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Shady Grove: Class Actions in the Context of *Erie*

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Shady Grove

CLASS ACTIONS IN THE CONTEXT OF *ERIE*

In the 2010 case *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[1] a divided Supreme Court issued a plurality opinion that sparked new debate about the role of the *Erie* doctrine, viewed through the lens of divergent national and state rules regarding class action certification. The 1938 landmark case *Erie Railroad Co. v. Tompkins*[2] gave rise to the *Erie* doctrine, which—to address federalism concerns—offers a solution to choice-of-law conflicts between federal and state rules in diversity suits. The *Erie* doctrine is particularly important where variance between national and state laws could result in different litigation outcomes depending on the particular rule applied. At first glance, the *Erie* doctrine appears to be a straightforward rule. In order to prevent forum shopping and an inequitable distribution of the laws,[3] "federal courts sitting in diversity apply state substantive law and federal procedural law."[4]

Despite its seeming simplicity, the *Erie* doctrine leads to numerous complications for a variety of reasons. The Constitution recognizes both the federal government and state governments as sovereign in their respective territories, with the federal government having ultimate supremacy.[5] Both the

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

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

[3] For a discussion of the *Erie* doctrine, including its "twin aims" of preventing (1) forum shopping and (2) an inequitable distribution of the laws, see *infra* Part II.

[4] *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive and federal procedural law."); *Erie*, 304 U.S. at 78.

[5] *See* U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). In *Erie*, the Supreme Court explained:

> [The Constitution] recognizes and preserves the autonomy and independence of the States—independence in their legislative and . . . in their judicial departments. Supervision over either the legislative or the judicial action of

states and the federal government are authorized to create laws dealing with procedural processes and substantive issues, but the line between substance and procedure is not always distinct.[6] Moreover, the United States legal system recognizes the authority of both statutory and common law, and judicial commentary on congressional legislation sheds light on the meaning of statutory rules and standards. However, for federal courts sitting in diversity, the *Erie* doctrine states that only federal rules stemming from the Constitution or congressional legislation preempt state law.[7] Therefore, in cases heard under diversity jurisdiction, federal common law "has been eliminated as a source of substantive rights for claims based on state law."[8] Because of the multiple and often overlapping layers of authority in American jurisprudence, the application of the *Erie* doctrine can become a complex endeavor for federal courts.

Class-action certification illustrates the complexity between the applicability of federal laws to the issue at hand and the substance/procedure dichotomy. Federal Rule of Civil Procedure Rule 23 governs class action certification, a necessary procedural step in pursuing a class action.[9] In theory,

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> the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Erie, 304 U.S. at 78-79 (internal quotation marks and citations omitted).

[6] For a discussion of the dichotomy between substance and procedure, see *infra* Part III.

[7] *See Erie*, 304 U.S. at 78; Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent* Erie *Decisions*, 92 VA. L. REV. 707, 737 (2006) ("Most conflicts between state and federal law are not even conceived of as *Erie* problems, but simply as routine issues under the Supremacy Clause. If the Constitution determines an issue, as it does the right to jury trial in federal court, then state law must give way. So, too, federal legislation, so long as it is constitutional, has the same preemptive effect on state law . . . .").

[8] Dudley & Rutherglen, *supra* note 7, at 737; *see also Erie*, 304 U.S. at 78 ("Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general' . . . . And no clause in the Constitution purports to confer such a power upon the federal courts."); *infra* Part II (discussing the development of the *Erie* jurisprudence).

[9] Rule 23 of the Federal Rules of Civil Procedure states in relevant part:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (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.

class actions promote efficiency by offering a procedural mechanism for parties to aggregate claims.[10] For example, when a court certifies a plaintiff class,[11] plaintiffs can pool—and courts can conserve—their resources, and defendants can avoid the burdens of defending against multiple lawsuits (including discovery costs).[12] However, states also have laws regulating the certification of class actions. Because of the lucrative nature of class actions, particularly for plaintiffs' attorneys, states have passed varying laws regarding class action certification.[13] Some states have laws that are more plaintiff-friendly, while other states, such as New York, have laws that are more restrictive of class certification.[14]

In the 1970s, New York passed section 901 of the New York Civil Practice Law to limit the enormous rewards often granted to plaintiffs in class actions.[15] Section 901(a) largely

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> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
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> . . .
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> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (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.

[10] Genevieve G. York-Erwin, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1793 n.1 (2009); *see also* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1443 (2010) (stating that class actions are procedural aggregation devices that do not change the rights of litigants).

[11] Although defendants may also pursue class certification, it is a mechanism more often employed by plaintiffs. For a discussion of the legislative history behind the Class Action Fairness Act of 2005, 28 U.S.C. § 1332 (2006) [hereinafter CAFA], see *infra* Part IV.A. Congress enacted CAFA largely because of vastly divergent state laws regarding class certification that led to abuse by plaintiffs' attorneys.

[12] York-Erwin, *supra* note 10, at 1799.

[13] For a discussion of the legislative history of CAFA, see *infra* Part IV.A

[14] *See infra* Part IV.A.

[15] Section 901 of New York State Civil Practice law provides:

> a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
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> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
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> 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

parallels the language of Rule 23,[16] but section 901(b) additionally states, "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."[17] Thus, section 901(b) prevents certification of suits where plaintiffs seek solely to recover a "penalty."

In 2005, Congress attempted to bring increasingly common nationwide class actions under federal jurisdiction with the Class Action Fairness Act (CAFA).[18] Congress wanted to address the consequences of multistate class actions on interstate commerce and the perceived abuses in class-action-friendly states, where plaintiffs' lawyers manipulated the class mechanism to pressure defendants into settlement.[19] Through CAFA, Congress gave federal jurisdiction to most nationwide class actions.[20] CAFA permits plaintiffs to file any class action in federal court (or defendants to remove any class action to federal court) if (1) minimum diversity requirements are met and (2) the amount in controversy aggregates to at least $5 million.[21] Thus, Congress expanded diversity jurisdiction for class actions, most notably by eliminating the requirement of complete diversity. Even when class-action claims arise under

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> 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
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> 4. the representative parties will fairly and adequately protect the interests of the class; and
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> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
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> b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

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

[16] *See* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 22 (2010) ("New York law includes a provision specifically addressing the availability of statutory-penalty or minimum-damage remedies in a class proceeding, which was enacted when New York updated its general class action provision following the 1966 amendments to Federal Rule 23.").

[17] N.Y. C.P.L.R. 901(b).

[18] 28 U.S.C. § 1332 (2006).

[19] *See infra* notes 206-11 and accompanying text.

[20] York-Erwin, *supra* note 10, at 1804.

[21] 28 U.S.C. § 1332(d).

state law, CAFA permits federal courts to hear those claims.[22] Recently, in *Shady Grove*, the Supreme Court analyzed whether Rule 23 and section 901(b) could coexist in New York federal courts with jurisdiction to hear class actions under CAFA.[23] The question before the court was, "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?"[24]

This note argues that the Second Circuit Court of Appeals and Justice Ginsburg in her dissent in *Shady Grove* correctly concluded that section 901 can coexist with Rule 23.[25] Indeed, Section 901 does not directly conflict with Rule 23 because section 901 imposes procedural limits on *New York* legal remedies, a substantive interest that belongs under state jurisdiction.[26] This note follows Justice Ginsburg's dissent and proposes that, in light of the *Shady Grove* decision, Congress should rewrite CAFA to preserve its original aim of controlling ballooning class-action litigation while still respecting states' rights to govern their laws. As Justice Ginsburg suggested, Congress should amend CAFA by adding a provision that prevents federal courts from certifying state-law class actions that could not be brought in state courts.[27] This proposal stays true to the legislative intent behind CAFA by permitting states, as well as the federal government, to enact policies that curb class action abuse.[28] The proposal also comports with many other CAFA carve-outs in which local interests supersede CAFA's

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[22] Adam N. Steinman, *Our Class Action Federalism:* Erie *and the Rules Enabling Act After* Shady Grove, 86 NOTRE DAME L. REV. 1131, 1132 (2011). *See* 28 U.S.C. § 1332(d).

[23] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1436 (2010).

[24] Steinman, *supra* note 22, at 1132.

[25] *See id.* at 1143 ("*Shady Grove* became a 5-4 decision . . . because only four Justices (led by Justice Ginsburg) were able to reconcile Federal Rule 23 and § 901(b). For Justice Scalia and the majority, the conflict between Federal Rule 23 and § 901(b) was unavoidable." (footnote omitted)).

[26] For a discussion of the substantive nature of statutory damages, see *infra* Part III.D; *see also* Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1925 (2006) ("Because avowedly procedural rules may have either substantive purposes or substantive effects, consideration should be given to the political legitimacy of the process by which they are formulated or applied and of the actors who are formulating or applying them. Rather than giving up on the procedure/substance dichotomy, we should craft it with attention to its ultimately political ramifications.").

[27] *Shady Grove*, 130 S. Ct. at 1473 n.15 (Ginsburg, J., dissenting).

[28] *See infra* notes 211-13 and accompanying text.

grant of federal jurisdiction.[29] This proposal acknowledges the inherent substantive state interests in regulating class actions arising under state law. It discourages vertical forum shopping and helps to ensure an equitable application of the law in both federal and state courts.[30] Moreover, the proposal does not permit a federal rule to abridge, enlarge, or modify a substantive state right.[31] Part I of this note will discuss the background and facts of *Shady Grove*. Part II will explain the *Erie* doctrine, the development of *Erie* jurisprudence, and applicable limitations on state legislatures. Part III will analyze the Supreme Court's error in failing to apply the correct *Erie* analysis in *Shady Grove*. Finally, Part IV will suggest a solution to the Supreme Court's flawed analysis in *Shady Grove* by proposing that Congress amend CAFA to prevent similar mistakes and to affirm state sovereignty.

I. *SHADY GROVE*: BACKGROUND AND FACTS

In *Shady Grove*, Sonia Galvez received treatment from Shady Grove Orthopedic Associates, located in Maryland, for her injuries resulting from a car accident.[32] Allstate Insurance Company insured Galvez, and her policy, issued in New York, was governed by New York law.[33] The cause of action in *Shady Grove* arose out of New York Insurance Law section 5106(a), which provides statutory interest on overdue benefits.[34] Under section 5106(a), once Shady Grove filed Galvez's claim with Allstate, the insurance company had thirty days to pay the claim or deny it.[35] Although Allstate eventually paid Shady Grove, Allstate did not timely do so, and statutory interest (at a rate of two percent a month) accrued on the overdue benefit.[36] Shady Grove could have individually pursued a claim for the interest against Allstate in New York state court. However, section 901(b), with its provision preventing the use of class

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[29] For a discussion of the carve-outs in the Class Action Fairness Act, see *infra* Part IV.C.

[30] See *infra* Part II for a discussion of the "twin aims" of *Erie*: (1) to discourage forum shopping; and (2) to avoid the inequitable administration of the laws.

[31] For a discussion of the Rules Enabling Act, 28 U.S.C. § 2072 (2006), see *infra* Part II.

[32] *Shady Grove*, 130 S. Ct. at 1436.

[33] *Id.*

[34] *Id.*

[35] *Id.* (noting that under New York law, Allstate had thirty days to pay or deny the claim once Shady Grove submitted it).

[36] *Id.*

actions to pursue statutory damages,[37] forced the *Shady Grove* plaintiffs to pursue their class-wide claim in federal court.[38] Shady Grove's individual claims totaled only $500, but the aggregated claims of all similarly situated plaintiffs totaled over $5 million.[39] Therefore, the *Shady Grove* plaintiffs met the minimal diversity and amount-in-controversy requirements to file the suit in federal court under CAFA.[40] The District Court for the Eastern District of New York dismissed the suit, reasoning that Shady Grove was precluded from bringing a class action by section 901(b).[41] On appeal, the Second Circuit affirmed the Eastern District's holding, noting that no conflict existed between Federal Rule of Civil Procedure 23 and section 901(b) "because they address different issues."[42] The Second Circuit held that Rule 23 controls the criteria for class certification, whereas section 901(b) governs the threshold question of "whether the particular type of claim is eligible for class treatment in the first place—a question on which Rule 23 is silent."[43] Like the Eastern District, the Second Circuit held that section 901(b) is substantive rather than procedural, and therefore federal courts sitting in diversity had to apply it under the *Erie* doctrine.[44]

The Supreme Court overturned both lower courts' analyses. In a plurality opinion,[45] the Supreme Court declared section 901(b) to be a procedural rule in direct conflict with Rule 23. The Court first held that Rule 23 governed class certification, a procedural mechanism, for federal courts sitting in diversity.[46] In his analysis, Justice Scalia ignored the substantive implications of rules governing class action certification[47] and found that if Rule 23 requirements are met,

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[37] N.Y. C.P.L.R. 901 (McKinney 2010).

[38] *Shady Grove*, 130 S. Ct. at 1437.

[39] *Id.* at 1460 (Ginsburg, J., dissenting).

[40] *Id.* at 1436-37 (majority opinion).

[41] *Id.* at 1437.

[42] *Id.* at 1438. For a discussion of the substantive nature of section 901(b) that could be incorporated into a federal court's interpretation of Rule 23, see *infra* Part III.D.

[43] *Shady Grove*, 130 S. Ct. at 1438.

[44] *Id.* at 1437.

[45] Justice Thomas, Justice Sotomayor, and Chief Justice Roberts joined Justice Scalia's opinion; Justice Stevens concurred in judgment, and thus a majority of the Court stated that Rule 23, not section 901(b), governed class action certification procedures in New York federal courts sitting in diversity. Justice Ginsburg wrote the dissent, joined by Justice Alito, Justice Kennedy, and Justice Breyer. *See id.* at 1435.

[46] *Id.* at 1448.

[47] For a discussion of the substantive issues underlying class actions, see *infra* Parts III.D and IV.A.

then federal courts must certify classes.[48] Justice Stevens, concurring in the judgment, reached the same conclusion as Justice Scalia, although he advocated for a nuanced, case-by-case analysis of federal rules by using a balancing test that would "not necessarily turn on whether the state law at issue takes the *form* of what is traditionally described as substantive or procedural. Rather, it [would turn] on whether the state law actually is part of a State's framework of substantive rights or remedies."[49] The plurality did not address the fact that *Shady Grove* was in federal court only because of the jurisdictional grant in CAFA. The *Shady Grove* decision distorted the intent of CAFA and expanded the right of plaintiffs to pursue class actions arising under a single state's laws in federal court.[50] Additionally, *Shady Grove* increased the power of the federal government to hear class actions arising under state law at the expense of the state's substantive interest to curb the certification of damage classes, which are classes formed to obtain solely monetary relief.[51]

II. FEDERALISM: THE RULES OF DECISION ACT, THE RULES ENABLING ACT, AND THE DEVELOPMENT OF *ERIE* JURISPRUDENCE

The conflicting interpretations given to the meaning of Rule 23 and section 901(b) by the Supreme Court and the New York federal courts reflect a longstanding choice-of-law problem for federal courts in the American system. Diversity jurisdiction,[52] which allows federal courts to hear claims arising under state laws, creates a situation where federal courts must decide whether to apply state or federal laws, including procedural and common law rules. In *Erie Railroad Co. v.*

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[48] *Shady Grove*, 130 S. Ct. at 1439.

[49] *Id.* at 1449 (Stevens, J., concurring).

[50] One of the reasons Congress expanded federal jurisdiction under CAFA was to prevent states from certifying and deciding *nationwide* or *multistate* class actions, thereby binding other states and creating federalism concerns. For a discussion of CAFA's legislative history, see *infra* Part IV.A.

[51] *See infra* Part IV.A. While Congress intended to increase the power of the federal government to hear class action disputes through CAFA, it did so because plaintiff friendly states were too easily certifying classes, leading to a variety of problems. CAFA was not passed out of concern that some states limited the ability to pursue class actions for certain claims. *See* Elizabeth J. Cabraser, *The Class Action Fairness Act of 2005: Findings and Purposes of CAFA*, *in* 1 LITIGATING TORT CASES § 9:28 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2010); *see also infra* Part III (discussing the substantive interest behind state limitations on statutory damages).

[52] U.S. CONST. art. III, § 2.

Tompkins,[53] the Supreme Court, in deciding whether to apply the Pennsylvania or the federal common law standard in evaluating the duty owed to trespassers, addressed the choice-of-law issue in diversity suits.[54] With deference to underlying principles of federalism and separation of powers,[55] the *Erie* Court applied the Pennsylvania standard and held, "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."[56] As interpreted in subsequent decisions, the *Erie* doctrine differentiated between substantive and procedural rules.[57] The *Erie* Court permitted federal courts to apply federal procedural rules, but it declared the end of federal substantive common law for courts hearing a matter under diversity jurisdiction.[58]

In explicating this decision, the *Erie* Court sought to address two major problems inherent within the applicability of divergent federal and state laws in diversity jurisdiction (the "twin aims" of *Erie*). First, *Erie* attempts to prevent the inequitable distribution of laws between citizens and noncitizens of a state. Under diversity jurisdiction, noncitizen plaintiffs have the privilege to pursue their state-law claims in state or federal courts (depending on the favorableness of applicable rules), which gives noncitizens an option not available to state-law litigants who are citizens of the state in which the action is brought.[59] The second aim of *Erie* seeks to prevent vertical forum shopping, which occurs when noncitizen plaintiffs elect to bring a claim in federal court under diversity jurisdiction, because the federal court's rules are more favorable.[60] Fundamentally, "The *Erie* rule is rooted in part in a

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[53] 304 U.S. 64 (1938).

[54] *Id.* at 70.

[55] *Id.* at 78; *see also* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 706 & n.77 (1974).

[56] *Erie*, 304 U.S. at 78.

[57] *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996); *see also* Hanna v. Plumer, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring) ("[T]he scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard."). *See infra* Part III (discussing the substance/procedure dichotomy).

[58] *Erie*, 304 U.S. at 78 ("There is no federal general common law.").

[59] *Id.* at 74-77.

[60] *Id.* Vertical forum shopping occurs when plaintiffs choose to pursue their claims in federal court instead of state court, depending on the favorability of applicable rules. In contrast, CAFA purported to prevent horizontal forum shopping, whereby plaintiffs would choose to bring their claims among various states, again

realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court."[61] Through this allocation of power between the federal and state governments, the *Erie* doctrine "implicates, indeed perhaps it is, the very essence of our federalism."[62]

Two federal statutes play essential roles in *Erie* jurisprudence and further explicate the applicable law for diversity actions.[63] The first is the Rules of Decision Act (RDA),[64] which was originally a part of the Judiciary Act of 1789 and was the basis of the Court's holding in *Erie*.[65] The Rules of Decision Act states, "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[66] The Rules of Decision Act applies in situations where there is no federal constitutional or statutory rule that governs the issue at hand. Like the *Erie* doctrine itself, it prevents federal courts sitting in diversity from creating a federal substantive "common law" that could supersede state authority.[67] Because "this restraint serves a policy of prime importance to our federal system,"[68] the Supreme Court has often "applied the [Rules of Decision] Act 'with an eye alert to . . . avoiding disregard of State law.'"[69]

The second federal statute of importance to the *Erie* doctrine is the 1934 Rules Enabling Act (REA),[70] in which Congress delegated to the Supreme Court[71] "the power to

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depending on the favorability of state law. For a discussion of horizontal forum shopping, see *infra* Part IV.A.

[61] *Hanna*, 380 U.S. at 467.

[62] Ely, *supra* note 55, at 695.

[63] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1460-61 (2010) (Ginsburg, J., dissenting).

[64] 28 U.S.C. § 1652 (2006).

[65] *Erie*, 304 U.S. at 71-72 (citing the Federal Judiciary Act of September 24, 1789, c. 20, 28 U.S.C. § 725).

[66] 28 U.S.C. § 1652.

[67] *Shady Grove*, 130 S. Ct. at 1460-61 (Ginsburg, J., dissenting) (citing *Erie*, 304 U.S. at 78).

[68] *Id.* at 1461.

[69] *Id.* (alteration in original) (quoting Guar. Trust Co. v. York, 326 U.S. 99, 110 (1945)).

[70] 28 U.S.C. § 2072.

[71] *See* Dudley & Rutherglen, *supra* note 7, at 738-39 ("A federal statute requires affirmative action by both houses of Congress while a federal rule does not. . . . All that is required for a federal rule to take effect is a failure by Congress to act. The actual drafting of the rules is undertaken by the Advisory Committee on Civil Rules and the Standing Committee on Federal Rules of Practice and Procedure, whose proposals are submitted for approval to the Judicial Conference and then to the Supreme Court.").

prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals"[72] so long as these rules do "not abridge, enlarge or modify any substantive right."[73] This limitation is important, because the Constitution grants Congress—not the Supreme Court—the authority to make law.[74] The Rules Enabling Act restricts the Court to enacting procedural, but not substantive, provisions.[75] The Supreme Court adopted the Federal Rules of Civil Procedure pursuant to the Rules Enabling Act.[76] In *Sibbach v. Wilson & Co.*,[77] the Supreme Court articulated the relevant analysis to determine the scope of a Federal Rule of Civil Procedure in light of the restrictions against "abridg[ing], enlarg[ing], or modify[ing] any substantive right."[78] It held that "[t]he test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[79] Ultimately, when determining whether to follow federal or state law, federal courts sitting in diversity follow either the Rules of Decision Act (if there is no federal provision on point) or the Rules Enabling Act (if there is an applicable federal provision).[80]

In *Hanna v. Plumer*,[81] the Supreme Court attempted to clarify the interplay among the *Erie* doctrine, the Rules of Decision Act, and the Rules Enabling Act in diversity actions. The issue in *Hanna* involved a conflict between Federal Rule of Civil Procedure 4(d)(1) and a Massachusetts state law, which provided different mechanisms for proper service of process.[82] Because a federal procedural rule, passed pursuant to the Rules Enabling Act, governed the issue in *Hanna*, the Court upheld the federal rule over the state rule.[83] Unlike *Erie*, the

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[72] 28 U.S.C. § 2072(a).

[73] *Id.* § 2072(b).

[74] U.S. CONST. art. 1, § 1.

[75] 28 U.S.C. § 2072.

[76] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1461 (2010) (Ginsburg, J., dissenting).

[77] 312 U.S. 1 (1941).

[78] *See Shady Grove*, 130 S. Ct. at 1442 ("In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, but with the limitation that those rules 'shall not abridge, enlarge or modify any substantive right.'" (quoting 28 U.S.C. § 2072(b))).

[79] *Sibbach*, 312 U.S. at 14.

[80] *Shady Grove*, 130 S. Ct. at 1442.

[81] 380 U.S. 460 (1965).

[82] *Id.* at 461-62.

[83] *Id.* at 463-64.

federal rule at issue in *Hanna* was not derived from the common law. The *Hanna* Court concluded that the supremacy of federal constitutional and statutory law, unlike the federal common law at issue in *Erie*, mandated that federal courts, even when sitting in diversity and hearing a case arising under state law, apply the conflicting federal provision.[84] Federalism inherently leads to some divergence between federal and state law, and the Court stated, "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act."[85]

Hanna established a two-prong choice-of-law test for federal courts sitting in diversity. Under the test, the threshold question for the court is whether there is a federal constitutional or statutory mandate or rule of civil procedure that governs the dispute.[86] If there is, then the court follows the *Hanna* prong and applies the federal provision unless it is unconstitutional or otherwise limited; Federal Rules of Civil Procedure cannot violate the Rules Enabling Act by abridging, enlarging, or modifying a substantive state right.[87] Congress has the power to prescribe procedural rules for federal courts, even if they may sometimes differ from the rules used in state courts.[88] The *Hanna* prong accepts the inequitable distribution of laws and forum shopping as inevitable consequences of a federal system in which the national government has ultimate supremacy over the states.[89]

On the other hand, if there is no federal provision governing the dispute, then the court follows the "unguided *Erie*" prong,[90] governed by the Rules of Decision Act and the *Erie* doctrine.[91] Under this test, the court will apply federal

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[84] *Hanna*, 380 U.S. at 473; U.S. CONST. art. VI.

[85] *Hanna*, 380 U.S. at 473-74.

[86] *Id.* at 471-72; Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010).

[87] *Shady Grove*, 130 S. Ct. at 1437; *see also id.* at 1461 (Ginsburg, J., dissenting) ("If a Federal Rule controls an issue and directly conflicts with state law, the Rule, so long as it is consonant with the Rules Enabling Act, applies in diversity suits.").

[88] *Hanna*, 380 U.S. at 473.

[89] *Id.* at 473-74.

[90] *Id.* at 471.

[91] *See Shady Grove*, 130 S. Ct. at 1461 (Ginsburg, J., dissenting) ("If . . . no Federal Rule or statute governs the issue, the Rules of Decision Act, as interpreted in *Erie*, controls. That Act directs federal courts, in diversity cases, to apply state law when failure to do so would invite forum-shopping and yield markedly disparate

rules that are "procedural" and state rules that are "substantive," giving deference to state provisions that involve specific state interests that extend beyond procedural regulation.[92] If a court's decision might violate or undermine the twin aims of *Erie*, then the court must follow the state law.[93] Therefore, a conflict between a state law and a Federal Rule of Civil Procedure, created through the Rules Enabling Act, involves a different analysis than that of an unguided choice mandated by the *Erie* doctrine.[94] The *Hanna* Court explained the differences between the two tests:

> It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions. When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* Choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if . . . this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[95]

Despite the *Hanna* Court's attempt at explaining the difference in analysis between an unguided *Erie* decision and one involving the application of a federal rule under the *Hanna* prong, "precise guidance has been lacking for both the 'twin aims' standard that governs unguided *Erie* choices and the [Rules Enabling Act]'s substantive-rights provision that governs the validity of a Federal Rule."[96] At least in theory, the unguided *Erie* prong and the *Hanna* prong restrict federal encroachment of state substantive law.[97] Still, the Supreme Court has never held that a Federal Rule of Civil Procedure

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litigation outcomes." (citations omitted)); *Hanna*, 380 U.S. at 471-74; Steinman, *supra* note 22, at 1134-35.

[92] *See Hanna*, 380 U.S. at 471-72.

[93] *See supra* note 91; *see also supra* notes 3-4.

[94] *Hanna*, 380 U.S. at 470-71.

[95] *Id.* at 471.

[96] Steinman, *supra* note 22, at 1136.

[97] *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1463 (2010) (Ginsburg, J., dissenting) ("[B]oth before and after *Hanna*, the above-described decisions show, 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.'" (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 & 438 n.22 (1996))); *Hanna*, 380 U.S. at 468 ("Not only are nonsubstantial, or trivial, variations not likely to raise the sort of equal protection problems which troubled the Court in *Erie*; they are also unlikely to influence the choice of a forum.").

violated the REA.[98] Because the application of the *Hanna* prong usually leads to the application of the federal rule, and the *Erie* prong usually leads to the application of the state rule, these tests may lead to vertical forum shopping, a problem the *Erie* doctrine attempted to prevent.[99] For example, a party that seeks the application of a federal rule may choose to bring the action in federal court (or remove) and argue under *Hanna* that the federal rule governs the issue at hand. On the other hand, a party that seeks the application of a state rule will bring the action in state court, where the Federal Rules of Civil Procedure cannot reach. If that action is removed to federal court, then the party that seeks application of the state rule will argue that the applicable federal rule is not broad enough to govern the issue. Therefore, federalism concerns arise in choice-of-law decisions for federal courts sitting in diversity.

In her dissent in *Shady Grove*, Justice Ginsburg articulated a nuanced analysis of the choice-of-law decisions by emphasizing the importance of federalism principles. Like the *Hanna* court, Justice Ginsburg acknowledged that the threshold issue in determining whether to follow the *Hanna* prong or the unguided *Erie* prong is whether there is an applicable federal rule on point.[100] However, Justice Ginsburg did not entirely separate the RDA from the REA. She pointed out that both play integral roles when federal courts choose the appropriate route. Justice Ginsburg explained, "Recognizing that the Rules of Decision Act and the Rules Enabling Act simultaneously frame and inform the *Erie* analysis, we have endeavored in diversity suits to remain safely within the bounds of both congressional directives."[101]

Despite the *Hanna* Court's attempt to offer a two-pronged analysis for choice-of-law decisions and despite the extensive analysis given to the *Erie* doctrine in numerous

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[98] *See Shady Grove*, 130 S. Ct. at 1442-43 ("[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 appeals, or who sign court papers without a reasonable inquiry into the facts asserted. Each of these rules had some practical effect on the parties' rights, but each undeniably regulated only the process for enforcing those rights; none altered the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either." (citations omitted)).

[99] *See supra* note 60 and accompanying text.

[100] *Shady Grove*, 130 S. Ct. at 1461 (Ginsburg, J., dissenting).

[101] *Id.* (citations omitted). For a discussion on how state interests can inform a federal court's interpretation of the federal rules, see *infra* Parts III.C-D.

judicial opinions, choice-of-law problems persist for two main reasons. First, a federal rule's applicability to an issue is not always clear.[102] As Justice Ginsburg noted, federalism concerns have led courts to follow the *Hanna* prong only if they find "direct collision" between a federal rule and state law.[103] Courts may subjectively apply a broad reading to a federal rule in order to enlarge its application, or give a narrow reading to a federal rule in order to limit its application.[104] If the court gives a narrow reading to the federal rule at issue and determines it does not apply to the facts of the case, then the court must enter unguided *Erie* territory, where it must distinguish between "substantive" and "procedural" rules (while maintaining a preference for application of the state rule consistent with the twin aims of *Erie*).[105] This subjectivity can lead to inconsistent application of the *Hanna* and *Erie* prongs, which can lead to a lack of uniformity and predictability in the law. The *Erie* doctrine itself leads to the second main problem: the line between "substantive" and "procedural" law is often blurry and is far from a bright-line test.[106] In fact, the distinction between "substance" and "procedure" varies with the circumstances and facts of each case.[107]

III. THE SUPREME COURT'S FAILURE TO APPLY *ERIE* CORRECTLY IN *SHADY GROVE*

The *Shady Grove* plurality opinion misapplied *Hanna*, because (1) Rule 23 and section 901(b) do not directly conflict; and (2) section 901(b)'s statutory limits on penalties are

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[102] A broad or narrow reading of a federal rule can complicate its applicability at hand. Like the difference between "substance" and "procedure," a Federal Rule's applicability or lack thereof to the facts at hand is not clear-cut. *Cf. Shady Grove*, 130 S. Ct. at 1461-63 (Ginsburg, J., dissenting) (analyzing various cases where the court permitted seemingly contradictory federal and state rules to coexist).

[103] Walker v. Armco Steel Corp., 446 U.S. 740, 749 (1980) (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965)).

[104] *Id.* at 749-50 ("The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court. It is only if that question is answered affirmatively that the *Hanna* analysis applies.").

[105] *See supra* notes 59-62 and accompanying text.

[106] *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 194 (2004) ("'The line between procedural and substantive law is hazy,' . . . 'but no one doubts federal power over procedure.'" (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring))).

[107] *See Hanna*, 380 U.S. at 471 ("The line between 'substance' and 'procedure' shifts as the legal context changes. 'Each implies different variables depending upon the particular problem for which it is used.'" (quoting Guar. Trust Co. v. York, 326 U.S. 99, 108 (1945))).

substantive, not procedural. Because Rule 23 and section 901(b) do not directly collide, the Court should have followed the unguided *Erie* prong and applied section 901(b) out of deference to New York state sovereignty under the Rules of Decision Act and the *Erie* doctrine. By applying Rule 23 instead of section 901(b), the Court exacerbated the problems that the twin aims of *Erie* attempted to prevent; the decision will lead to the inequitable distribution of laws and vertical forum shopping. Moreover, even if the Court was correct in applying the *Hanna* prong because it rightly determined that Rule 23 governed the issue at hand and directly collided with section 901(b), it failed to acknowledge that section 901(b) is a substantive rule. Thus, even under the *Hanna* prong, the Court still should have applied section 901(b) over Rule 23 based on the REA's command that federal procedural rules may not "abridge, enlarge, or modify any [state] substantive right[s]."[108]

A. Justice Scalia's Misapplication of the Hanna *Prong in* Shady Grove

In *Shady Grove*, Justice Scalia, in his plurality opinion, explained the Court's approach in dealing with a potential conflict between a federal rule and a state rule. Justice Scalia followed the standard framework for a choice of law decision for federal courts sitting in diversity. He first asked whether Rule 23 governed the issue.[109] He noted that, under the *Hanna* prong, if Rule 23 were broad enough to cover the issue, then the Court would have to apply it, despite a conflicting New York law, unless the rule violated the Constitution or exceeded congressional authorization under the Rules Enabling Act.[110] In addressing the mandate to avoid abridging, modifying, or enlarging state substantive rights, Justice Scalia wrote,

> The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself regulates: If it governs only the manner and 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.[111]

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[108] 28 U.S.C. § 2072(b) (2006).

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

[110] *Id.*

[111] *Id.* at 1442 (alterations in original) (citations omitted) (internal quotation marks omitted).

Justice Scalia pointed out that the Court must analyze the substantive or procedural aspect of the federal, not state, rule at issue.[112] He explained, "the validity of a Federal Rule depends entirely upon whether it regulates procedure. If it does, it is authorized by [the Rules Enabling Act] and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights."[113] Based on the test, Justice Scalia concluded that Rule 23 is validly within the Rules Enabling Act, because class actions, like traditional joinder, simply provide a means for multiple parties to aggregate claims.[114] However, Justice Scalia did not find that class actions change parties' legal rights and duties or alter rules of decision.[115] Thus, even though the amount at stake for Allstate in *Shady Grove* ballooned from what would have been a $500 claim in state court to a $5 million class action in New York federal court, Justice Scalia found that Rule 23 did not "enlarge" any substantive right.[116]

Instead of recognizing any substantive New York state interest in limiting damage classes, Justice Scalia determined that both Rule 23 and section 901(b) were procedural provisions.[117] He stated, "Rule 23 permits all class actions that meet its requirements, and a State cannot limit that permission by structuring one part of its statute to track Rule 23 and enacting another part that imposes additional requirements."[118] Justice Scalia noted that section 901(b) does not simply cap statutory damages or rule out certain forms of damages; rather it procedurally inhibits the right to maintain a class action because "it prevents the class actions it covers from coming into existence at all."[119]

In her dissent, Justice Ginsburg pursued a different approach. She concluded that Rule 23 and section 901(b) apply to different situations and therefore do not clash; in turn she analyzed the conflict under the unguided *Erie* prong rather than the *Hanna* prong. Justice Ginsburg, like the Second Circuit and the Eastern District of New York had held, opined that section

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[112] *Id.* at 1444.

[113] *Id.*

[114] *Id.* at 1443.

[115] *Id.*

[116] For a discussion of Justice Scalia's seemingly conflicting opinion on the substantive nature of state limitations on statutory damages, see *infra* Part III.D.

[117] For a discussion of the substantive nature of class action damages, see *infra* Part III.D.

[118] *Shady Grove*, 130 S. Ct. at 1439.

[119] *Id.*

901(b) pertains to remedies in class actions, a substantive issue, whereas Rule 23 simply pertains to procedures surrounding class actions.[120] Justice Ginsburg explained,

> Rule 23 describes a method of enforcing a claim for relief, while [section] 901(b) defines the dimensions of the claim itself. . . . The New York Legislature could have embedded the limitation in every provision creating a cause of action for which a penalty is authorized; [section] 901(b) operates as shorthand to the same effect.[121]

Rather than reading section 901(b) as merely a procedural mechanism that adds a limitation to the provisions of Rule 23, Justice Ginsburg read the New York law as embodying a substantive state interest in limiting the crippling effect that class actions can have on defendants.[122] By incorporating New York's substantive interests into her reading, Justice Ginsburg's dissent falls more in line with state sovereignty principles prevalent in *Erie* jurisprudence.[123]

B. The Erie *Prong's Development: The Outcome Determinative Test, Federalism, and the Line Between Substance and Procedure*

Justice Scalia saw Rule 23 as valid and procedural under the Rules Enabling Act, and so he held Rule 23 governed the issue. Because he analyzed *Shady Grove* under the *Hanna* prong, he did not consider the substantive interests behind New York's enactment of section 901(b), which he also found to be procedural. However, the line between substance and procedure is rather "murky";[124] procedural devices often have substantive consequences. Indeed, states often deliberately design class action procedural protocols to effectuate significant substantive

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[120] *Id.* at 1465-66 (Ginsburg, J., dissenting) ("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." (citations omitted)).

[121] *Id.* at 1466.

[122] *See id.* at 1464-65; *see also infra* Part III.D (explaining how the *Shady Grove* court could have incorporated New York's substantive interests into its reading of Rule 23 and section 901(b)).

[123] *See supra* Part II (discussing the development of *Erie* jurisprudence); *see also Shady Grove*, 130 S. Ct. at 1473 (Ginsburg, J., dissenting) ("I would continue to approach *Erie* questions in a manner mindful of the purposes underlying the Rules of Decision Act and the Rules Enabling Act, faithful to precedent, and respectful of important state interests.").

[124] *Shady Grove*, 130 S. Ct. at 1437 (majority opinion).

interests.[125] While obvious that procedural issues include litigation protocols and substantive law governs the merits of the issue litigated, it is equally obvious that procedural rules can yield substantive consequences on the outcome of litigation.[126] Supreme Court jurisprudence illustrates the dilemma surrounding this substance-versus-procedure dichotomy.

The Supreme Court case *Guaranty Trust Co. v. York*,[127] decided shortly after *Erie*, illustrates the interplay between substance and procedure and offers an attempted solution to the problem. In this shareholder derivative suit, the Court had to decide whether a federal court sitting in diversity should apply a state statute of limitations that was shorter than the federal statute of limitations.[128] A statute of limitations, arguably a procedural device, affects the time period that individuals have to bring suit. Therefore, application of the state statute would limit the plaintiffs' ability to bring their cause of action.[129] The Court reasoned that, for federal courts hearing cases solely based on diversity jurisdiction, *Erie* essentially insured that the rules used, and therefore the outcome that resulted, would be the same as if the relevant state court tried the case.[130] The Court based its rationale for this outcome determinative test on the twin aims of *Erie*: the inequitable distribution of laws and the prevention of forum shopping.[131] The Court explained, "[F]or the same transaction the accident of a suit by a non-resident litigant in federal court

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[125] Lucas Watkins, *How States Can Protect Their Policies in Federal Class Actions*, 32 CAMPBELL L. REV., 285, 285 (2010); *see also* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1442 (2008) ("[P]rocedure is power. . . . [A]ll informed observers of the litigation process now understand that Federal Rule of Civil Procedure 23 and state class action rules, although regulating the process of litigation, can still have major substantive impact."). For a discussion of state interests behind rules regarding class certification, see *infra* Part IV.A.

[126] Glenn S. Koppel, *Reflections on the "Chimera" of a Uniform Code of State Civil Procedure: The Virtue of Vision in Procedural Reform*, 58 DEPAUL L. REV. 971, 989 (2009) ("[I]t is resolving disputes through reasoned and principled deliberation, based on rules, that is at the heart of adjudication and . . . predefined procedures provide the methods for vindicating substantive rights." (citations omitted) (internal quotation marks omitted)).

[127] 326 U.S. 99 (1945).

[128] *Id.* at 100-01; *see also id.* at 113 n. 1 (Rutledge, J., dissenting).

[129] *Id.* at 101 (majority opinion).

[130] *Id.* at 109 ("In essence, the intent of [the *Erie*] decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.").

[131] *Id.*

instead of in a State court a block away should not lead to a substantially different result."[132]

The "outcome determinative" test put forth in *Guaranty Trust* is appealing because it seems simple; if the difference between a state and federal rule would affect the outcome of the case, then a federal court sitting in diversity should apply the state rule. However, its simplicity is also its downfall: it ignores the constitutional reality that the United States is a federal system, and federal constitutional and statutory law has supremacy over state law.[133] The Court addressed this issue in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[134] which dealt with the allocation of authority between the judge and jury in determining an employer's immunity to a workmen's compensation claim.[135] While South Carolina law gave the judge the right to determine the issue of immunity,[136] the Seventh Amendment of the U.S. Constitution guarantees a jury trial in federal, but not state, civil actions.[137] These seemingly procedural distinctions have both outcome-determinative and substantive potential consequences; juries, who are less knowledgeable about specific legal provisions, may be more sympathetic to plaintiffs than are judges. The Court explained that the federal judicial system ultimately is independent from that of the states and therefore, in certain situations, different rules will inevitably apply in the different courts.[138] Litigants who properly invoke diversity jurisdiction may have their cases governed, in certain circumstances, by federal rules (that could be labeled either substantive or procedural).[139]

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[132] *Id.* For a discussion of the *Erie* doctrine, see *supra* Part II.

[133] US CONST. art. VI, cl. 2.

[134] 356 U.S. 525 (1958).

[135] *Id.* at 527, 533.

[136] *Id.* at 534.

[137] U.S. CONST. amend. VII ("[T]he right of trial by jury shall be preserved . . . .").

[138] *Byrd*, 356 U.S. at 537. For a discussion of *Hanna*, see *supra* Part II. The *Hanna* Court, like the *Byrd* Court, said some divergent federal and state rules were inevitable in the American federal system.

[139] *See Byrd*, 356 U.S. at 537-38 ("It may well be that in the instant personal-injury case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury. Therefore, were 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice. But there are affirmative countervailing considerations at work here. . . . An essential characteristic of [the federal] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." (footnote omitted)).

C. Gasperini*: An Illustration of the Court's Incorporation of State and Federal Rules*

More recently, the Court has demonstrated that it can use ambiguity within a Federal Rule of Civil Procedure to allow a state rule limiting jury awards to coexist with the Seventh Amendment's reexamination clause.[140] In the 1996 diversity case *Gasperini v. Center for Humanities*,[141] the issue concerned the standard of review to determine whether a new trial should be ordered because of excessive statutory damages. Federal Rule of Civil Procedure 59 (Rule 59) gives significant deference to the common law when designating the standard by which courts may grant a new trial.[142] Based on the provisions of Rule 59, federal courts have wide discretion to use statutory or common law provisions in determining whether to grant a new trial.

Indeed, one traditional reason for ordering a new trial is a reward of excessive damages. *Gasperini* took place in New York, and New York Civil Practice Law and Rules section 5501(c)[143] permitted trial and appellate courts to order a new trial if, upon review, the court determined a money award was "excessive or inadequate" by "'deviat[ing] materially from what would be reasonable compensation.'"[144] Before the enactment of section 5501(c) in 1986, New York federal and state trial judges "invoked the same judge-made formulation in responding to excessiveness attacks on jury verdicts: courts would not disturb an award unless the amount was so exorbitant that it shocked the conscience of the court."[145] Appellate courts would disturb the trial court's determination regarding the jury verdict only where it was obvious that the trial court acted unreasonably in its discretion.[146] However, like the South Carolina federal courts

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[140] U.S. CONST. amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); *see also* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 (1996) (differentiating the issue in *Byrd*, which dealt with the Seventh Amendment's guarantee of a right to a jury trial in federal civil actions, with the issue in *Gasperini*, which dealt with the Seventh Amendment's Reexamination Clause).

[141] 518 U.S. 415 (1996).

[142] For jury trials, Rule 59 permits a court to grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." FED. R. CIV. P. 59(a)(1)(A).

[143] N.Y. C.P.L.R. 5501(c) (McKinney 2010).

[144] *Gasperini*, 518 U.S. at 423 (quoting N.Y. C.P.L.R. 5501(c)); *see also id.* at 425 (explaining that section 5501(c) applies to New York trial and intermediate appellate courts).

[145] *Id.* at 422 (internal quotation marks omitted).

[146] *Id.* at 424 ("New York state-court opinions confirm that § 5501(c)'s 'deviates materially' standard calls for closer surveillance than 'shock the conscience' oversight.").

in *Byrd*, New York federal courts sitting in diversity faced a dilemma.[147] Section 5501(c) increased the courts' authority to review jury awards,[148] and in doing so, it potentially infringed upon the conflicting Seventh Amendment guarantee that jury verdicts would not be unduly re-examined.[149] Rule 59 gave no clear guidance as to whether a federal court sitting in diversity should apply the state or traditional federal standard of review to determine whether a new trial should be ordered because of excessive damages; either the state or the federal rule were seemingly permissible.[150]

Because Rule 59 granted such deference to various standards of review used by courts, the *Gasperini* Court analyzed the divergent standards under the unguided *Erie* prong and analyzed whether section 5501(c) was a substantive or procedural provision. The Court found that New York's "material deviation" standard was a procedural provision with substantive implications.[151] The standard used to determine "excessive" damages could greatly affect the award of damages granted to parties.[152] In turn, this standard obviously affects litigation strategies, including the decision whether to litigate at all. In *Gasperini*, both parties and the Supreme Court "acknowledge[d] that a statutory cap on damages would supply substantive law for *Erie* purposes."[153] The Court noted that section 5501(c) did not specifically set a maximum recovery amount, but it did provide a standard by which courts could determine, through case law, if a damage award was "excessive."[154] The Court explained, "In sum,

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[147] *Id.* at 429-30 ("[I]f federal courts ignore the change in the New York standard and persist in applying the 'shock the conscience' test to damage awards on claims governed by New York law, 'substantial variations between state and federal [money judgments]' may be expected." (alteration in original) (footnote omitted) (quoting Hanna v. Plumer, 380 U.S. 460, 467-68 (1965)).

[148] *Id.* at 422-23.

[149] *Id.* at 433; *see supra* note 140.

[150] *See Gasperini*, 518 U.S. at 437 (explaining that federal law determines the role of federal trial and appellate courts in reviewing jury verdicts).

[151] *Id.* at 426.

[152] *Id.* at 429-30.

[153] *Id.* at 428. The Court quoted the Reply Brief for Petitioner:

> [T]he state as a matter of its substantive law may, among other things, eliminate the availability of damages for a particular claim entirely, limit the factors a jury may consider in determining damages, or place an absolute cap on the amount of damages available, and such substantive law would be applicable in a federal court sitting in diversity.

Id. at 429.

[154] *Id.* at 429 (concluding that section 5501(c) "differs from a statutory cap principally in that the maximum amount recoverable is not set forth by statute, but rather is determined by case law" (internal quotation marks omitted)).

section 5501(c) contains a procedural instruction, . . . but [New York's] objective is manifestly substantive."[155] Therefore, the Court had the constitutional obligation to uphold the Seventh Amendment, but under the *Erie* doctrine and the Rules of Decision Act, it also had the obligation to make a decision that respected New York's substantive law.

The Court went on to note that the variation in standards for evaluating excessive damages implicated the "twin aims" of *Erie*, because the two standards would lead to significantly divergent money judgments in New York state and federal courts.[156] Nonetheless, a purely "outcome determinative" test was not enough to uphold a state rule over a federal constitutional guarantee.[157] Considering all of these issues, the Supreme Court reasoned that the federal trial court judge, present for the jury trial, could ensure that the jury's verdict fell within the boundaries set by state law by reviewing a jury's award under the material deviation standard established by section 5501(c).[158] However, the Seventh Amendment's prohibition of improper reexamination of jury awards[159] led the Court to hold that New York federal appellate courts could not apply the "material deviation" standard at the appellate stage in litigation where such a determination would be beyond the jury's reach; rather, appellate courts could review the determination of the federal trial judge only when the trial judge demonstrated an abuse of discretion.[160] Thus, the Supreme Court artfully incorporated the New York statutory standard of "material deviation" while remaining true to the Seventh Amendment.[161] By acknowledging the substantive nature of section 5501(c) and the ambiguity of Rule 59, the Court found a way to continue applying section 5501(c) in federal as well as state courts, even in light of a potential barrier imposed by the Constitution, the ultimate American legal authority.

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[155] *Id.* (citation omitted) (internal quotation marks omitted).

[156] *Id.* at 430.

[157] *Id.* at 432.

[158] *Id.* at 418.

[159] *See id.* (quoting the Seventh Amendment's Reexamination Clause); *see also supra* note 140.

[160] *Gasperini*, 518 U.S. at 419 ("New York's law controlling compensation awards for excessiveness or inadequacy can be given effect, without detriment to the Seventh Amendment, if the review standard set out in CPLR § 5501(c) is applied by the federal trial court judge, with appellate control of the trial court's ruling limited to review for abuse of discretion." (internal quotation marks omitted)).

[161] *Id.* at 435 ("[A]ppellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice . . . .").

D. The Failure of the Supreme Court to Apply Gasperini*'s Logic and Find Section 901(b)'s Substantive Aspects*

Unlike the *Gasperini* Court's interpretation of section 5501(c) as procedural with substantive implications, the *Shady Grove* plurality read section 901 to be purely procedural and therefore in an inevitable clash with Rule 23.[162] The *Shady Grove* Court could have applied *Gasperini*'s logic by finding that section 901(b) encompassed a substantive state concern in order to let Rule 23 and section 901(b) coexist peacefully.[163] Rule 23 by itself does not eliminate possible roles for state law.[164] Although the national government is ultimately supreme to the states in the federalist system, which means that federal law will at times supersede state law, states still have sovereignty in numerous areas. Courts may interpret the federal rules while giving due consideration to state law.[165] As Justice Ginsburg pointed out in the majority opinion of *Gasperini*, "Federal rule[s] appl[y] regardless of state law. Federal courts have interpreted the Federal Rules, however, with sensitivity to important state interests and regulatory policies."[166] In his dissent in *Stewart Organization, Inc. v. Ricoh, Inc.*,[167] Justice Scalia seemed to endorse precisely this type of narrow reading of a federal law in order to accommodate state interests.[168] He stated,

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[162] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1439 (2010) (stating that section 901(b) "undeniably answer[s] the same question as Rule 23: whether a class action may proceed for a given suit").

[163] *See* Watkins, *supra* note 125, at 297 ("*Gasperini* is properly read as general command for federal courts to let state policies color their interpretation of the Federal Rules of Civil Procedure—even when prior interpretations seem to be controlling authority. And this command applies even more strongly when the Rule at issue is general and permissive in nature.").

[164] *See* Steinman, *supra* note 22, at 1144 ("*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.").

[165] *See* U.S. CONST. amend. X.

[166] *Gasperini*, 518 U.S. at 427 n.7 (citations omitted); *see also Shady Grove*, 130 S. Ct. at 1463 (Ginsburg, J., dissenting).

[167] 487 U.S. 22 (1988).

[168] The issue in *Stewart* involved a motion to transfer venue under 28 U.S.C. § 1404(a) and not a Federal Rule of Civil Procedure. *Id.* at 28. However, Scalia's inclination to read a congressional statute narrowly and a federal rule broadly is odd, considering the separation of powers concerns involved in promulgating the Federal Rules of Civil Procedure. *See, e.g.*, Burbank & Wolff, *supra* note 16, at 43-44 ("[I]t is reasonable to impute to Congress a concern for protecting state lawmaking choices that affect state substantive rights, since that body often invokes federalism as warranting solicitude for state prerogatives. But that is a secondary consequence of the Enabling Act's primary concern, which is preventing the Supreme Court, exercising delegated

> [T]here is nothing unusual about having the applicability of a federal statute depend on the content of state law. We have recognized that precisely this is required when the application of the federal statute depends, as here, on resolution of an underlying issue that is fundamentally one of state law.[169]

Further, Rule 23's very terms do not set a bright-line procedural rule. Rather, Rule 23 illustrates the vague line between (1) substance and procedure and (2) statutory law and common law.[170] For instance, Rule 23(a) mandates that before a class may be certified, it must satisfy all four of the following requirements: numerosity, commonality, typicality, and adequacy of representation.[171] As an additional requirement of certification, a class must satisfy one of the requirements of Rule 23(b). The plaintiffs in *Shady Grove* relied on Rule 23(b)(3), which specifically states, "[Q]uestions of law or fact common to class members [must] predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[172] Obviously, words such as *predominate* and *superior* do not offer a map to neat and explicitly clear determinations.[173] Indeed, the Rule 23 guidelines for class certification do not offer a clear-cut set of instructions in themselves—the instructions are rather based on case law.[174] Therefore, as Professor Adam Steinman explains,

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legislative power to promulgate court rules, from encroaching upon Congress's lawmaking prerogatives.").

[169] *Stewart*, 487 U.S. at 35 n.1 (Scalia, J., dissenting) (citations omitted) (internal quotation marks omitted).

[170] Likewise, Rule 59's standard for granting a new trial and the Seventh Amendment's Reexamination Clause, both at issue in *Gasperini*, also illustrates these ambiguities.

[171] FED. R. CIV. P. 23(a); *see Shady Grove*, 130 S. Ct. at 1437; *see also* Steinman, *supra* note 22, at 1144 ("Rule 23(a) mandates that all class actions must satisfy four elements: 'numerosity, commonality, typicality, and adequacy of representation.'" (quoting *Shady Grove*, 130 S. Ct. at 1437)).

[172] FED. R. CIV. P. 23(b)(3); *see also* Steinman, *supra* note 22, at 1144-45 (quoting FED. R. CIV. P. 23(b)(3)).

[173] Steinman, *supra* note 22, at 1145 ("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.'"). For a list of factors in Rule 23 that courts use in the superiority analysis, see *supra* note 9; Steinman, *supra* note 22, at 1145 n.78 ("Rule 23 does provide a non-exhaustive list of factors that are 'pertinent' to the superiority inquiry . . . . [However], these factors do not foreclose the incorporation of state law into the superiority analysis.").

[174] Steinman, *supra* note 22, at 1145 (explaining that the federal courts place a "judicial gloss" upon class action certification that dictates over the Federal Rules of Civil Procedure).

> [T]here 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 that is consistent with state law, then the Federal Rule does not truly collide with state law.[175]

By ignoring this important point, the *Shady Grove* decision precluded New York from legislating in a substantive area. In *Gasperini*, New York law guided the court to determine the standard for excessive damages as a means of granting a new trial under Rule 59 in light of section 5501(c) and the Seventh Amendment. The same application of state law could have been used in *Shady Grove*: section 901(b) could have led the court to determine that class action was not a superior means of pursuing a claim under Rule 23.[176] The *Shady Grove* plaintiffs relied upon the superiority requirement of Rule 23(b), and it is this provision that opens an area for state law.[177] New York, or other state law,[178] could inform the court's decision on whether class action would be "superior" to individual actions.[179] Just as the *Gasperini* court determined that a state law could inform Rule 59 and the Seventh Amendment, the *Shady Grove* Court could have determined

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[175] *Id.* at 1145-46; *see also* Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1082 (2011) ("The important point remains that, even without a bar on class certification for statutory damages, the terms of Rule 23 make class certification far from a sure thing."); Patrick Woolley, Erie *and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1743 (2006) (stating that the denying certification based on the "superiority" provision of Rule 23(b) "rests on the premise that federal courts should allow the substantive law . . . to be developed state-by-state rather than using the law of the forum to resolve all the claims"); York-Erwin, *supra* note 10, at 1809 ("[S]uperiority analysis under Rule 23(b) should not turn primarily on conservation of judicial resources.").

[176] *See* Steinman, *supra* note 22, at 1147 ("How federal courts . . . decide whether a class action would be 'superior' in any given case is not dictated by Rule 23 itself. For a state-law claim . . . state law might inform whether class treatment is superior for class-certification purposes . . . .").

[177] Nagareda, *supra* note 175, at 1075; *see also* Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 46-47 (Univ. of Penn. Law Sch. Pub. Law & Theory Research Paper Series, Research Paper No. 10-28), *available at* http://ssrn.com/abstract=1665092 ("With statutes, judges apply the law but do not make it. . . . With judge-made law, however, they make the law and are free to make the priority decision on their own. . . . Without legislative guidance, the priority determination is a policy decision, and unsurprisingly judges have been guided by policy-*Erie* in deciding the extent to which their judge-made rules should displace otherwise-applicable state law. That is exactly the reasoning we see in *Walker* and *Gasperini*.").

[178] *See, e.g.*, Steinman, *supra* note 22, at 1147 ("This logic would also apply when (unlike in *Shady Grove*) state law is more *permissive* of class actions.").

[179] *Id.* at 1146-47.

that New York law spoke directly to the "superiority" requirement of Rule 23(b), particularly in light of the fact that Rule 23(a) and 23(b) both state that a class action "may" (not "must") be maintained upon meeting certain requirements.[180]

Justice Ginsburg drew attention to this flaw in Justice Scalia's reasoning. Section 901(b), like section 5501(c) at issue in *Gasperini*, was a procedural mechanism with substantive objectives. Justice Ginsburg stated,

> Rule 23 authorizes class treatment for suits satisfying its prerequisites because the class mechanism generally affords a fair and efficient way to aggregate claims for adjudication. Section 901(b) responds to an entirely different concern; it does not allow class members to recover statutory damages because the New York Legislature considered the result of adjudicating such claims en masse to be exorbitant. The fair and efficient *conduct* of class litigation is the legitimate concern of Rule 23; the *remedy* for an infraction of state law, however, is the legitimate concern of the State's lawmakers and not of the federal rulemakers.[181]

Justice Ginsburg further explained the theoretical and constitutional problems behind Justice Scalia's formalistic approach to the facts of *Shady Grove*. She noted that even under the *Hanna* prong, Justice Scalia's interpretation failed to uphold the provisions of the Rules Enabling Act that prohibit federal rules from "abridg[ing], enlarg[ing], or modify[ing] state substantive rights."[182] Moreover, Justice Ginsburg invoked the limitations imposed on the national government by the system of federalism and on the judiciary by the separation of powers. She stated, "[Justice Scalia's interpretation] ignores the balance that Congress struck between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies. It also ignores the separation-of-powers presumption and federalism presumption that counsel against judicially created rules displacing state substantive law."[183] Although Congress delegated the power to write the Federal Rules of Civil Procedure to the judiciary, Justice Ginsburg duly noted, as did

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[180] FED. R. CIV. P. 23.

[181] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1466 (2010) (Ginsburg, J., dissenting) (footnote omitted); *see also id*. ("It is relevant 'whether the state provision embodies a substantive policy or represents only a procedural disagreement with the federal rulemakers respecting the fairest and most efficient way of conducting litigation.'" (quoting Ely, *supra* note 55, at 722)).

[182] 28 U.S.C. § 2072(b) (2006).

[183] *Shady Grove*, 130 S. Ct. at 1453 (Ginsburg, J., dissenting) (citation omitted).

the *Erie* Court, that the Court did not have the authority to make substantive law that could overcome state legislation.[184]

Justice Ginsburg identified section 901(b) as substantive rather than procedural by examining its legislative history. She wrote,

> *[S]uits seeking statutory damages are arguably* best *suited to the class device* because individual proof of actual damages is unnecessary. *New York's decision instead to block class-action proceedings for statutory damages therefore makes scant sense, except as a means to a manifestly substantive end*: Limiting a defendant's liability in a single lawsuit in order to prevent the exorbitant inflation of penalties-remedies the New York Legislature created with individual suits in mind.[185]

The nature of damages in class actions renders them inherently substantive. Justice Ginsburg pointed out that statutory damages pose a particularly unique problem for defendants in class actions: "When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury."[186] Indeed, Justice Scalia's formalistic reading of the procedural aspects of Rule 23 ignores the substantive realities of class actions, which states intend to regulate through various rules.[187] For example, Justice Scalia failed to acknowledge "the monumental pressure that class certification imposes on defendants to settle—a dominant factor in the practical dynamics of class litigation—or the decades of efforts by courts . . . to shape class action practice to avoid compromising important policies bound up in the substantive law."[188] Moreover, Justice Ginsburg pointed out that in *Gasperini*, both Justice Stevens and Justice Scalia indicated that statutory damages were indeed a substantive, rather than a procedural issue.[189] In *Gasperini*, Justice Stevens stated, "A state-law ceiling on allowable damages . . . is a substantive rule of decision that federal courts must apply in

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[184] For a discussion of the *Erie* doctrine, see *supra* Part II.

[185] *Shady Grove*, 130 S. Ct. at 1465 (Ginsburg, J., dissenting) (emphasis added); *see also id.* 1465 n.3 ("[A] class action can result in 'potentially ruinous liability.' A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims." (citation omitted)).

[186] *Id.* at 1465 n.3.

[187] Watkins, *supra* note 125, at 285-86.

[188] Burbank & Wolff, *supra* note 16, at 65 (footnote omitted). For a discussion of CAFA's legislative history and purpose, see *infra* Part IV.A.

[189] *Shady Grove*, 130 S. Ct. at 1472 (Ginsburg, J., dissenting).

diversity cases governed by New York law."[190] Justice Scalia wrote, "State substantive law controls what injuries are compensable and in what amount."[191] Justice Scalia and Justice Stevens's broad, inherently procedural reading of Rule 23 in *Shady Grove* contradicts both the ambiguity surrounding the "superiority" requirement of Rule 23(b)(3)[192] and their former analysis regarding the substantive state interest in determining limitations on damages.[193]

Despite significant precedent that called for accommodating state interests and that defines statutory damages as a substantive state interest, the plurality opinion in *Shady Grove* misappropriated precedent in the *Erie* choice-of-law cases—including *Gasperini*—and stopped short of finding section 901(b) a substantive provision.[194] Even though New York tried to prohibit cases such as *Shady Grove* from proceeding as class actions through section 901(b), the Supreme Court permitted it to proceed in federal court under Rule 23. The Court's decision in *Shady Grove* is problematic in its consequences as well as in its misapplication of precedent. First, it violates the twin aims of *Erie* because it will increase forum shopping and the inequitable distribution of the laws.[195] With the *Shady Grove* decision, the Supreme Court made it easier to pursue a class action in federal court sitting in diversity than in the state court of New York, whose legislature created the cause of action. Further, the Court's decision perverted the legislative intent behind CAFA, which sought to establish federal jurisdiction to protect defendants in states with laws favoring plaintiffs in pursuing nationwide class actions.[196]

IV. SOLUTION: AMEND CAFA TO PREVENT SIMILAR MISTAKES AND TO UPHOLD STATE SOVEREIGNTY

The *Shady Grove* plurality treated the issue of class actions, sui generis, as solely that of a clash between Rule 23 and section 901(b). However, the opinion peculiarly ignores

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[190] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 439-40 (1996) (Stevens, J., dissenting); *see Shady Grove*, 130 S. Ct. at 1472 (Ginsburg, J., dissenting).

[191] *Gasperini*, 518 U.S. at 464 (Scalia, J., dissenting); *see Shady Grove*, 130 S. Ct. at 1472 (Ginsburg, J., dissenting).

[192] FED. R. CIV. P. 23(b)(3). For the full text of Rule 23, see *supra* note 9.

[193] *See supra* notes 45-48 and accompanying text.

[194] For a discussion of Scalia's interpretation of section 901(b) as procedural, see *supra* Part III.A.

[195] For a discussion of the *Erie* doctrine, see *supra* Part II.

[196] For a discussion of CAFA's legislative history and purpose, see *infra* Part IV.A.

CAFA, the law that allowed the case to proceed in federal court in the first place. While the interest owed to Shady Grove was only about $500, Shady Grove was able to pursue its claim in New York federal court as a class action under CAFA's provision that permits claims to be brought in federal courts as long as minimum diversity is met, the class contains at least one hundred members, and the amount in controversy aggregates to at least $5 million.[197] Although Congress enacted CAFA to curb abusive practices pursued by some plaintiffs' lawyers in class-action friendly states, the *Shady Grove* decision completely undermines both the legislative intent behind CAFA and the federalism principles embodied in the "twin aims" of *Erie*. Therefore, Congress should amend CAFA (which already contains several carve-outs that incorporate considerations of local interests) in order to ensure that any class action brought in federal court could also be maintained in the forum's state courts.

A. CAFA Legislative History

Congress enacted CAFA in 2005 in "response to the perceived evils of damage class actions run amok."[198] Between the 1970s and 1990s, plaintiffs increasingly sued corporate defendants for damages,[199] and class actions increased in both federal and state courts as "[b]road rules of personal jurisdiction allowed plaintiffs to sue most national corporations in state or federal court anywhere in the country. In these early years, many judges—both state and federal—favored the damage class as a useful mechanism for resolving mass torts and consumer claims."[200] By the 1990s, however, state and federal courts began to hand down different results, even though they both applied the same choice-of-law rules.[201] While federal courts increasingly began to move away from nationwide damage class certification, some state courts became more open to class action certification requests.[202] Thus, the decisions issued by federal courts created significant

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[197] 28 U.S.C. § 1332(d)(2) (2006).

[198] York-Erwin, *supra* note 10, at 1802.

[199] *See id.* at 1830 n.1 ("Damage classes seek primarily money damages, rather than injunctive relief, under Rule 23(b)(3)." (internal quotation marks omitted)).

[200] *Id.* at 1802 (footnote omitted).

[201] *Id.*

[202] *Id.*

precedent disfavoring nationwide classes.[203] In turn, plaintiffs' attorneys began to file nationwide class actions in state courts, obviously shopping for the states that had the friendliest certification rules and laws supportive of plaintiffs.[204]

Federal legislators saw the numerous abuses in state courts that result from divergent state rules regarding damage-class certification.[205] States with pro-plaintiff rules and laws were creating precedent in nationwide class actions that bound other states, thus creating federalism concerns by interfering with the sovereignty of other states.[206] Through plaintiff-friendly class action laws, some states had rules that led to bias against out-of-state defendants.[207] Further, certification of a damage class leads defendants to settle,[208] which in turn yields

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[203] *See id*.

[204] *Id.* at 1803; *see also* Burbank, *supra* note 125, at 1508 ("[F]or a time at least, some plaintiff class action lawyers were successful in securing certifications in multistate class actions that could not have been certified under developing federal class action jurisprudence."); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2376 (2008) ("Litigant use of procedure to obtain perceived tactical advantage is most familiar in the much-maligned practice of 'forum shopping.' Strategic choice of forum is utilized by both plaintiffs and defendants. Plaintiffs choose to file their complaint in the forum they think will be most hospitable." (footnote omitted)); Linda J. Silberman, *Choice of Law in National Class Actions: Should CAFA Make a Difference?*, 14 ROGER WILLIAMS U. L. REV. 54, 55 (2009) ("Interstate forum-shopping in class action litigation has occurred for various reasons—most notably a group of 'magnet' state courts that became attractive to plaintiffs' lawyers because of the ease of obtaining certification of a nationwide class.").

[205] Silberman, *supra* note 204, at 56-57 ("The premise underlying CAFA is that the federal courts will be less biased and parochial than the state courts have been with respect to the certification of 'nationwide' classes.").

[206] *See* Cabraser, *supra* note 51, § 9:28(a)(4) (explaining the federalism concerns that gave rise to CAFA's enactment, including the fact that some states were keeping class actions dealing with national interests out of federal court, some state laws exhibited prejudice against out-of-state defendants, and states were making decisions that bound other states); *see also* Burbank, *supra* note 125, at 1511 ("In [an] increasingly entrepreneurial and competitive environment . . . a state court class action [that] was settled first [could have] preclusive effect."); Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1733 (2008) ("Congress explicitly found that abuses in class actions undermine the national judicial system because State and local courts are keeping cases of national importance out of Federal court and making judgments that impose their view of the law on other States and bind the rights of the residents of those States." (internal quotation marks omitted)); Silberman, *supra* note 204, at 66 ("[T]he Senate Report on CAFA noted the trend toward nationwide class actions, which invite one state court to dictate to 49 others what their laws should be on a particular issue, thereby undermining basic federalism principles." (internal quotation marks omitted)); Woolley, *supra* note 175, at 1726 ("The legislative history of CAFA purports to document a number of state court abuses with respect to class suits, including state decisions applying the law of *one* state to claims in nationwide class suits." (footnote omitted)).

[207] Roosevelt III, *supra* note 177, at 53 (citing CAFA § 2(a)(2)).

[208] Silberman, *supra* note 204, at 63 ("[I]t is universally acknowledged that certification of a class is often the catalyst for settlement.").

enormous rewards to plaintiffs' attorneys.[209] Because class actions often lead defendants to settle, plaintiffs' lawyers used this tactic and pursued a strategy of forum shopping to benefit themselves.[210] To address this abusive strategy by plaintiffs' attorneys, CAFA allows defendants to remove class actions to federal court in order to prevent plaintiffs from horizontal forum shopping as a means of pursuing class actions in plaintiff-friendly state jurisdictions.[211]

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[209] For Justice Ginsburg's argument that the pressure put on defendants to settle in class actions is a substantive area of state concern, see *supra* Part III.D; *see also* Cabraser, *supra* note 51, § 9:28(a)(3) (stating that one of the reasons Congress enacted CAFA was to correct the harm or lack of benefit that class members often experience in light of the large fees granted to attorneys and to some plaintiffs at the expense of others); Lee & Willging, *supra* note 206, at 1734 ("A 2003 . . . survey of attorneys in recently terminated class actions yielded a finding that the median recovery in class action settlements was $800,000 and that 75% of the settlements were valued at less than $5.2 million."); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7-8 (1991) ("Over the past decade a number of scholars . . . have recognized that the single most salient characteristic of class . . . litigation is the existence of 'entrepreneurial' plaintiffs' attorneys. Because these attorneys are not subject to monitoring by their putative clients, they operate largely according to their own self-interest, subject only to whatever constraints might be imposed by bar discipline, judicial oversight, and their own sense of ethics and fiduciary responsibilities." (footnote omitted)).

[210] Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. LEGIS. 76, 98 (2009) ("CAFA was intended to respond to perceived abuses in class action practice, specifically to the perceptions that plaintiffs engage in forum shopping and that too many class action settlements are approved in which substantial fees are granted to the plaintiff lawyers at the expense of the plaintiffs."); *see also* Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1593-94 (2008) ("CAFA, like every other major class action development of recent years, was born amidst snide remarks about lawyers' inventing lawsuits and manipulating the system to enrich themselves at others' expense. Politicians and other CAFA proponents called class action lawyers self-interested, unscrupulous, unprincipled, and unaccountable." (footnotes omitted)); Silberman, *supra* note 204, at 55 ("Interstate forum-shopping in class action litigation has occurred for various reasons—most notably a group of 'magnet' state courts that became attractive to plaintiffs' lawyers because of the ease of obtaining certification of a nationwide class."); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2039 (2008) ("As has been extensively analyzed, aggregate litigation can create a serious misalignment between the interests of class counsel and the interests of the absentees they represent, a mismatch that in turn can lead class counsel to sacrifice the welfare of the class in return for personal gain.").

[211] Silberman, *supra* note 204, at 56-57. For a discussion of vertical forum shopping, see *supra* Part II. CAFA's purpose, to prevent horizontal forum shopping, differs from the goal to prevent vertical forum shopping as espoused by the twin aims of *Erie*. Horizontal forum shopping occurs when plaintiffs choose to pursue claims in a particular state that is known for plaintiff-friendly laws. Vertical forum shopping, which the twin aims of *Erie* sought to prevent, occurs when plaintiffs choose to pursue claims in federal court over state court because of friendlier federal laws. *See supra* note 60.

CAFA indicates that class actions invoke substantive concerns.[212] CAFA includes "a litany of complaints about alleged 'abuses of the class action device' that have 'harmed class members with legitimate claims and defendants that have acted responsibly; adversely affected interstate commerce; and undermined public respect for our judicial system.'"[213] CAFA emphasizes that federal courts are the appropriate venue for "interstate cases of national importance under diversity jurisdiction."[214] Thus, CAFA targets multistate or nationwide class actions, where choice-of-law issues can be complex, and the state law often applied would have a preclusive effect, superseding the applicable laws of other states.[215] This effect creates a particular problem when "[t]he court might . . . decide that a single state's law should govern the entire action when, had the claims been brought individually, it would have decided them under multiple different laws."[216] While it may address some of these issues, CAFA can be seen as overinclusive, because "it applies to all state courts, not just problem jurisdictions. Furthermore, it applies to all class actions, not merely to duplicative state and federal class actions. . . . In short, CAFA is directed toward every class action, not just those circumstances in which problems have been identified."[217] *Shady Grove* exemplifies the overinclusive problem inherent in CAFA. *Shady Grove* did not involve multistate litigation, and the limitations on damages set by section 901(b) demonstrate that New York did not have particularly plaintiff-friendly class action laws.

Shady Grove presents a unique problem seemingly not contemplated by the drafters of CAFA. The issue in *Shady*

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[212] Burbank, *supra* note 125, at 1442 ("Even if [class action] rules do not change substantive law directly, they can change the practical enforcement of substantive rights, whether by enabling plaintiffs to sue who would not otherwise be able to do so, or by exercising irresistible pressure on defendants to settle cases that they regard as lacking in merit."); Watkins, *supra* note 125, at 287 ("The class action defies easy classification under the traditional substance-procedure divide. . . . Like statutes of limitations, pleading standards, and other rules of a procedural flavor, class actions have always served purposes beyond docket control.").

[213] Roosevelt III, *supra* note 177, at 52-53 (quoting CAFA § 2(a)(2)).

[214] *Id.* at 53 (quoting CAFA § 2(a)(2)).

[215] *Id.*

[216] *Id.* at 54. For Justice Scalia's assertion that class actions do not alter legal rights but simply offer a means of joinder, see *supra* Part III.A. Justice Scalia's contention conflicts with the reality of the problems inherent in choice of law decisions and federalism concerns that arise in nationwide class actions.

[217] Timothy Kerr, *Cleaning Up One Mess to Create Another: Duplicative Class Actions, Federal Courts' Injunctive Power, and the Class Action Fairness Act of 2005*, 29 HAMLINE L. REV. 217, 255 (2006) (footnote omitted).

Grove involved a straightforward state claim with substantive limitations set by the New York legislature.[218] Therefore, the Eastern District of New York and the Second Circuit both logically concluded that section 901(b) governed the issue and prevented Shady Grove from pursuing its claim as a class action. Of course, Shady Grove was still free to pursue its individual claim for $500 against Allstate in New York state court.[219] Justice Ginsburg wrote, "Congress surely never anticipated that CAFA would make federal courts a mecca for suits of the kind Shady Grove has launched: class actions seeking state-created penalties for claims arising under state law-claims that would be barred from class treatment in the State's own courts."[220] In effect, CAFA has "prevent[ed] states from interpreting and effectuating their laws through their own courts, thus interfering considerably with their sovereignty."[221] The Supreme Court's rigid reading of the "clash" between Rule 23 and section 901(b) perverts the legislative intent behind CAFA, the very provision that gave the *Shady Grove* plaintiffs the option of pursuing their claim in federal court.[222] Moreover, it permits the federal government to supersede a state law, even though the cause of action arose under state law, thus significantly infringing upon state authority as granted in the constitutional system of federalism under the Tenth Amendment.

B. The Twin Aims of Erie *Weigh in Favor of Section 901(b) Over Rule 23*

When deciding an *Erie* choice-of-law case, the crucial threshold question—whether to analyze the case under the

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[218] For a discussion of *Shady Grove*'s background and facts, see *supra* Part I.

[219] *See, e.g.*, Nagareda, *supra* note 175, at 1070-71 ("Insofar as legislative materials reveal, the notion behind § 901(b) is to avoid remedial overkill—the addition of class treatment to a remedy already designed to provide an aggrieved party with a sufficient incentive to pursue a claim, so as to generate a whopping level of potential liability in the aggregate." (citation omitted)).

[220] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1473 (2010) (Ginsburg, J., dissenting).

[221] Kerr, *supra* note 217, at 256; *see also* Justin D. Forlenza, *CAFA and* Erie*: Unconstitutional Consequences?*, 75 FORDHAM L. REV. 1065, 1067 (2006) ("CAFA's practical effect will be to usurp the state judiciary's primary role of creating and developing the substantive law in those areas. Thus, the statute will force federal courts to create and develop substantive federal common law.").

[222] For an explanation of the problems created by plaintiffs who use horizontal forum shopping to pursue class actions, see *supra* Part IV.A. CAFA did not target states like New York that attempted to restrict plaintiffs' abilities to pursue class actions.

Hanna prong or the unguided *Erie* prong—substantially affects the outcome of the decision, as exemplified by *Shady Grove*.[223] By analyzing the issue under the *Hanna* prong, the Court favored the application of federal law, particularly because the Court has never invalidated a Federal Rule of Civil Procedure.[224] On the other hand, if the Court had followed the unguided *Erie* prong, like Justice Ginsburg, it most likely would have permitted Rule 23 and section 901(b) to coexist and would have applied the state rule in order to uphold the twin aims of *Erie*.[225] "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)."[226]

All nine justices pointed out that the *Shady Grove* decision would encourage vertical forum shopping, a violation of the "twin aims" of *Erie*.[227] Nonetheless, Justice Scalia stated, "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."[228] Further, Justice Scalia wrote,

> [Forum shopping] is unacceptable when it comes as the consequence of judge-made rules created to fill supposed gaps in positive federal law. For where neither the Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one, state must govern because there can be no other 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.[229]

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[223] *See* Steinman, *supra* note 22, at 1143 ("*Shady Grove* confirms how crucial *Erie*'s threshold question can be.").

[224] For a discussion of the Court's resistance to invalidating a Federal Rule of Civil Procedure, see *supra* Parts II & III.A.

[225] For a discussion of the *Erie* doctrine, see *supra* notes 53-62 and accompanying text.

[226] Steinman, *supra* note 22, at 1143.

[227] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1447 (2010) ("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 1459 (Stevens, J., concurring) (recognizing that class certification "is relevant to the forum shopping considerations that are part of the Rules of Decision Act or *Erie* inquiry"); *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)).

[228] *Id.* at 1448 (citations omitted) (quoting Hanna v. Plumer, 380 U.S. 460, 473-74 (1965)).

[229] *Id.* at 1447-48 (citations omitted) (internal quotation marks omitted). For a discussion of *Hanna*'s acceptance of forum shopping as somewhat inevitable in a federal system, see *supra* Part II.

In his concurring opinion, Justice Stevens put forward a similar argument, noting that forum shopping considerations would concern the court only if a relevant federal rule did not govern the case.[230] Stevens wrote, "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."[231]

While Justices Scalia and Stevens correctly stated that vertical forum shopping is an inevitable consequence in a supremacy federalist system, their decision in *Shady Grove* to read Rule 23 as directly colliding with section 901(b) precluded the justices from drawing any other conclusion, even though the Eastern District of New York and the Second Circuit did not see such a conflict. If the Supreme Court had instead chosen to read Rule 23 and section 901(b) as coextensive, then it would have been compelled to favor the application of section 901(b) in this case because the case arises under and is limited by state laws and rules. Just as they ignored the legislative intent behind CAFA,[232] the plurality in *Shady Grove* ignored New York's substantive state interests behind section 901(b).[233] By doing so, they made bypass of New York's rules easier for out-of-state plaintiffs through the exploitation of diversity jurisdiction. The *Shady Grove* decision gave non–New York citizen plaintiffs an advantage that New York citizen-plaintiffs would not have in a similar case arising under New York law against a New York defendant. In turn, this ability of non-citizen plaintiffs to vertically forum shop also creates an inequitable distribution of laws in violation of the second aim of *Erie*.[234] Thus, the *Shady Grove* decision turned the purposes of both CAFA and *Erie* on their heads. [235]

C. Adding a "Shady Grove *Carve-Out" to CAFA*

While CAFA permits any defendant to remove a case to federal court where the amount in controversy is at least $5

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[230] *Shady Grove*, 130 S. Ct. at 1459 (Stevens, J., concurring).

[231] *Id.* (citations omitted) (internal quotation marks omitted).

[232] For a discussion of CAFA's legislative intent, see *supra* Part IV.A.

[233] For a discussion of New York's substantive interest behind section 901(b), see *supra* Part III.D.

[234] *See supra* Part II.

[235] *See Shady Grove*, 130 S. Ct. at 1473 (Ginsburg, J., dissenting) ("Congress envisioned fewer—not more—class actions overall [by enacting CAFA]. . . . The policy of *Erie* precludes maintenance in federal court of suits to which the State has closed its courts." (citations omitted) (internal quotation marks omitted)).

million, there are at least 100 class members, and minimum diversity is met,[236] CAFA also contains several exceptions to obtaining federal jurisdiction. "Under CAFA, whether federal jurisdiction is appropriate for class actions brought in the state where all the primary defendants reside depends upon the citizenship of the plaintiff class."[237] First, federal courts do not have jurisdiction when at least two-thirds (aggregated) of the plaintiffs and all primary defendants are citizens of the forum state.[238] When between one-third and two-thirds of class members are citizens of the forum state, federal courts may decline to exercise jurisdiction, based on six factors: (1) interstate or national interest; (2) *whether the claims are under forum state law*; (3) whether the claims have been artfully pled in order to avoid federal court; (4) whether the forum state has a distinct nexus with the class members, the alleged harm, or the defendants; (5) whether plaintiff citizenship in the aggregate points to the forum state rather than another state; and (6) whether any other class actions asserting the same or similar claims on behalf of the same or other persons have been filed in the preceding three years.[239] Additionally,

> *[T]he local controversy exception applies to claims that are unique to the state where the action is filed*. If more than two-thirds of the class plaintiffs are citizens of the forum state, the court's focus will shift to the defendant and the conduct alleged. In order for this exception to apply, at least one defendant from whom significant relief is sought, and whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class must be a citizen of the forum state.[240]

Because CAFA already has a number of carve-outs, including ones that particularly take local controversies into account, Congress should amend it to include an additional carve-out that will avoid a further extension of *Shady Grove*. Congress could simply add an exception that states, as suggested by Justice Ginsburg, that federal courts sitting in diversity do not have jurisdiction over "claims that could not be maintained as a class action in [the relevant] state court."[241] Thus, the integrity of CAFA's purpose would be preserved.

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[236] *See supra* note 21 and accompanying text.

[237] Ellis, *supra* note 210, at 101 (footnote omitted).

[238] 28 U.S.C. § 1332(d)(4)(B) (2006).

[239] *Id.* § 1332(d)(3)(A)-(F) (emphasis added).

[240] Ellis, *supra* note 210, at 102 (emphasis added) (footnotes omitted) (internal quotation marks omitted).

[241] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1473 n.15 (2010) (Ginsburg, J., dissenting).

Federal courts would continue to have jurisdiction in multistate class actions, which is an obvious area of federal concern, given the issue's substantial interstate-commerce questions.[242] Federal courts would still also have the opportunity, through defendants' removal motions, to prevent state courts from handing down opinions that potentially bind other states.[243] The carve-out would continue to protect defendants and plaintiffs from plaintiffs' attorneys seeking to enrich themselves at the expense of the parties. Additionally, such an amendment would improve CAFA by upholding state sovereignty, particularly where, as in *Shady Grove*, both the cause of action and limitations on that cause of action are products of state law.[244] This is an important feature of the proposed amendment, because it respects the limitations on federal power and the rights of states characteristic of our federal system.[245] Further, it respects regional differences and local issues by allowing states to create their own rules as they see fit.[246]

Finally, by furthering such federalism, this amendment would also stay true to the "twin aims of *Erie*."[247] Parties could no longer seek a forum based on the divergence between federal and state rules that could lead to markedly different outcomes when litigating under a state-created right of action. Thus, the carve-out would increase equity between plaintiffs and defendants and between out-of-state and in-state parties. Equitable distribution of the laws and a discouragement of forum shopping increase the uniformity of applicable laws, which in turn makes laws more stable.

By narrowly carving out CAFA to prevent class actions from proceeding in federal court if they could not be

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[242] Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1807 (2008) ("[I]t may . . . [be] justified as a matter of jurisdictional policy to define the exceptions to federal court jurisdiction very narrowly so as to ensure that [CAFA] jurisdiction reaches all cases that are truly multistate.").

[243] *See supra* note 239 and accompanying text.

[244] Watkins, *supra* note 125, at 296 ("Since class actions have special connections to substantive rights, federal courts—already sensitive to substantive rights in interpretation of federal rules—should give class action policies special solicitude; and in deciding questions of certification, they should look to the certification law of the state whose substantive law provides the cause of action.").

[245] Silberman, *supra* note 204, at 63 ("[U]sing aggregation to alter choice of law . . . . ignores the question of what rights the parties have in the first place and it undermines the underlying structure of federalism in the United States where the individual states set the appropriate standards of responsibility and compensation in a particular area.").

[246] For a discussion of the *Erie* doctrine and its relationship to federalism, see *supra* Part II.

[247] For a discussion of the *Erie* doctrine, see *supra* Part II.

maintained in state court, Congress could prevent future misapplication of *Erie* choice-of-law cases in class actions that have federal jurisdiction under CAFA but arise under state law. While the *Shady Grove* plurality seems rightly concerned with preserving the integrity of the Rules Enabling Act, legitimizing the Federal Rules of Civil Procedure and promoting the uniformity of rules and efficiency in federal courts,[248] a CAFA carve-out remains true to all of these interests, because Rule 23 would not change. Further, this limited restriction on CAFA's reach does not create confusion in forcing courts to overly accommodate state rules.[249] Quite simply, a legislative amendment would mean that when deciding class actions arising solely under state law, courts would not have to debate whether a federal provision is in direct collision with a state rule and whether they should follow the *Hanna* or unguided *Erie* prong.[250] They would not have to determine whether the provision at issue is substantive or procedural: the carve-out itself would acknowledge the substantive concerns invoked by the class action mechanism.[251] Instead of being dragged into "*Erie*'s murky waters,"[252] federal courts sitting in diversity would simply look to relevant state law in determining class certification. Thus, the proposed CAFA carve-out simplifies choice of law issues for federal courts sitting in diversity and upholds numerous interests within our system of government, including the legislative purpose behind CAFA—seeking to protect the system of

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[248] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) ("What the dissent's approach achieves is . . . the invalidation of Rule 23 (pursuant to section 2072(b) of the Rules Enabling Act) to the extent that it conflicts with the substantive policies of section 901."); *id.* at 1444 (noting that the substantive or procedural *effect* of a federal rule of civil procedure is not the issue in determining its validity; rather, the issue is whether the rule in itself is procedural); *see also* Kevin M. Clermont, *The Repressible Myth of* Shady Grove, 86 NOTRE DAME L. REV. 987, 1017-18 (2011) (noting that efficiency is served by a uniform system of federal rules that may always be redrafted based on facial challenges rather than as-applied challenges).

[249] For criticisms of the type of confusing balancing tests and over-deference to state courts seemingly advocated by *Gasperini* and *Byrd*, see generally Clermont, *supra* note 248; Richard D. Freer & Thomas Arthur, *The Irrepressible Myth of* Byrd, 44 CREIGHTON L. REV. 61 (2010); Armando Gustavo Hernandez, *The Head-on Collision of* Gasperini *and the Derailment of* Erie*: Exposing the Futility of the Accommodation Doctrine*, 44 CREIGHTON L. REV. 191 (2010); John B. Oakley, *Illuminating* Shady Grove*: A General Approach to Resolving* Erie *Problems*, 44 CREIGHTON L. REV. 79 (2010).

[250] For a discussion of the development of *Erie* jurisprudence, see *supra* Part II.

[251] For a discussion of the substantive interests underlying class actions, see *supra* Parts III.D and IV.A.

[252] *Shady Grove*, 130 S. Ct. at 1437.

federalism—which is inherently implicated in choice-of-law decisions arising under diversity jurisdiction.[253]

CONCLUSION

Based on the controversial 2010 decision in *Shady Grove*, Congress should amend CAFA. The parties in *Shady Grove* were in federal court only because of CAFA's provision granting federal jurisdiction where the amount in controversy exceeds $5 million and minimal diversity is met, despite the fact that plaintiffs were pursuing a cause of action created under and limited by New York law. If Congress amended CAFA to deny federal jurisdiction to class actions that could not be maintained in the state under whose laws the cause of action at issue arose, then it could uphold the purpose of CAFA while at the same time respecting the ability of states to legislate about the substantive issues underlying the use of class actions as a procedural mechanism. This amendment would preserve the system of federalism and respect various precedents acknowledging the substantive nature of statutory damage limitations. Such a division of power enhances the government's ability to address the interests of all of its citizens and maintains the respective realms of sovereignty.

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[253] Silberman, *supra* note 204, at 66 ("[T]he Senate Report on CAFA noted the trend toward nationwide class actions, which invite one state court to dictate to 49 others what their laws should be on a particular issue, thereby undermining basic federalism principles." (internal quotation marks omitted)); *see also supra* Part II (discussing federalism concerns inherent in the *Erie* doctrine).

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