Erie*/REA jurisprudence has not always reflected the antipreemption canon that all of the *Shady Grove* Justices appeared to embrace as fairly uncontroversial. In *Walker*, for example, the Court explicitly rejected the idea that "the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law."[190] In *Burlington*, the Court wrote that a Federal Rule would preempt state law when "the purposes underlying the [Federal] Rule are sufficiently coextensive with the asserted purposes of the [state law] to indicate that the Rule occupies the [state law's] field of operation."[191] *Burlington*, in fact, found that a Federal rule preempted a particular Alabama statute even though Alabama had a rule *identical* to the Federal Rule and allowed both its rule and the statute to operate in tandem.[192] This result is difficult to square with the antipreemption canon that *Shady Grove* apparently endorsed.

It is not inconceivable, therefore, that federal courts might attribute a more robust preemptive effect to the Federal Rules, and to Rule 23 in particular. Borrowing from traditional preemption principles, courts might inquire (for example) whether the Rule drafters intended a particular Federal Rule "to occupy the field" and whether accommodating state law would "stand[ ] as an obstacle to the accomplishment and execution of the [Rule drafters'] full purposes and objectives."[193] Even this approach, however, would not necessarily foreclose the arguments outlined above. It is not clear, for example, that excluding consideration of state class action law from Rule 23(b)(3)'s superiority inquiry is needed to accomplish the Rule drafters' "full purposes and objectives." Work would certainly need to be done to show that those purposes and objectives included empowering federal judges to develop a federal "superiority" common law utterly unhindered by any state law influences. To reach that conclusion, moreover, would require either overruling *Gasperini* or explaining why Rule 23 and Rule 59 should be treated differently in terms of their preemptive scope. As described above, that result is problematic, and if taken seriously it threatens to obliterate entirely the dis-

190 Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.9 (1980).

191 Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 7 (1987).

192 *Id.*

193 Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

tinction between "unguided *Erie* choices" and those that are governed by a Federal Rule.[194]

Viewed through a more traditional preemption lens, one could also imagine a number of arguments that Rule 23 is indeed "wide" enough to preempt state law principles that are framed in terms of remedies, limitations periods, or preemption. One could argue that because Rule 23 is meant to determine the propriety of a class action, it must be read to preempt state law principles that would eviscerate the fundamental nature of a class action. Arguably a state law principle that eliminates remedies *only* in class actions does precisely that.[195] Perhaps it is also inherent in the very idea of a class action that absent class members are *deemed* to be present and active litigants who have exactly the same rights they would have if they *were* pursuing their claims individually. If so, Rule 23 would preempt state laws restricting either the remedies available in a class action, the ability of a class action to toll the limitations period for all class members, or the preclusive effect of a class action judgment.[196]

It has yet to be shown, of course, that such preemptive effects were among—or would help to effectuate—the purposes or objectives of Rule 23's drafters. With respect to preclusion, for example, the historical record is directly to the contrary.[197] Perhaps Rule 23 is best conceptualized as a device for facilitating the processing of claims where (among other things) the plaintiffs are "so numerous that joinder of all members is impracticable."[198] But Rule 23 does not preempt state law judgments about the remedies available in such aggregated proceedings, the extent to which a claim by a representa-

194 *See supra* notes 118–26 and accompanying text.

195 It would be as if the defendant in *Hanna*, after losing on his argument that the Massachusetts service requirements should escape preemption by Rule 4, simply filed a motion to dismiss on the basis that Massachusetts law forbids any *remedy* in cases where such a defendant did not receive in-hand service. *See* Hanna v. Plumer, 380 U.S. 460, 470 (1965) (holding that a Massachusetts law requiring in-hand service of process on the estate's executor "clash[ed]" "unavoidabl[y]" with Federal Rule 4, thus putting the *Erie* choice on the REA side of *Hanna*'s dichotomy).

196 With respect to state law limitations periods, this approach might find support in *Hanna*, a case that also had implications for a state's statute of limitations. *Hanna* found that Federal Rule 4, the text of which addressed only the *methods* of serving process, preempted a state law providing that *in-hand* delivery of "the writ" was required to satisfy the limitations period. This aspect of *Hanna* has been both criticized and praised. *Compare* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1175–76 (1982), *with* Clermont, *supra* note 106, at 1008–09.

197 *See supra* note 143 and accompanying text (noting that the drafters of Rule 23's 1966 revision made a conscious decision not to dictate the preclusive effect of a class action judgment).

198 FED. R. CIV. P. 23(a)(1).

tive party is able to satisfy the limitations period as to absent class members for certain kinds of claims, or the preclusive effect of a class action judgment. This approach to Rule 23 may strike some as overly cramped, but it is not dissimilar to the Supreme Court's efforts to restrict the preemptive scope of Rule 3 in *Walker*[199] and Rule 41 in *Semtek*.[200]

C. *Step Three: Determine Whether Following the Federal Rule Would Violate the REA*

Assume the federal court decides that the Federal Rule preempts state law. The court must then ask whether following the Federal Rule is permissible under the REA. Before considering the class action scenarios described above, this subpart examines the debate between Justices Scalia and Stevens over the proper interpretation of the REA. As explained below, some areas of purported disagreement may be more semantic than substantive.

1. Sparring Justices May Be Closer than They Appear

One of the intramajority disputes in *Shady Grove* centers on Justice Stevens's view that the REA forbids a Federal Rule of Civil Procedure from "displac[ing] 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."[201] Justice Stevens then provides several examples where "seemingly procedural rules may displace a State's formulation of its substantive law,"[202] including statutes of limitations, burdens of proof, and standards of appellate review. He writes:

> [S]tatutes of limitations, although in some sense procedural rules, can also be understood as a temporal limitation on legally created rights; if this Court were to promulgate a federal limitations period, federal courts would still, in some instances, be required to apply state limitations periods. Similarly, if the federal rules altered the burden of proof in a case, this could eviscerate a critical aspect—albeit one that deals with *how* a right is enforced—of a State's framework of rights and remedies. Or if a federal rule about appellate review displaced a state rule about how damages are reviewed

199 *See* Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980).

200 *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–06 (2001).

201 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1452 (2010) (Stevens, J., concurring in part and concurring in the judgment) (emphasis added).

202 *Id.* at 1453 n.9.

> on appeal, the federal rule might be pre-empting a state damages cap.[203]

Justice Scalia, by contrast, would simply inquire whether the Federal Rule "really regulates procedure"[204]—a phrase that stems from the Supreme Court's 1941 decision in *Sibbach v. Wilson & Co.*[205] Scalia critiques Stevens's approach as "stretch[ing] the term 'substantive rights' in § 2072(b) to mean not only state-law rights themselves, but also any state-law procedures closely connected to them."[206] A careful reading of Justice Scalia's reasoning, however, reveals that even under his approach substantive concerns might lead a federal court to conclude that a Federal Rule does *not* "really regulate procedure." Responding to Justice Stevens, he ultimately concludes:

> The examples [Justice Stevens] offers—statutes of limitations, burdens of proof, and standards for appellate review of damages awards—do not make [his] broad definition of substantive rights more persuasive. *They merely illustrate that in rare cases it may be difficult to determine whether a rule 'really regulates' procedure or substance.*[207]

Thus, even Justice Scalia leaves ample room for courts to conclude that a Federal Rule that is procedural in some sense does not "'*really* regulate[ ]' procedure" but rather "'*really* regulates' . . . substance."[208] So he too must confront what rights qualify as substantive, and he recognizes that a number of issues that might be couched as procedural will still present difficult questions under the REA. The dispute between Justices Scalia and Stevens on this issue is in many ways one of semantics. Under Justice Stevens's articulation, a "seemingly procedural rule[ ]" violates the REA if it nonetheless "displace[s] a State's formulation of its substantive law."[209] Under Justice Scalia's, a seemingly procedural rule violates the REA if the federal court determines that it "*really* regulates . . . substance."[210]

A related debate between Justices Stevens and Scalia is over the role that state law plays in measuring whether a Federal Rule is permissible. For Justice Scalia, the REA test must focus on "the substan-

---

203 *Id.*

204 *Id.* at 1445 (plurality opinion) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

205 312 U.S. 1, 14 (1941).

206 *Shady Grove*, 130 S. Ct. at 1446 n.13 (plurality opinion).

207 *Id.* (emphasis added).

208 *Id.* (emphasis added).

209 *Id.* at 1453 n.9 (Stevens, J., concurring in part and concurring in the judgment).

210 *Id.* at 1446 n.13 (plurality opinion) (emphasis added).

tive or procedural nature of the *Federal Rule*,"[211] regardless of the state law that the Federal Rule would displace.[212] Justice Stevens, on the other hand, reads the REA's substantive-rights provision as preventing Federal Rules from "displacing *state* substantive law."[213]

Conceptually, a Federal Rule and the state law it displaces are two sides of the same coin. The size of the Federal Rule shoe is, by definition, the exact same size as the footprint it leaves on state law. This is so even if the subject of the Federal Rule does not perfectly align with certain state law sources, or if state law appears to be silent on particular issues. There is no such thing as "no state law." The lack of clearly established state law on a particular issue simply means the federal court must predict how the state's highest court would decide that precise issue. Because there is always *some* state law on that issue (perhaps via an *Erie* guess), it does not necessarily matter whether we frame the REA inquiry in terms of the state law that would be displaced or the Federal Rule that would do the displacing.[214] The key

211 *Id.* at 1444 (emphasis added).

212 *Id.* ("[T]he substantive nature of New York's law, or its substantive purpose, *makes no difference.* A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes)."); *id.* ("In sum, it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule."); *id.* at 1445 (arguing that *Sibbach* "[r]ecogniz[ed] the impracticability of a test that turns on the idiosyncrasies of state law").

213 *Id.* at 1453 (Stevens, J., concurring in part and concurring in the judgment) (emphasis added); *see also id.* (arguing that § 2072(b) strikes a "balance . . . between uniform rules of federal procedure and respect for a *State's* construction of its own rights and remedies" (emphasis added)); *id.* at 1453 n.9 (arguing that the REA forbids "seemingly procedural rules [that] displace a State's formulation of its substantive law"); *id.* at 1454 (describing his approach as one that "looks to state law"); *id.* at 1457 ("[A] federal court must inquire whether doing so would abridge, enlarge, or modify *New York's* rights or remedies, and thereby violate the Enabling Act." (emphasis added)).

214 One might also frame the Scalia/Stevens REA debate as echoing their debates over the role of text and purpose in statutory interpretation. *Compare, e.g.*, Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 331–32 (2007) (Scalia, J., concurring in the judgment), *with id.* at 336 n.1 (Stevens, J., dissenting). Justice Scalia describes his REA approach as focusing on "the law's form, *i.e.*, what the law actually says," *Shady Grove*, 130 S. Ct. at 1447 n.15 (plurality opinion), while Justice Stevens trains on "the nature and functions of the state law that the federal rule will displace," *id.* at 1454 n.10 (Stevens, J., dissenting). It does not appear, however, that Stevens's REA test hinges on the subjective purpose underlying a state's adoption of a given rule. Justice Stevens searches for "the true nature of a state procedural rule," *id.* at 1457, and whether a rule "serves the function of defining [the state's] rights and remedies,"

questions are simply: (1) what is the issue (or "right") being regulated? and (2) is that issue (or "right") substantive?[215]

2. Rule 23 and the REA

Circling back to the class action context, let's first consider an argument that *Shady Grove* rejected: that Allstate had a "'substantive right . . . not to be subjected to aggregated class-action liability' in a single suit."[216] Even if we assume that state law provides this right, a federal court must still decide whether this right is "substantive." Allstate would argue that whether a particular remedy is or is not available in a class action is a substantive issue, not a procedural one. If Rule 23 answers that question, it is really regulating *substance*, not pro-

---

id., but this is not the same thing as divining the subjective intent behind the rule. Even Justice Stevens's discussions of the New York legislature's "intent" and "policy judgment," and what it "had in mind" when enacting section 901(b), reveal that the *nature* of section 901(b) as a rule regulating class certification is, for him, ultimately dispositive. *Id.* at 1458 ("New York clearly crafted § 901(b) with the intent that *only certain lawsuits*—those for which there were not statutory penalties—*could be joined in class actions* in New York courts. *That decision reflects a policy judgment about which lawsuits should proceed in New York courts in a class form* and which should not." (emphasis added)); *id.* at 1459 ("Although one can argue that class certification would enlarge New York's 'limited' damages remedy, such arguments rest on extensive speculation about what the New York Legislature had in mind when it created § 901(b)."). That section 901(b) was motivated by fear that class actions "would lead to annihilating punishment of the defendant" did not matter for Justice Stevens, because such punishment would result from a procedural vehicle (the class action) that simply "makes litigation easier" and hence "makes it easier for plaintiffs to recover damages." *Id.* Justice Stevens thus deemed section 901(b) "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." *Id.* Although Justice Stevens insists that a Federal Rule could not override a state law that "serves to define who can obtain a [particular remedy]" or "operate[s] as a limitation on [a particular remedy]," *id.*, it is unclear what sort of legislative history—reflecting what sort of subjectively "substantive" purpose—would ever be sufficient to make such a showing. Stevens's ultimate conclusion appears to be that Rule 23 is validly applied because the availability of a class action is a procedural issue, even if an important motivation behind a state's class action law is to limit excessive aggregate recoveries. What Justice Stevens does not consider is the possibility that other state law principles exist *in addition to* section 901(b) that train directly on what he might deem to be more substantive concerns (although a federal court might need to discern these principles via an *Erie*-guess). *See supra* Parts IV.C, V.A.

215 As described above, the *Sibbach* "really regulates procedure" test, as endorsed by Scalia, does not rule out the possibility that ostensibly procedural rules might "really regulate substance." *See supra* notes 206–10 and accompanying text.

216 *Shady Grove*, 130 S. Ct. at 1443 (plurality opinion) (alteration in original) (quoting Brief for Respondent, *supra* note 168, at 31).

cedure, and hence violates the REA's requirement that the Federal Rules "shall not abridge, enlarge or modify substantive rights."[217]

The response, which is implicit in both Scalia's and Stevens's rejection of this argument, is as follows: Whether a particular remedy is or is not *available* is the substantive right. But to decide whether a particular remedy is or is not available *in a class action* is to "really regulate procedure."[218] The *substantive* right is to a particular amount of statutory damages for each violation. Whether those rights may be invoked in a class action, however, is *not* a matter of substantive right.[219]

Now consider the potential REA problems that *Shady Grove* failed to address. As explained above, class certification (or decertification) can have a significant effect on limitations and preclusion law, which the Court has deemed to be sensitive areas under the REA.[220] Even under Justice Scalia's approach, courts will have to grapple with whether Rule 23 is "'really regulat[ing]' procedure or substance"[221] to the extent it regulates limitations and preclusion law.

Take the effect of class actions on limitations periods. A defendant like Allstate would argue that whether a plaintiff must individually take action within the required limitations period to invoke a statutory-damages claim is a matter of the parties' substantive rights. To allow Rule 23 to dictate an answer to that question, therefore, would violate the REA. Perhaps a federal court would agree with Allstate. Courts and commentators have long recognized that state limitations law should be free from intrusion by the Federal Rules.[222] But perhaps the right to require (or not to require) *individual* action within the limitations period is *not* substantive. The Rules may permissibly regulate that *procedural* issue. The substantive right is merely that

---

217 28 U.S.C. § 2072(b) (2006).

218 *Shady Grove*, 130 S. Ct. at 1444 (plurality opinion) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1940)). As applied to Rule 23, Scalia reasons: "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, instead of in separate suits." *Id.* at 1443.

219 *See id.* at 1443 ("[L]ike traditional joinder, [a class action] leaves the parties' legal rights and duties intact and the rules of decision unchanged."); *id.* at 1459 n.18 (Stevens, J., concurring in part and concurring in the judgment) ("Justice Ginsburg asserts that class certification in this matter would 'transform a $500 case into a $5,000,000 award.' But in fact, class certification would transform 10,000 $500 cases into one $5,000,000 case." (quoting *id.* at 1460 (Ginsburg, J., dissenting))).

220 *See supra* Part IV.A.

221 *Shady Grove*, 130 S. Ct. at 1446 n.13 (plurality opinion) (quoting *Sibbach*, 312 U.S. at 14).

222 *See supra* notes 157–58 and accompanying text.

some action be taken within the given limitations period, even if that action is on behalf of unnamed parties.[223]

Courts could undertake a similar inquiry with respect to preclusion. Allstate would argue that it is a matter of substantive right whether a judgment awarding statutory damages has res judicata effect on a defendant as to plaintiffs who have never appeared individually in the action. To allow Rule 23 to dictate an answer to that question, therefore, would "really regulate . . . substance" in violation of the REA. This is a plausible argument given the Court's concern about allowing the Federal Rules to interfere with preclusion law.[224] But perhaps the right to be free from res judicata as to *unnamed* statutory-damages plaintiffs is *not* substantive. The substantive right is merely the right not to be bound as against non-*parties*. The 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.

The questions identified above do not lend themselves to mechanical answers, nor will the answers courts ultimately reach be free from controversy. Federal courts have been struggling with the contours of the Rules Enabling Act for as long as there has been a Rules Enabling Act. The conceptual framework suggested here would, perhaps, lead courts to confront these questions more directly.

VI. CLOSING THOUGHTS: ON IDEOLOGY, POLITICS, AND HEAD-COUNTING

A final aspect of the *Shady Grove* decision that has garnered attention is the unusual split between the Justices.[225] Justice Scalia (joined by, among others, Chief Justice Roberts and Justice Thomas) writes a majority opinion that potentially benefits class action plaintiffs, whose lawsuit would otherwise be barred by New York law. Justice Ginsburg (joined by, among others, Justice Breyer) writes a dissent that would

223 This argument finds implicit support in *Hanna*, which allowed Rule 4 to trump state law despite a possible effect on the state's statute of limitations. *See also supra* note 196. In *Hanna*, the Court found that allowing service of process via a method that was authorized by Federal Rule 4 did not violate the REA, even though the state law it displaced was explicitly couched as a requirement for satisfying the limitations period.

224 *See supra* notes 150–53 and accompanying text.

225 *See, e.g.*, Linda S. Mullenix, *Federal Class Actions: A Near-Death Experience in a* Shady Grove, 79 GEO. WASH. L. REV. 448, 480 (2011) ("The ideological alignments in *Shady Grove* are entertaining."); Ashby Jones, *The* Shady Grove *Case: Is Scalia Getting Soft on Plaintiffs?* WALL ST. J.L. BLOG (Apr. 1, 2010, 6:45 PM), http://blogs.wsj.com/law/2010/04/01/the-shady-grove-case-is-scalia-getting-soft-on-plaintiffs.

forbid such a class action in federal court. According to some, it is surprising that so-called conservative Justices would be on the side of class action plaintiffs suing a large corporation like Allstate, while so-called liberal Justices would be inclined to help Allstate block such a class action.[226]

One possible explanation for the odd split in *Shady Grove* is that the litigants were, arguably, not in their typical positions vis-à-vis the larger federalism question. *Shady Grove* was a case where state law is *more hostile* to class actions than federal law. The conventional wisdom today, however, is that many state courts are more welcoming of class actions than federal courts.[227] So the "conservative" Justices in the *Shady Grove* majority may have been thinking ahead to the situation where a plaintiff seeks to transplant a *more lenient* state court approach into federal court. In that scenario, adhering to the federal approach would help defendants to the detriment of class action plaintiffs. The "liberal" Justices in the *Shady Grove* dissent may have been contemplating that scenario as well, just with a different set of policy preferences.

In this sense, the posture of *Shady Grove* is quite similar to that of *Erie* itself. One of the great ironies of the *Erie* decision is that its big-business litigant—Erie Railroad Company—preferred state law over federal common law for that particular case.[228] Typically, the kind of general federal common law that had been authorized by *Swift* (and that *Erie* forbade) worked to the advantage of corporate litigants.[229] So even though Justice Brandeis was no friend of early twentieth-cen-

---

226 The breakdown is even more surprising, perhaps, given traditional presumptions about how conservative and liberal jurists approach federalism and states' rights. *See, e.g.*, Mullenix, *supra* note 225, at 480 (noting that *Shady Grove*'s "liberal dissenters" are "difficult to explain" because they enforsed "a states-rights paradigm that would have restricted class actions"); *see also* Steinman, *supra* note 10, at 303 ("Conservative judges who are widely viewed as pro-business also profess a commitment to federalism and states' rights.").

227 *See, e.g.*, DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS 66 (2000); 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); 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); 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); 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); *see also* Steinman, *supra* note 10, at 278–80 & nn.222–24 (providing examples of state court decisions reflecting a more permissive approach).

228 *See* Steinman, *supra* note 10, at 255.

229 *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).

tury corporate America, it came as no surprise that he decided *Erie* the way he did. *Erie* may have been a victory for Erie Railroad in that particular lawsuit, but as a general matter, business interests like Erie would much rather have played on the federal common law field than on the state law field.

These examples illustrate why the *Erie* doctrine is such a fascinating area for Court watchers. Like other federalism questions and institutional issues generally, it is one step removed (at least) from its impact in any particular case. One cannot know whom the choice between state law and federal law will help or hurt in the abstract. It depends on the content of state and federal law on any particular issue at any particular point in time. Some jurists may approach federalism questions with views about the institutional values in and of themselves.[230] Others may be driven more by the impact of the federalism issue on the immediate case at hand. Still others may seek to predict which types of litigants are more likely to benefit when the federalism principles are applied going forward. All this makes it very difficult to predict how the Justices will align themselves if some of the open questions identified in this Article find their way back to the Supreme Court.

CONCLUSION

The Supreme Court's recent decision in *Shady Grove* is only the latest chapter in the unfolding story that is Our Class Action Federalism. Many open questions remain. Class action litigation is a sensitive and politically-charged topic, so future developments will not be free from controversy or strong feelings. Moreover, the story will proceed against the backdrop of an area of law—the *Erie* doctrine—that is mythic,[231] exasperating,[232] and still a "rite of passage"[233] for the entire profession. Stay tuned.

230 *See supra* note 227 (discussing common presumptions about the conservative and liberal approaches to federalism and states' rights).

231 Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 1015 (1998).

232 *See* Ely, *supra* note 157 (noting *Erie*'s "Irrpressible Myth").

233 *See, e.g.*, Suzanna Sherry, *Wrong, Out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 38 PEPPERDINE L. REV. (forthcoming 2012), *available at* http://ssrn.com/abstract=1803458.