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NOTES

O SONIA, WHERE ART THOU?: WHY JUSTICE SOTOMAYOR'S SILENT "OPINION" SHOULD SERVE AS *SHADY GROVE*'S HOLDING

*Craig T. Cagney**

Since the Supreme Court decided the case in 1938, Erie Railroad Co. v. Tompkins *has limited the application of the Federal Rules of Civil Procedure. By changing shape,* Erie *has eluded the Court's attempts to curb its influence for most of the past century. Only recently, in* Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co., *did the Court manage to apply a Federal Rule over* Erie*'s contrary command to apply state law, but that decision so divided the Court that no one opinion enjoyed the support of five Justices. The resulting confusion among the lower courts over which should serve as* Shady Grove*'s holding has allowed* Erie *to escape again in a new form. This Note argues that these courts have overlooked Justice Sotomayor's hidden "opinion," which decided* Shady Grove *on the narrowest grounds and would have avoided their conflicting decisions.*

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INTRODUCTION

> "But all the while the myth of Erie was abuilding, and with it the belief that it carried some special constitutional magic of a sort that transcended ordinary issues of federal power."[1]

Erie is the trickster of federal civil procedure. In mythology and folktales, the trickster character is a shape-shifting entity that bends and breaks conventional rules to beguile his victims and avoid capture.[2] The nebulous decision in *Erie Railroad Co. v. Tompkins*[3] has similarly confounded the federal courts. It has left them uncertain as to when they may apply their own procedural rules, and has convinced them at times to displace—and even distort—these rules. Meanwhile, *Erie* has eluded the U.S. Supreme Court's attempts to pin down its meaning and remove this uncertainty. Each time, *Erie* furtively returns in a new form to baffle and mislead the courts.[4] The Supreme Court's recent decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[5] which should have eliminated *Erie*'s influence once and for all, is only the most recent episode of futility in this continuing odyssey.

This epic struggle began nearly a century ago. Pursuant to the authority granted in the Rules Enabling Act[6] (Enabling Act), eight Supreme Court Justices approved the Federal Rules of Civil Procedure (Federal Rules) as a uniform replacement for the idiosyncratic state procedural rules that the federal courts had previously used.[7] Soon after these rules were sent to

1. John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 704–05 (1974).

2. *See* STITH THOMPSON, THE FOLKTALE 319–28 (1946). For example, in one folktale from a Native American tribe, the trickster Wemicus attempted to kill his son-in-law, but the son-in-law turned those murderous plans against him. *Id.* at 333. Wemicus avoided his own death by turning into a pike. *Id.*

3. 304 U.S. 64 (1938); *see* Henry P. Chandler, *Some Major Advances in the Federal Judicial System 1922–1947*, 31 F.R.D. 307, 503–04 (1963).

4. *See infra* notes 173–83 and accompanying text.

5. 130 S. Ct. 1431 (2010).

6. Ch. 651, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072 (2006)).

7. *See* Order of Dec. 20, 1937, 302 U.S. 783 (1937); Chandler, *supra* note 3, at 503.

Congress for review, the lone dissenting Justice penned the decision in *Erie*,[8] which would forever thwart their effectiveness.[9] *Erie* held that federal courts must apply certain state laws in cases invoking their diversity jurisdiction.[10] The decision, however, neither identified which state laws must apply, nor clarified whether those laws must also supersede any conflicting Federal Rules.[11] Because of this ambiguity, hesitant courts only applied a Federal Rule in diversity cases after engaging in a "relatively unguided" *Erie* analysis[12] to determine if they were allowed to do so.[13]

In the ensuing years, the Supreme Court failed to reach a consensus on what *Erie* meant and whether its command superseded Congress's authorization of a uniform system of federal procedure.[14] When the Court finally did direct federal courts to apply any Federal Rule that directly conflicted with a contrary state law, it later eviscerated that command by construing the Rules narrowly to avoid any such conflict.[15] The reasoning changed to reflect the Court's various machinations and contortions, but the end result remained the same: *Erie*'s influence survived and federal courts only applied the Federal Rules when *Erie* allowed them to do so.[16]

In what should have been the climactic end to this epic, the *Shady Grove* Court finally applied a Federal Rule despite *Erie*'s contrary command.[17] As in every previous episode, however, *Erie* has changed shape and survived. The Supreme Court could only produce an enigmatic decision that left it unclear how a federal court could ever again apply a Federal Rule

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8. *Erie*, 304 U.S. at 69; *see* Chandler, *supra* note 3, at 503–04 ("Mr. Justice Brandeis never put in writing his reasons for dissenting . . . . It seems probable that they were related to the philosophy of his decision rendered within a few months in April 1938 in Erie Railroad v. Tompkins.").

9. *See* 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, 728–30 (2006) (explaining how *Erie* and the Court's early interpretations of its requirements "combined to threaten the integrity of the Federal Rules"); *id.* at 737 (noting that "conflicts between the Federal Rules and state law . . . [remain] the principal arena in which controversies persist under the *Erie* doctrine").

10. *See infra* notes 47–56 and accompanying text. The federal courts' diversity jurisdiction is invoked when there is complete diversity of citizenship—that is, no plaintiff is from the same state as any defendant—and the dispute involves more than $75,000. *See* 28 U.S.C. § 1332(a) (2006); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (interpreting the predecessor to § 1332(a) as requiring complete diversity of citizenship). It is usually necessary to invoke the court's diversity jurisdiction to bring a claim created by state law, because the federal courts have separate authority to exercise subject matter jurisdiction over federal questions. *See* 28 U.S.C. § 1331 (2006).

11. *See generally* Dudley & Rutherglen, *supra* note 9 (discussing the influence of *Erie* on pre-*Shady Grove* decisions); *infra* notes 58–64 and accompanying text.

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

13. *See, e.g.*, Sampson v. Channell, 110 F.2d 754, 756–57 (1st Cir. 1940) (reasoning that classifications of substance and procedure must be reevaluated in light of *Erie*); Francis v. Humphrey, 25 F. Supp. 1, 2–4 (E.D. Ill. 1938) (reasoning that *Erie* restricts the Federal Rules' scope); Summers v. Hearst, 23 F. Supp. 986, 992 (S.D.N.Y. 1938) (deciding that *Erie* could have no effect on the application of an equity rule, a predecessor to the Federal Rules).

14. *See generally infra* Part I.

15. *See infra* notes 106–29, 155–57 and accompanying text.

16. *See infra* notes 173–91 and accompanying text.

17. *See infra* notes 193, 203 and accompanying text.

against *Erie*'s wishes. A four-Justice plurality and a single concurring Justice formed a tentative majority, but proposed two competing *Erie*-free analyses for determining whether a federal court must apply a Federal Rule or a conflicting state law.[18] The plurality divided even further when Justice Sonia Sotomayor abandoned a portion of Justice Antonin Scalia's opinion.[19]

Shady Grove's labyrinthine decision has produced a new split among the lower courts over whether Justice Scalia's plurality opinion or Justice John Paul Stevens's concurring opinion should serve as the effective holding.[20] Many side with Justice Stevens in continued obeisance to *Erie*'s decree.[21] If one carefully considers Justice Sotomayor's departure from the plurality, however, a hidden third "opinion" emerges from those parts that she joined.[22] This Note argues that this "opinion" actually decided the case on the narrowest grounds, and should serve as the basis for a clearer Federal Rules analysis that protects their uniformity from *Erie*'s disruptive influence.

This Note consists of four parts. Part I briefly examines the Court's *Erie* and Federal Rules jurisprudence to determine the prevailing precedent before *Shady Grove*. Part II presents Justices Scalia's and Stevens's positions in *Shady Grove* and analyzes each to determine whether it could serve as the Court's holding under the *Marks v. United States*[23] doctrine. Part III examines the lower court decisions that have followed both Justices Scalia's and Stevens's tests in factual contexts similar to those in *Shady Grove*. Part IV argues that Justice Sotomayor's decision not to join part of the plurality opinion created a third approach, which would have avoided these lower courts' conflicting decisions and should be followed as *Shady Grove*'s effective holding in the future.

I. THE SUPREME COURT'S *ERIE* ODYSSEY

This part examines how the Federal Rules became entangled with the *Erie* doctrine and discerns which decisions served as the governing precedent before *Shady Grove*. Part I.A begins by analyzing *Erie*, which effectively held that federal courts must apply state substantive law in diversity cases, but mysteriously ignored that holding's implications for the

18. *See infra* Part II.

19. *See infra* note 227 and accompanying text; *see also infra* Part IV.

20. *See infra* Part III.

21. *See infra* Part III.C; *see also infra* notes 369–71 and accompanying text.

22. This Note refers to Parts II.A, B, and D of Justice Scalia's opinion as Justice Sotomayor's "opinion" because she was the only member of the plurality who joined only these parts. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1436 (2010). Although Chief Justice John Roberts and Justices Scalia and Clarence Thomas also joined Parts II.A, B, and D, *see id.*, this Note argues that joining Part II.C indicates that they share a broader understanding of the Enabling Act's authorization, *see infra* Part IV. Reading Parts II.A, B, and D in isolation, as Justice Sotomayor would have, reveals a narrower understanding. *See id.*

23. 430 U.S. 188 (1977). The *Marks* doctrine helps lower courts determine the Court's effective holding "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices." *Id.* at 193.

pending Federal Rules.[24] This part then surveys the Court's episodic attempts to eliminate *Erie*'s disruptive influence over the Federal Rules. Part I.B examines the decisions before *Hanna v. Plumer*,[25] in which the Court only applied a Federal Rule if *Erie* did not require the state law to apply.[26] Part I.C describes *Hanna*'s attempt to abrogate that rule by insisting that the Enabling Act, and not *Erie*, governed the validity of the Federal Rules.[27] Part I.D explains how *Erie* transformed into a "sensitivity to important state interests,"[28] which convinced the Court to interpret the Rules narrowly when *Erie* required state law to apply.[29]

A. Erie *Is Born*

Erie's first trick was its own birth. That decision unpredictably inverted the federal courts' previous practice of applying federal substantive law and state procedural rules.[30] The distinction between substantive and procedural law was the product of two laws originally passed in 1789: the Conformity Act[31] and the Rules of Decision Act.[32] Under both the original Conformity Act, which required "static conformity" with the rules as they existed in 1789, and its more flexible successors, each federal court had to utilize the procedural rules of the state in which it sat.[33] The Rules of Decision Act similarly commanded that "the laws of the several states, except where [federal law] shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States."[34] The Supreme Court in *Swift v. Tyson*,[35] however, construed "the laws of the several states" to mean only state statutes and laws affecting uniquely local matters, but not substantive areas of the common law, like contracts and torts.[36] The Court held that the federal

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24. *See infra* notes 58–64 and accompanying text.
25. 380 U.S. 460 (1965).
26. *See infra* notes 95, 98–99 and accompanying text.
27. *See infra* notes 106–08 and accompanying text.
28. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996); *see infra* notes 119–30, 154–62, 167–72 and accompanying text.
29. *See infra* notes 173–91 and accompanying text.
30. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1036 (1982); Dudley & Rutherglen, *supra* note 9, at 719.
31. Process (Conformity) Act of 1789, ch. 21, 1 Stat. 93 (repealed 1828).
32. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (1789) (current version at 28 U.S.C. § 1652 (2006)).
33. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1002, at 11 (3d ed. 2002 & Supp. 2011); Burbank, *supra* note 30, at 1037; *see also* Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196 (superseded by Federal Rules of Civil Procedure 1938 and repealed 1948) (allowing conformity, "as near as may be," with the current state procedural laws); Conformity Act of 1842, ch. 109, 5 Stat. 499 (superseded 1872) (extending 1828 Act to include states admitted after 1828); Conformity Act of 1828, ch. 68, § 1, 4 Stat. 278 (superseded 1842) (allowing federal courts to conform with procedure used by states in 1828).
34. Ch. 20, § 34, 1 Stat. at 92.
35. 41 U.S. (16 Pet.) 1 (1842).
36. *See id.* at 18; 17A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 124.01[1], at 124-8 (3d ed. 2011).

courts could determine the substantive common law for themselves.[37] Thus, under the Conformity Acts and *Swift*'s interpretation of the Rules of Decision Act, the federal courts applied federal substantive common law and state procedural rules in diversity actions.[38]

This scheme began to change in 1934.[39] Even under the more flexible Conformity Act of 1872,[40] federal courts "continued to operate in an atmosphere of uncertainty and confusion" when determining each state's procedural rules.[41] Reformers pushed for a uniform, national set of rules for all federal courts.[42] In response to this reform movement, Congress passed the Enabling Act[43] in 1934, which authorized the Supreme Court "to prescribe, by general rules . . . the practice and procedure in civil actions at law," but included the crucial limitation that "[s]aid rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."[44] Pursuant to the Enabling Act's authorization, the Supreme Court commissioned an Advisory Committee to draft the new procedural rules in 1935 and adopted the final draft in December 1937.[45] Because the

37. *Swift*, 41 U.S. (16 Pet.) at 18; *see* 17A MOORE, *supra* note 36, § 124.01[1], at 124-8. For example, in the negligence action in *Erie*, both of the lower federal courts decided the proper duty of care for themselves and did not consider Pennsylvania's negligence law. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 70 (1938).

38. *See* Dudley & Rutherglen, *supra* note 9, at 719; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 930 & n.115 (1987).

39. *See* Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072 (2006)) (authorizing the Supreme Court to promulgate federal rules of procedure).

40. Ch. 255, § 5, 17 Stat. 197 (superseded by Federal Rules of Civil Procedure 1938 and repealed 1948); *see* 4 WRIGHT & MILLER, *supra* note 33, § 1002, at 15–16. In addition to allowing conformity to current state procedural rules, the 1872 Act also allowed federal courts to conform "'as near as may be'" to state practices, which the courts used to develop their own procedural rules for the state. *Id.* § 1002, at 16 (quoting Conformity Act of 1872, ch. 255, § 5).

41. 4 WRIGHT & MILLER, *supra* note 33, § 1002, at 16.

42. *Id.*; Burbank, *supra* note 30, at 1035–36, 1040–42; Subrin, *supra* note 38, at 943–44.

43. Ch. 651, 48 Stat. 1064.

44. *Id.* § 1; *see* 4 WRIGHT & MILLER, *supra* note 33, § 1003, at 22 n.11; Burbank, *supra* note 30, at 1095–97. According to Professor Stephen Burbank, the drafters of the Enabling Act did not intend for the "substantive right" restriction to protect state interests. *See id.* at 1112. After all, the Enabling Act was passed while the courts still applied federal substantive law. *See id.* at 1109. The drafters only intended for it to "emphasize a restriction inherent in the use of the word 'procedure' in the first sentence" and not to "perform any additional function." *Id.* at 1108. Professor Burbank argued that the provision only served to clarify the "allocat[ion] [of] lawmaking power between the Supreme Court as rulemaker and Congress," *id.* at 1106, to prevent the Court from using its rulemaking power to create substantive law, *id.* at 1124–25; *cf.* Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1941) (characterizing the Enabling Act's limitation as preventing the Court from altering substantive rights "in the guise of regulating procedure"); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (reasoning that the Constitution does not grant to either Congress or the federal courts the "power to declare substantive rules of common law applicable in a State").

45. *See* 4 WRIGHT & MILLER, *supra* note 33, § 1004, at 25–29; Chandler, *supra* note 3, at 491–98. The long delay was based in part on disagreements on the form of certain rules, such as whether a lawsuit should commence with the filing of a complaint or upon service of process. Chandler, *supra* note 3, at 496–97. The Committee eventually decided that the filing of a complaint should commence a lawsuit based on the majority preference of the committee members. *Id.* at 497; *cf.* FED. R. CIV. P. 3 ("A civil action is commenced by filing

proposed Federal Rules would apply to actions in both law and equity, they had to be sent to Congress for review before they became effective.[46]

While the Federal Rules were under review, the Supreme Court heard the landmark case of *Erie Railroad Co. v. Tompkins*.[47] Even though neither party had argued for the Court to overrule *Swift*, it did just that and unpredictably abandoned that nearly century-old interpretation of the Rules of Decision Act.[48] Harry Tompkins had filed a negligence action in the U.S. District Court for the Southern District of New York against the Erie Railroad, after one of its train doors hit him and severed his arm in Pennsylvania.[49] Tompkins could recover damages against the railroad only if it had owed him a duty of care.[50] Both the district court and the Second Circuit had held that federal common law imposed a duty on the railroad and awarded damages to Tompkins.[51] The Supreme Court surprisingly reversed, holding that "[t]here [was] no federal general common law."[52]

Overruling *Swift*, the Court decided that the "law of the several states" in the Rules of Decision Act referred to both state statutes and state common law.[53] *Swift*, the Court reasoned, had intended to promote a uniform national common law, but in doing so assumed a power to decree a substantive common law that the Constitution did not grant.[54] Furthermore, states had persisted in interpreting the common law for themselves and the resulting discrepancies between state and federal common law afforded diverse litigants an unfair choice that did not exist for litigants who could not invoke the federal courts' diversity jurisdiction.[55] To prevent this disparity, the Court reasoned that federal courts must apply state law where

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a complaint with the court."). The Committee noted, however, that the Enabling Act may not authorize the Federal Rules to toll a state's statute of limitations upon the filing of a complaint. *See* Burbank, *supra* note 30, at 1158; *cf. infra* notes 90–95, 121–29 (discussing the Court's decisions on whether Federal Rule 3 tolls a state's statute of limitations).

46. Chandler, *supra* note 3, at 491, 505.

47. 304 U.S. 64 (1938).

48. *See* Allan Ides, *The Supreme Court and the Law to Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the* Erie *Doctrine and Related Problems*, 163 F.R.D. 19, 24–25 (1995).

49. *Erie*, 304 U.S. at 69; *see* Ides, *supra* note 48, at 19.

50. *Erie*, 304 U.S. at 69.

51. *Id.* at 70.

52. *Id.* at 78; *see* 17A MOORE, *supra* note 36, § 124.01[1], at 124-9.

53. *Erie*, 304 U.S. at 78; *see* 17A MOORE, *supra* note 36, § 124.01[1], at 124-9.

54. *Erie*, 304 U.S. at 74–75, 78–80; *see* 17A MOORE, *supra* note 36, § 124.01[1], at 124-9; Ides, *supra* note 48, at 26. Justice Brandeis suggested that the new interpretation of the Rules of Decision Act was constitutionally mandated, but most commentators regard this reasoning as a non-binding dictum because reinterpreting that statute was sufficient to decide the case. *See* 17A MOORE, *supra* note 36, § 124.01[01], at 124-9 & n.7; Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 278 (1946); Ely, *supra* note 1, at 702–04. Still, Brandeis's language suggested that *Erie* was a constitutional definition of the boundary between federal and state authority and might explain why courts have applied that doctrine to the Federal Rules. *See, e.g.*, Francis v. Humphrey, 25 F. Supp. 1, 4 (E.D. Ill. 1938) (reasoning that a Federal Rule that would affect state substantive rights "is beyond the constitutional power of both the federal courts and of Congress" (citing *Erie*, 304 U.S. at 78)); Ely, *supra* note 1, at 704–06.

55. *Erie*, 304 U.S. at 74–75; *see* 17A MOORE, *supra* note 36, § 124.01[1], at 124-9 to -10; Ides, *supra* note 48, at 26.

neither the Constitution nor a federal statute governed the issues before them.[56]

The decision did not qualify this broad command.[57] Justice Louis Brandeis, *Erie*'s author and the lone dissenter to the Federal Rules' adoption,[58] did not expressly preserve federal authority over procedure, nor did he mention the new, pending Federal Rules.[59] Only Justice Stanley Forman Reed, in a concurring opinion, argued that "[t]he line between procedural and substantive law is hazy but no one doubts federal power over procedure."[60] Perhaps because it reversed *Swift*,[61] or possibly because earlier decisions had ruled that the Rules of Decision Act did not govern procedural law,[62] *Erie* was commonly and quickly understood only to require the application of state substantive law.[63] With only conventional wisdom defining the scope of its authority, *Erie* posed an immediate threat to the Federal Rules, which had no authority under the Enabling Act to affect substantive rights.[64]

B. Erie *Lords over the Federal Rules*

The first challenge to the Rules reached the Supreme Court in 1941 in *Sibbach v. Wilson & Co.*[65] In response to Hertha Sibbach's personal injury suit, Wilson had moved for a court order requiring a physical examination of her injuries, pursuant to Federal Rule 35.[66] Because Illinois law prohibited such mandatory exams,[67] Sibbach refused to comply with the court's order.[68] She claimed that Rule 35 abridged her substantive right to be free from such exams, in violation of the Enabling Act,[69] and that *Erie* required the court to apply Illinois law.[70] Adopting the popular

56. *Erie*, 304 U.S. at 77–78; *see* 17A MOORE, *supra* note 36, § 124.01[1], at 124-9.

57. *See* 17A MOORE, *supra* note 36, § 124.01[1], at 124-10.

58. *See* Order of Dec. 20, 1937, 302 U.S. 783 (1937) (noting Justice Brandeis's dissent); Chandler, *supra* note 3, at 503–04.

59. *See* 17A MOORE, *supra* note 36, § 124.01[1], at 124-10; Ely, *supra* note 1, at 708 & n.80.

60. *Erie*, 304 U.S. at 92 (Reed, J., concurring).

61. *See, e.g.*, Francis v. Humphrey, 25 F. Supp. 1, 2–4 (E.D. Ill. 1938) (explaining that *Erie* had inverted the *Swift* scheme and, "legally speaking, 'turned the world upside down'").

62. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 26 (1825) (holding that the Rules of Decision Act "has no application to the practice of the Court"); Brief for Respondent at 12–15, Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (No. 28), 1910 WL 21010, at *12–15 (citing *Wayman* and asserting that *Erie* governed only substantive law because it only interpreted the Rules of Decision Act).

63. *See Erie*, 304 U.S. at 92 (Reed, J., concurring); 17A MOORE, *supra* note 36, § 124.01[1], at 124-10; Clark, *supra* note 54, at 288; Charles E. Clark, *The Tompkins Case and the Federal Rules*, 1 F.R.D. 417, 417–18 (1940).

64. *See generally* Clark, *supra* note 63 (discussing concerns about *Erie*'s potential impact on the Federal Rules immediately after that case was decided).

65. 312 U.S. 1, 4 (1941); *see* Ides, *supra* note 48, at 29.

66. *Sibbach*, 312 U.S. at 4 (citing FED. R. CIV. P. 35).

67. *Id.* at 7.

68. *Id.* at 10–11.

69. *Id.*

70. *See* Supplemental Brief of Petitioner at 9–10, *Sibbach*, 312 U.S. 1 (No. 28), 1910 WL 21009, at *9–10. Although the Court did not reference *Erie* in its decision, both parties

understanding that *Erie* established a federal procedural–state substantive law scheme,[71] the Supreme Court reasoned that Rule 35 was valid because it "really regulate[d] procedure,—the judicial process for enforcing rights and duties recognized by substantive law."[72] The Enabling Act's limitation on affecting substantive rights, according to the Court, meant only that the Federal Rules must not regulate those rights "in the guise of regulating procedure."[73] It rejected Sibbach's contention that the term "substantive rights" included "important" or "substantial" rights created by state procedural rules.[74] According to the Court, Sibbach's "asserted right . . . [was] no more important than many others enjoyed by litigants . . . before the Federal Rules of Civil Procedure altered and abolished old rights or privileges and created new ones in connection with the conduct of litigation."[75] Because Sibbach had conceded that Rule 35 regulated procedure,[76] the Supreme Court affirmed its validity under the Enabling Act.[77]

Although *Sibbach* tried to confine *Erie*'s scope to those laws regulating substance, it provided little guidance on how to determine which laws regulated substance and which procedure. This led to the predictable conundrum presented in *Guaranty Trust Co. v. York*,[78] in which the Court had to decide whether *Erie* required federal courts to apply a state statute of limitations that New York courts had described as both substantive and procedural.[79] Disregarding the state's characterizations of the statute because they were made in different contexts,[80] the Court reasoned that a law must be substantive "in the aspect that alone is relevant to [the *Erie*] problem": whether "it significantly affect[ed] the result of a litigation" such that "the outcome of the litigation in the federal court [would] be

had cited the case in their briefs as requiring the application of state substantive law, but not federal procedural law. *See id.*; Brief of Respondent at 12–15, *Sibbach*, 312 U.S. 1 (No. 28), 1910 WL 21010, at *12–15.

71. *Sibbach*, 312 U.S. at 10 & n.8 (citing Rules of Decision Act, Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92); *see* Burbank, *supra* note 30, at 1029; Ides, *supra* note 48, at 31.

72. *Sibbach*, 312 U.S. at 14.

73. *Id.* at 10; *see* Ely, *supra* note 1, at 719; Ides, *supra* note 48, at 30–31; *cf. supra* note 44 (discussing original intent of Enabling Act's drafters).

74. *Sibbach*, 312 U.S. at 11; *see* Burbank, *supra* note 30, at 1030.

75. *Sibbach*, 312 U.S. at 14.

76. Sibbach was forced to argue that the issue regulated by Rule 35 was at least partially procedural. If Sibbach had convinced the Court that the matter was purely substantive, the district court would have applied Indiana law under traditional choice-of-law rules because the accident occurred in that state. *See Sibbach*, 312 U.S. at 10–11. Indiana, however, permitted court-ordered examinations. *See id.* at 7. To ensure the federal court would apply Illinois law, which prohibited such exams, Sibbach argued that the issue was substantive for *Erie* purposes, but was procedural "[o]n the question of whether the Indiana or Illinois law govern[ed]." *See* Supplemental Brief of Petitioner, *supra* note 70, at 9–10, 1910 WL 21009, at *9–10.

77. *Sibbach*, 312 U.S. at 14.

78. 326 U.S. 99 (1945).

79. *Id.* at 100–01, 109.

80. *Id.* at 107–09; *see* Ides, *supra* note 48, at 36–37.

substantially the same . . . as it would be if tried in a State court."[81] Because the expiration of a statute of limitations completely barred recovery in a state court, the Supreme Court held that the federal courts must apply it and bar recovery as well.[82]

York's new standard proved too broad, however, and threatened to sweep into federal court any state procedural rule that affected the litigation's outcome.[83] For example, in *Mississippi Publishing Corp. v. Murphree*,[84] a publisher challenged the validity of Federal Rule 4, which authorized statewide service of process, because state rules only permitted service within the same district as the courthouse.[85] Because the case was filed in the U.S. District Court for the Northern District of Mississippi, but the defendant could only be served in the Southern District,[86] a state court would have dismissed the claim for improper service of process.[87] Realizing the absurdity of this result, the Court upheld Rule 4 because the Enabling Act's limitation was "obviously not addressed to such incidental effects as necessarily attend the adoption of the [Federal Rules]."[88] The Rule, the Court decided, regulated only "'the manner and means by which a right to recover . . . is enforced'" and was "[i]n this sense . . . a rule of procedure and not of substantive right."[89]

Mississippi Publishing, however, had little effect in halting *Erie*'s encroachment upon the Federal Rules' authority. In *Ragan v. Merchants Transfer & Warehouse Co.*,[90] decided in 1949, the Court affirmed the dismissal of an action as time barred—even though the complaint was filed in federal court within the two-year statute of limitations period—because the defendant was served only after that period had expired.[91] Although Federal Rule 3 provided that the suit "'commenced by filing a complaint,'"[92] the Kansas statute of limitations provided that a suit commenced only after the plaintiff served the defendant.[93] As in *York*, the Supreme Court reasoned that the federal court must dismiss the action

81. *York*, 326 U.S. at 109; *see* Ides, *supra* note 48, at 37–38; *see also* Dudley & Rutherglen, *supra* note 9, at 729–30 (suggesting that *York* may have created only a new way to discern substance from procedure).

82. *York*, 326 U.S. at 110; *see* Ides, *supra* note 48, at 36.

83. *See* 17A MOORE, *supra* note 36, § 124.01[2], at 124-11; Ides, *supra* note 48, at 38.

84. 326 U.S. 438 (1946).

85. *Id.* at 440, 443. The corporation also argued for improper venue, but the Court confirmed that venue was proper. *Id.* at 441.

86. *Id.* at 440.

87. *See* Robert P. Wasson, Jr., *Resolving Separation of Powers and Federalism Problems Raised by* Erie, *the Rules of Decision Act, and the Rules Enabling Act: A Proposed Solution*, 32 CAP. U. L. REV. 519, 607 (2004) (arguing that *Mississippi Publishing* applied *York* differently than in other *Erie* cases).

88. *Miss. Publ'g*, 326 U.S. at 445 (citing Sibbach v. Wilson & Co., 312 U.S. 1, 11–14 (1941)).

89. *Id.* at 446 (first alteration in original) (quoting Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945)).

90. 337 U.S. 530 (1949).

91. *Id.* at 531, 533–34.

92. *Id.* at 531 n.1 (quoting FED. R. CIV. P. 3).

93. *Id.* at 531 n.4 (citing KAN. STAT. ANN. § 60-308 (1935)).

because the state court would have done so.[94] It refused to consider the state law as merely regulating procedure because the Federal Rule would have provided a "different measure of the cause of action" and could not apply "consistently with *Erie*."[95]

On the same day, in *Cohen v. Beneficial Industrial Loan Corp.*,[96] the Court decided that federal courts in New Jersey could not certify a derivative class action if the plaintiff shareholder had not posted a bond to cover the corporation's costs, as state law required.[97] Although the class action satisfied all of the conditions for certification under Federal Rule 23, the Court reasoned that the New Jersey statute "create[d] a new liability where none existed before" and thus "it would clearly be substantive" if it performed no procedural function.[98] Departing from *Sibbach*'s formalistic rationale, the Court explained that "[r]ules which lawyers call procedural do not always exhaust their effect by regulating procedure."[99] In this way, *Erie* had begun to preempt even Federal Rules that regulated procedure.

C. The Court Banishes Erie

Sixteen years later, the Supreme Court tried to halt *Erie*'s sprawling advance with the decision in *Hanna v. Plumer*.[100] As in *Ragan*, the Court confronted an inconsistency between the technical requirements of the Federal Rules and a state's statute of limitations,[101] although in this instance the injured plaintiff had both filed the complaint and served the defendant within the statute of limitations period.[102] In accordance with the service of process requirements in Federal Rule 4(d)(1), Eddie Hanna left copies of the summons and complaint at the residence of Edward Plumer, the executor of the deceased defendant's estate.[103] Part of Massachusetts's statute of limitations, however, required that an estate's executor be "'served by delivery in hand'" within the statutory period.[104] Relying on *Ragan* and *York*, the U.S. District Court for the District of Massachusetts dismissed Hanna's case as time-barred, and the First Circuit affirmed, reasoning that the in-hand requirement served a substantive purpose.[105]

The Supreme Court reversed because *Erie* could not be "invoked to void a Federal Rule."[106] *Erie* had only interpreted the Rules of Decision Act,

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94. *See id.* at 532; Ides, *supra* note 48, at 44; *cf. York*, 326 U.S. at 110 (dismissing the case because the state court would have).
95. *Ragan*, 337 U.S. at 533–34.
96. 337 U.S. 541 (1949).
97. *Id.* at 544–45 & n.1, 556–57.
98. *Id.* at 555–56.
99. *Id.* at 555.
100. 380 U.S. 460 (1965).
101. *Id.* at 461–62.
102. *Id.* at 461. For this reason, the Court distinguished the case from *Ragan*, deciding that the only issue was whether the manner of service was proper. *See id.* at 462 n.1.
103. *Id.* at 461 (citing FED. R. CIV. P. 4(d)(1)).
104. *Id.* at 462 & n.1 (quoting MASS. GEN. LAWS ch. 197, § 9 (1958)).
105. *Id.* at 462; *see* Ides, *supra* note 48, at 56.
106. *Hanna*, 380 U.S. at 469–70; *see* Ely, *supra* note 1, at 718.

which called for state law in the absence of a federal statute,[107] but the Enabling Act required federal courts to apply a relevant Federal Rule unless the original drafters had "erred in their prima facie judgment that the Rule . . . transgresse[d] neither the terms of the Enabling Act nor constitutional restrictions."[108] The Court held that Federal Rule 4(d)(1) was clearly both constitutional, because Congress could regulate matters "rationally capable of classification as either" substance or procedure,[109] and consistent with the Enabling Act, because it related to court procedure and practice.[110] Thus, Rule 4(d)(1) applied and Plumer was properly served within the statutory period.[111]

Of course, this holding conflicted with *Ragan*, where the Court reasoned that applying the Federal Rule was inconsistent with *Erie*'s command.[112] The *Hanna* Court distinguished *Ragan* as an instance where "the scope of the Federal Rule was not as broad as the losing party urged" and thus the Rule did not govern the issue before the Court.[113] In *Hanna*, the conflict was "unavoidable" because "Rule 4(d)(1) sa[id]—implicitly, but with unmistakable clarity—that in-hand service [was] not required in federal courts."[114] Therefore, the Rule was on point and *Erie* had no authority to dictate what law applied.[115]

Hoping to further restrain *Erie*, the Court proceeded to examine which law would have applied under that doctrine, even though its Enabling Act interpretation was sufficient to decide the case.[116] The Court clarified that *York* did not require federal courts to duplicate the result in state courts,[117]

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107. *See Hanna*, 380 U.S. at 471–72 (noting that *Erie* only required application of state law in the absence of a constitutional provision or federal statute); Ely, *supra* note 1, at 718 (noting that "*Hanna*'s main point" was that "the Rules Enabling Act—and not the Rules of Decision Act construed by *Erie R.R. v. Tompkins*"—governed the Federal Rules' validity).

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

109. *Id.* at 472.

110. *Id.* at 464–65 (citing Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445–46 (1946); Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)); *see* Ides, *supra* note 48, at 56–57; *cf. supra* notes 72–77, 88–89 and accompanying text (discussing *Sibbach*'s and *Mississippi Publishing*'s interpretation of Enabling Act).

111. *Hanna*, 380 U.S. at 474.

112. *See* Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533–34 (1949); Jeffrey L. Rensberger, Hanna*'s Unruly Family: An Opinion for* Shady Grove Orthopedic Associates v. Allstate Insurance, 44 CREIGHTON L. REV. 89, 90–91 (2010) ("[T]he reasoning of *Hanna*—that Rule 3 was 'not as broad' as was asserted—is alien to *Ragan* itself.").

113. *Hanna*, 380 U.S. at 470 & n.12 (citing Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949)); *see* Ely, *supra* note 1, at 730 (describing the *Hanna* Court as "at great pains" to distinguish *Ragan*).

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

115. *See id.*

116. Ely, *supra* note 1, at 710 ("[The Court] saw fit . . . to add a considered dictum on the question of what law would have been applicable had there been no such Rule and thus a genuine *Erie* problem been presented."); *cf. supra* note 54 (discussing how *Erie*'s unnecessary constitutional reasoning may have led courts to allow *Erie* to preempt the Federal Rules); *infra* notes 372–75 and accompanying text (arguing that dicta in Justice Stevens's opinion in *Shady Grove* led to similarly unintended consequences).

117. *See Hanna*, 380 U.S. at 466–67 (deciding that *York*'s outcome-determinative test was "never intended to serve as a talisman"); *id.* at 468–69 (explaining that outcomes can

but only to apply those state laws that implicated "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[118] Because Massachusetts's in-hand service requirement had not influenced the plaintiff's choice between filing in federal or state court, the Court decided that *Erie* would not have required state law to apply "even if there were no Federal Rule" on point.[119] Ironically, this gratuitous dictum would eventually undo *Hanna*'s efforts. If the state law would not have applied anyway, *Hanna* was consistent with the prevailing rule it intended to eradicate: the Federal Rules only applied when *Erie* did not require state law.[120]

D. Erie *Returns in Disguise*

Although *Hanna* should have implicitly overruled *Ragan*,[121] the trickster *Erie* changed shape and turned *Hanna*'s dictum against it. Just like *Ragan*, *Walker v. Armco Steel Corp.*[122] presented the Supreme Court with a plaintiff who had filed the complaint within the statute of limitations period, according to Federal Rule 3, but had not served the defendant within that time, as required by the state statute.[123] Even though *Hanna*'s holding had abrogated *Ragan*'s reasoning—that the state law must apply because *Erie* prevented the Rule's application—the Court reaffirmed *Ragan* and again decided that the state law must apply.[124] Because *Hanna* had distinguished *Ragan* as an instance where the Federal Rule was not broad enough to control the issue,[125] the Court decided that *Hanna* required federal courts to first determine the Federal Rule's scope.[126] Although cautioning that this first step was not a license to "narrowly construe[] [the Rules] in order to avoid a 'direct collision' with state law,"[127] the Court found no indication

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vary if "the difference between the two rules would be of scant, if any, relevance to the choice of a forum").

118. *Id.* at 468; *see* Ely, *supra* note 1, at 710–13.

119. *Hanna*, 380 U.S. at 466, 469–70; *see* Ides, *supra* note 48, at 58. It is unclear what law would govern if there were no federal law on point and *Erie* did not require federal courts to apply state law. *Compare* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that state law must apply in the absence of an applicable constitutional provision or act of Congress), *with* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001) (holding that, in the absence of any controlling federal law, "federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity").

120. *See, e.g.*, Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 534 (1949) (holding that applying the Federal Rule would violate *Erie*); Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 446 (1946) (holding that a Federal Rule could apply if it did not affect "the rules of decision by which th[e] [federal] court will adjudicate [the state's] rights").

121. *See* Dudley & Rutherglen, *supra* note 9, at 734 & n.129; Ely, *supra* note 1, at 729–32. *See generally* Douglas G. Thompson, *Federal Rule 3 and the Tolling of State Statutes of Limitations in Diversity Cases*, 20 STAN. L. REV. 1281 (1968) (analyzing the impact of *Hanna* on *Ragan*).

122. 446 U.S. 740 (1980).

123. *Id.* at 742–43.

124. *Id.* at 752–53.

125. *Id.*

126. *Id.* at 749–50; *see* Ides, *supra* note 48, at 62.

127. *Walker*, 446 U.S. at 750 n.9.

that Rule 3 was intended to toll statutes of limitations. The Rule only governed the date by which a court calculated the other Rules' procedural deadlines,[128] whereas the state statute of limitations represented substantive decisions about a defendant's freedom from defending stale claims.[129] As there was no conflict, *Erie* governed and demanded the application of the state statute to avoid "an 'inequitable administration' of the law."[130] Thus, *Erie* and the substance-procedure dichotomy returned as the measuring stick of the Rules' scope.

Initially, the Court tried to prevent *Walker*'s new approach from undermining the Rules. In 1987, a unanimous Court in *Burlington Northern Railroad Co. v. Wood*[131] added teeth to *Walker*'s instruction to give the Rules their plain meaning and to avoid narrow constructions.[132] In that case, the defendant had lost at trial, posted a bond to stay enforcement of the judgment, and then lost its subsequent appeal.[133] The Eleventh Circuit then assessed a mandatory penalty against the defendant, pursuant to Alabama law, for staying the judgment to pursue an unsuccessful appeal.[134] Under Federal Rule of Appellate Procedure 38, however, assessing such a penalty was not mandatory; rather, the Courts of Appeals had discretion to assess a penalty if it determined that the appeal was frivolous.[135] The Supreme Court vacated the penalty because the Federal Rule's discretionary provision "unmistakably conflict[ed] with the mandatory provision" of the state statute.[136] Thus, under *Hanna*, the Rule had to apply unless it was unconstitutional or exceeded the Enabling Act's authorization.[137] Although the Enabling Act prohibited the Rules from "'abridg[ing], enlarg[ing] or modify[ing] any substantive right,'"[138] the Court reasoned that Congress's intent to create a uniform system of procedural rules "suggest[ed] that Rules which incidentally affect litigants' substantive rights do not violate this provision if [such effects are] reasonably necessary to maintain the integrity of that system."[139] Without deciding whether the state law was substantive for *Erie* purposes,[140] the Court held that the Enabling Act authorized

128. *Id.* at 750–51; *cf. supra* note 45 (noting the Advisory Committee's uncertainty as to whether the Enabling Act authorizes Federal Rule 3 to toll a statute of limitations).

129. *Walker*, 446 U.S. at 751 (citing Ely, *supra* note 1, at 730–31).

130. *Id.* at 752–53 (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965)).

131. 480 U.S. 1 (1987).

132. *Id.* at 4–5 (citing *Walker*, 446 U.S. at 750 n.9 ("This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law. The Federal Rules should be given their plain meaning.")); *see* Ides, *supra* note 48, at 63–64.

133. *Burlington N.*, 480 U.S. at 2–3; *see* Ides, *supra* note 48, at 63.

134. *Burlington N.*, 480 U.S. at 3; *see* Ides, *supra* note 48, at 63.

135. *Burlington N.*, 480 U.S. at 4; *see* FED. R. APP. P. 38.

136. *Burlington N.*, 480 U.S. at 7.

137. *Id.* at 5; *see* Ides, *supra* note 48, at 64.

138. *Burlington N.*, 480 U.S. at 5 (quoting Rules Enabling Act, 28 U.S.C. § 2072 (1982)); *see* Ides, *supra* note 48, at 64.

139. *Burlington N.*, 480 U.S. at 5; *see* Ides, *supra* note 48, at 64.

140. The Courts of Appeals were divided on whether the state law was substantive. In the decision below, the Eleventh Circuit had decided it was substantive, in reliance on a Fifth Circuit case—decided while the Eleventh Circuit was part of the Fifth Circuit—that

Federal Rule of Appellate Procedure 38 because it could "reasonably be classified as procedural" and "affect[ed] only the process of enforcing litigants' rights."[141]

The Court's subsequent decisions, however, directed the federal courts to do as *Walker* did—not as it said—and narrowly construe the Rules. The Court first moved away from *Burlington Northern* in 1996 with its decision in *Gasperini v. Center for Humanities, Inc.*[142] A jury had awarded William Gasperini $450,000 in compensatory damages for 300 lost photographic slides.[143] Because of the excessive award, the defendant moved for a new trial pursuant to Federal Rule 59, which permitted new trials "'for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States,'" but the U.S. District Court for the Southern District of New York denied the motion.[144] The Second Circuit vacated the judgment, reasoning that *Erie* required federal courts to apply the New York standard of review for new trials[145]—whether the jury award "'deviate[d] materially'" from comparable awards[146]—instead of the federal district courts' traditional "shocks the conscience"[147] or the appellate courts' "abuse of discretion" standards.[148] Applying the "materially deviates" standard itself, the Second Circuit ordered a new trial unless Gasperini would accept a reduced award of $100,000.[149]

The Supreme Court vacated the Second Circuit's decision.[150] Although the majority agreed that New York's "materially deviates" standard must apply under *Erie* because it served a "manifestly substantive" purpose,[151] the standard of review applied by the Courts of Appeals was "'a matter of federal law.'"[152] Only the federal district court could apply the state

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considered the state law a "'non-federal substantive matter.'" *Burlington N.*, 480 U.S. at 6 n.4 (quoting Proctor v. Gissendaner, 587 F.2d 182, 184 (5th Cir. 1979)). After its separation from the Fifth Circuit, the Eleventh Circuit adopted *Gissendaner* as binding precedent. *Id.* The Fifth Circuit, however, explicitly overruled *Gissendaner* in holding that an identical Mississippi statute "confer[red] no substantive right." Affholder, Inc. v. S. Rock, Inc., 746 F.2d 305, 311 (5th Cir. 1984) ("*Proctor v. Gissendaner* no longer express[es] the law of the circuit."). The Supreme Court did not resolve the split. It did, however, suggest that the state law was not substantive because it found *Affholder* "persuasive," *Burlington N.*, 480 U.S. at 6–7, and reasoned that the Federal Rule's choice of a "discretionary procedure" instead of a mandatory one "affect[ed] only the process of enforcing litigants' rights and not the rights themselves," *id.* at 8.

141. *Burlington N.*, 480 U.S. at 8.

142. 518 U.S. 415 (1996).

143. *Id.* at 419–20.

144. *Id.* at 467–68 (Scalia, J., dissenting) (emphasis omitted) (quoting FED. R. CIV. P. 59).

145. *Id.* at 420, 426 (majority opinion).

146. *Id.* at 420, 425 (quoting N.Y. C.P.L.R. 5501(c) (McKinney 1996)).

147. *Id.* at 422.

148. *Id.* at 438.

149. *Id.* at 421, 431.

150. *Id.* at 439.

151. *Id.* at 429–30; *see* Dudley & Rutherglen, *supra* note 9, at 711.

152. *Gasperini*, 518 U.S. at 437 (alteration in original) (quoting Donovan v. Penn Shipping Co., 429 U.S. 648, 649 (1977) (per curiam)); *see* Dudley & Rutherglen, *supra* note 9, at 711. The Court's reasoning relied in part on *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525 (1958). *See Gasperini*, 518 U.S. at 436 n.21 (citing *Byrd*, 356 U.S. at 537). Described by two commentators as "the Rodney Dangerfield of the *Erie*

standard "without disrupting the federal system."[153] The dissent objected because Rule 59 only permitted the district court to apply a standard previously used by "'*the courts of the United States*'"—that is, a federal standard.[154] The majority rejected this interpretation because federal courts must interpret the Federal Rules' scope "with sensitivity to important state interests and regulatory policies."[155] Apparently ignoring *Burlington Northern*, the majority incorrectly observed that the Court had interpreted the Rules to avoid conflict since *Hanna* because the Enabling Act did not authorize the Rules to affect substantive rights.[156] The majority decided that Rule 59 only required a federal court to grant a new trial for a traditional reason, such as excessiveness, but that state law must determine excessiveness.[157] Thus, *Erie* had transformed again into a "sensitivity to important state interests."[158] By invoking the Enabling Act's prohibition against affecting substantive rights,[159] *Gasperini* suggested that *Erie* not only influenced the Rules' scope, but also governed their validity under the Enabling Act.[160]

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doctrine," Richard D. Freer & Thomas C. Arthur, *The Irrepressible Influence of* Byrd, 44 CREIGHTON L. REV. 61, 61 (2010), *Byrd* required federal courts performing an *Erie* analysis to balance the state's interest in applying state law against the countervailing federal interest in allocating court functions, *see Byrd*, 356 U.S. at 536–38. Further discussion of *Byrd* is beyond the scope of this Note, but for an argument that the scheme articulated in *Byrd* explains the Court's inconsistent results and that a majority in *Shady Grove* employed this scheme, see generally Freer & Arthur, *supra*.

153. *Gasperini*, 518 U.S. at 437–38; *see* Dudley & Rutherglen, *supra* note 9, at 710–11. For criticism of this outcome, see generally 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) (criticizing *Gasperini*'s command to accommodate state law as unworkable and arguing for elimination of that doctrine).

154. *Gasperini*, 518 U.S. at 467–68 (Scalia, J., dissenting) (quoting FED. R. CIV. P. 59); *see* Dudley & Rutherglen, *supra* note 9, at 713–14 (arguing that Rule 59 "takes a completely backward-looking view of the power to grant new trials . . . limit[ing] its view entirely to prior federal practice").

155. *Gasperini*, 518 U.S. at 427 n.7 (majority opinion) (citing Walker v. Armco Steel Corp., 446 U.S. 740, 750–52 (1980)).

156. *Id.* at 437 n.22 (citing Rules Enabling Act, 28 U.S.C. § 2072(b) (1994); RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 729–30 (4th ed. 1996)); *see* Dudley & Rutherglen, *supra* note 9, at 714–15 (arguing that the *Gasperini* majority interpreted the Rule narrowly to avoid the Enabling Act's prohibition on affecting substantive rights). *But see* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5, 7 (1987) (holding that Federal Rule of Appellate Procedure 38 "unmistakably conflict[ed]" with the state law and interpreting the Enabling Act to authorize incidental effects on substantive rights).

157. *Gasperini*, 518 U.S. at 437 n.22.

158. *Id.* at 427 n.7.

159. *See id.* at 437 n.22 (citing 28 U.S.C. § 2072(b)).

160. *Compare id.* at 427–28 & n.7 (determining whether the "materially deviates" standard is "'substantive' or 'procedural' for *Erie* purposes" and noting that the Federal Rules should be interpreted "with sensitivity to important state interests"), *with id.* at 437 n.22 (arguing that Federal Rule 59 should be interpreted to avoid conflict with the "materially deviates" standard because the Enabling Act does not authorize the Rules to affect "'any substantive right'" (quoting 28 U.S.C. § 2072(b))). *See generally* Richard D. Freer, *Some Thoughts on the State of* Erie *After* Gasperini, 76 TEX. L. REV. 1637, 1641–44 (1998) (arguing that *Gasperini* "embrace[d] a new general policy regarding interpretation of

By the time of the Court's decision in *Semtek International Inc. v. Lockheed Martin Corp.*[161] in 2001, it had become clear that *Erie* had returned.[162] There, the U.S. District Court for the Central District of California had dismissed Semtek's contract claim because California's two-year statute of limitations had expired.[163] Semtek then filed the same contract claim in a Maryland state court, where the statute of limitations ran for three years.[164] The state trial court dismissed the claim as precluded by the prior dismissal in California because, under Federal Rule 41, the federal court's dismissal "'operate[d] as an adjudication upon the merits.'"[165] California law, however, did not grant preclusive effect to a dismissal on statute of limitations grounds.[166] The Supreme Court reversed the dismissal because Rule 41 would violate both the Enabling Act and *Erie* if it governed the preclusive effect of judgments and extinguished a substantive right that still existed under California law.[167] Deciding that the phrase "on the merits" in Rule 41 was ambiguous,[168] the Court interpreted it to mean only that the same plaintiff could not return to the same federal court with the same claim.[169] With Rule 41 construed narrowly, there was no Federal Rule or federal statute on point.[170] Reasoning that federal law must govern the preclusive effect of a federal judgment, the Court decided the issue as a matter of "federal common law."[171] In accordance with *Erie*, the Court decided that federal common law required the application of state preclusion rules.[172]

Thus, *Erie* had returned in a new shadowy form—or perhaps had never left. Before *Hanna*, the Supreme Court explicitly reasoned that federal courts could not apply the Federal Rules if *Erie* required a contrary state law.[173] After *Hanna*, the Supreme Court still refused to apply the Federal

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the Federal Rules" because "the 'substantive rights' limitation of the [Enabling Act] counsels such sensitive interpretation" (citing 28 U.S.C. § 2072(b))).

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

162. *See id.* at 503–04.

163. *Id.* at 499.

164. *Id.*

165. *Id.* at 501 (quoting FED. R. CIV. P. 41(b)).

166. *See id.* at 500–01.

167. *Id.* at 503–04, 509; *see* Ralph U. Whitten, Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*: Justice Whitten, Nagging in Part and Declaring a Pox on All Houses*, 44 CREIGHTON L. REV. 115, 120 (2010) ("[T]he Court made its clearly tortured interpretation of Rule 41(b) out of fear that the rule would violate the Enabling Act if given a straightforward interpretation and the judgment held claim preclusive.").

168. *Semtek*, 531 U.S. at 501–03. *But see* Dudley & Rutherglen, *supra* note 9, at 722–23 (arguing that the Court exaggerated this ambiguity because all jurisdictions grant preclusive effect to any judgment that the rendering court deems "on the merits").

169. *Semtek*, 531 U.S. at 505–06. *But see* Dudley & Rutherglen, *supra* note 9, at 723 (noting that the Court's interpretation "originated in *Semtek* itself" and has not been used in any other court).

170. *Semtek*, 531 U.S. at 506–08.

171. *Id.*

172. *Id.* at 508–09 (citing Dupasseur v. Rochereau, 88 U.S. (21 Wall.) 130, 135 (1874)); *cf. supra* note 119 and accompanying text (discussing *Hanna*'s suggestion that *Erie* may not require application of state law even in the absence of federal law).

173. *See supra* notes 95, 98–99 and accompanying text.

Rules where *Erie* required state law, but for different reasons.[174] *Hanna* and its progeny had established a separate, two-step Enabling Act analysis, but it was not truly free from *Erie*'s influence.[175] In the first step, federal courts had to determine whether the Federal Rule conflicted with the state law,[176] but *Gasperini* directed the courts to interpret the Rules "with sensitivity to important state interests" and to avoid any conflict with a contrary state law.[177] In other words, they should interpret the Rules to avoid conflicts with *Erie*,[178] because *Erie* governed if the Federal Rules were not broad enough to control the issue.[179]

If there was an unavoidable conflict, the second step required courts to determine whether the Enabling Act authorized the Rule.[180] *Burlington Northern* held that a Federal Rule fell within this authorization if it could "reasonably be classified as procedural," "affect[ed] only the process of enforcing litigants' rights," and had no more than an incidental effect on substantive rights.[181] In that case, however, the Supreme Court never decided which law *Erie* would have required,[182] so it remained possible that *Gasperini*'s and *Semtek*'s suggestion was true: a Federal Rule that would violate *Erie* might also violate the Enabling Act.[183]

In its new form, *Erie* disrupted the Federal Rules more than it had when it explicitly preempted them.[184] For example, before *Gasperini*, Federal Rule 59 only permitted federal courts to use federal standards for granting new trials.[185] Afterwards, not only did federal courts have to apply any substantive state standard—with no guidance on which were substantive[186]—but any federal court also had the option to apply New York's "deviates materially" standard because a "court[] of the United States"[187] had used it to grant a new trial.[188] Similarly, *Semtek*'s decision that Federal Rule 41 had no preclusive effect could frustrate the application of other Rules that implicate claim preclusion.[189] For instance, under the

174. *See supra* notes 128–30, 155–59, 167–72 and accompanying text.
175. *See* Ides, *supra* note 48, at 61–62.
176. *See id.* at 80.
177. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996); *see supra* notes 155–59 and accompanying text.
178. *See supra* notes 130, 151, 167, 172 and accompanying text.
179. *See* Hanna v. Plumer, 380 U.S. 460, 470 (1965).
180. *See id.* at 471; Ides, *supra* note 48, at 80.
181. Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5, 8 (1987) (quoting *Hanna*, 380 U.S. at 472); *see supra* notes 137–41 and accompanying text.
182. *See supra* note 140.
183. *See* Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–04 (2001); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 437 n.22 (1996) (citing Rules Enabling Act, 28 U.S.C. § 2072(b) (1994)); *supra* notes 156, 159–60, 167 and accompanying text.
184. *See* Dudley & Rutherglen, *supra* note 9, at 735–36 (arguing that cases like *Walker*, *Gasperini*, and *Semtek* have created two sets of Federal Rules: one for diversity cases, and one for federal cases); *id.* at 747–48 (concluding that narrow interpretations "compromise[] the entire federal court system").
185. *See id.* at 713.
186. *See id.* at 716.
187. FED. R. CIV. P. 59(a)(1).
188. *See* Dudley & Rutherglen, *supra* note 9, at 717.
189. *See id.* at 724–25.

compulsory counterclaim rule in Federal Rule 13(a), parties must raise certain related counterclaims in the same litigation; if they do not, those parties are barred from raising those claims in subsequent actions.[190] After *Semtek*, parties could probably still raise these claims in states that did not grant those unraised claims preclusive effect.[191] Not only had *Erie* the trickster eluded the Court's control, it had also transformed into a more powerful and confounding force.

II. THE EPIC DECISION IN *SHADY GROVE*

The Supreme Court finally broke the unspoken rule in 2010 in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[192] when it applied a Federal Rule, even though *Erie* would have required the application of state law.[193] Shady Grove had filed a putative class action in the U.S. District Court for the Eastern District of New York seeking to recover the interest that Allstate owed to them and other insurance claimants under New York law.[194] A New York statute requires insurance companies to pay claims within thirty days, or else pay the claim with interest at a fixed rate.[195] Allstate allegedly paid Shady Grove's claim after thirty days, but refused to pay the accrued interest of approximately $500.[196] In the class action, Shady Grove sought to recover approximately $5,000,000 in accrued interest that Allstate allegedly owed to all New York claimants.[197]

Regardless of whether the complaint met the class action requirements set forth in Federal Rule 23,[198] Allstate moved to dismiss it because New York's class action rule, Civil Procedure Law and Rule (C.P.L.R.) 901(b), provides that "'an action to recover a penalty . . . imposed by statute may not be maintained as a class action.'"[199] The district court granted Allstate's motion to dismiss because *Erie* required it to apply C.P.L.R. 901(b).[200] The Second Circuit affirmed,[201] reasoning that C.P.L.R. 901(b)

190. *See* FED. R. CIV. P. 13(a); Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 & n.1 (1974) (interpreting Federal Rule 13(a) in the context of a federal bankruptcy claim).

191. *See* Dudley & Rutherglen, *supra* note 9, at 725.

192. 130 S. Ct. 1431 (2010).

193. *See id.* at 1443 (plurality opinion); *id.* at 1456–57 (Stevens, J., concurring).

194. *Id.* at 1436–37 (plurality opinion).

195. *See id.* at 1436 (citing N.Y. INS. LAW. § 5106(a) (McKinney 2009)).

196. *Id.* at 1436–37.

197. *See id.* at 1437 & n.3; *id.* at 1460 (Ginsburg, J., dissenting) (describing the putative class action as an "attempt to transform a $500 case into a $5,000,000 award").

198. *See* FED. R. CIV. P. 23.

199. *Shady Grove*, 130 S. Ct. at 1436 n.1, 1437 (plurality opinion) (quoting N.Y. C.P.L.R. 901(b) (McKinney 2006)).

200. *Id.* at 1437. Because the lower courts held that N.Y. C.P.L.R. 901(b) prevented them from certifying the class, Shady Grove could only seek $500 in damages, and thus the complaint sought far less than the minimum amount-in-controversy necessary to invoke the federal courts' diversity jurisdiction. *See Shady Grove*, 130 S. Ct. at 1437 & n.3; *cf.* 28 U.S.C. § 1332(a) (2006) (more than $75,000); Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d)(2) (more than $5,000,000 in aggregate).

201. *Shady Grove*, 130 S. Ct. at 1437 (plurality opinion); Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 549 F.3d 137, 146 (2d Cir. 2008).

is substantive because it governs the "remedies [that] may be sought by class action plaintiffs," while Rule 23 does not.[202]

The Supreme Court reversed the Second Circuit's ruling and ordered the district court to apply Federal Rule 23, even though C.P.L.R. 901(b) would have applied under *Erie*.[203] As with each previous episode in the Court's *Erie* odyssey, however, the decision possesses a fatal Achilles' heel that ultimately has allowed *Erie* to escape its restrictions. This time the flaw is a lack of consensus. The Court unanimously agreed on the two-step Enabling Act analysis: first, determine the Rule's scope, and second, if the Rule is on point, determine whether the Enabling Act authorizes the Rule.[204] The four-Justice dissent, however, advocated interpreting Rule 23 "'with sensitivity'" to avoid any conflict with state law, as the lower courts had and as the Supreme Court had in *Gasperini* and *Semtek*.[205] The five-Justice majority disagreed, but wrote opposing plurality and concurring opinions explaining how to determine when the Enabling Act authorizes a Federal Rule to violate *Erie*.[206] Furthermore, Justice Sotomayor parted ways with the rest of the four-Justice plurality on one part of its opinion.[207]

This part analyzes the two opinions that concurred in the *Shady Grove* judgment. Part II.A examines Justice Scalia's plurality opinion, which argued for a broad test that would endorse the Rules' validity in almost all situations. Part II.B discusses Justice Stevens's more nuanced approach,

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202. *Shady Grove*, 549 F.3d at 143.

203. *Shady Grove*, 130 S. Ct. at 1443, 1447–48 (plurality opinion); *id.* at 1459–60 (Stevens, J., concurring).

204. *Id.* at 1437 (plurality opinion); *id.* at 1448 (Stevens, J., concurring); *id.* at 1460–61 (Ginsburg, J., dissenting).

205. *Shady Grove*, 130 S. Ct. at 1463–64, 1465–66, 1473 (Ginsburg, J., dissenting) (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996)). One commentator has suggested that the division between the majority and the dissent can be explained by the two competing views of the class action as either "a sophisticated joinder device" or "a creation that transform[s] the substantive law." Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1942 (2011). Further analysis of Justice Ginsburg's opinion is beyond this Note's scope because no lower court has followed it as the holding, although a few note that Justice Stevens and the four dissenting Justices formed a majority that would preserve the application of some state procedural laws. *See* Godin v. Schencks, 629 F.3d 79, 87 (1st Cir. 2010); *In re* Digital Music Antitrust Litig., No. 06 MD 1780, 2011 WL 2848195, at *18 (S.D.N.Y. July 18, 2011); *In re* Wellbutrin XL Antitrust Litig., 756 F. Supp. 2d 670, 675 (E.D. Pa. 2010); Estate of C.A. v. Grier, 752 F. Supp. 2d 763, 767 (S.D. Tex. 2010). For an in-depth analysis of the dissenting opinion, see Linda S. Mullenix, *Federal Class Actions: A Near-Death Experience in a* Shady Grove, 79 GEO. WASH. L. REV. 448, 477–79 (2011).

206. *See Shady Grove*, 130 S. Ct. at 1436 (plurality opinion); *id.* at 1448 (Stevens, J., concurring).

207. *See id.* at 1436 (plurality opinion) (noting that Justice Sotomayor joined the plurality opinion as to Parts II.A, B, and D, but that only Chief Justice Roberts, and Justices Thomas and Scalia joined Part II.C). Because she did not write a separate opinion, it is unclear precisely why Justice Sotomayor joined only these parts of the plurality's opinion. Based on her line of questioning during oral argument, it appears that Justice Sotomayor joined the plurality because of her concern about "the larger implications for class action practice" and the possibility that "a state could pass a law that said no cause of action could be brought as a class action ever." Mullenix, *supra* note 205, at 466–67. In Part IV, this Note argues that Justice Sotomayor generally agreed with the plurality, but believed the scope of the Enabling Act's authority was narrower than the other three justices did.

which would prevent the Rules from displacing state procedural rules that are "intertwined"[208] with substantive rights. Finally, Part II.C analyzes each opinion under the *Marks v. United States*[209] doctrine, which determines the Court's holding when it fails to reach a majority opinion.

A. Justice Scalia's Opinion

Applying the two-step Enabling Act framework, Justice Scalia began his analysis by determining Rule 23's scope.[210] Because Justice Stevens joined this portion of the plurality opinion, Justice Scalia wrote for the majority when he held that both class action rules "attempt[] to answer the same question."[211] The majority refused to interpret Rule 23 "with sensitivity to important state interests"[212] if that approach means artificially narrowing the Rule's scope to always avoid a conflict.[213] Distinguishing the Court's earlier decision in *Semtek*, the majority decided the command to interpret the Rules "with sensitivity" only applies when the Rule is ambiguous and capable of two possible meanings.[214] Where the Rule is clear, the Court cannot "contort [the Rule's] text" to avoid conflict.[215] The majority rejected the Second Circuit's reasoning that C.P.L.R. 901(b), unlike Rule 23, determines the threshold issue of whether a particular claim was eligible for class treatment.[216] It found no reason to "read Rule 23 as addressing only whether claims made eligible for class treatment by some *other* law should be certified as class actions."[217] "By its terms," the majority decided, Rule 23 sets forth the criteria necessary for proceeding as a class action.[218] Because C.P.L.R. 901(b) sets forth a competing set of criteria, the Court decided that the two plainly conflict.[219]

Having found a conflict, Justice Scalia—writing only for the four-Justice plurality[220]—proceeded to determine whether the Enabling Act authorizes

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208. *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring).

209. 430 U.S. 188 (1977).

210. *Shady Grove*, 130 S. Ct. at 1437 (plurality opinion); *see* Mullenix, *supra* note 205, at 470–71.

211. *Shady Grove*, 130 S. Ct. at 1437 (plurality opinion); *see id.* at 1448 (Stevens, J., concurring) (noting that Justice Stevens joined this part of Justice Scalia's opinion); Mullenix, *supra* note 205, at 471.

212. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7, 438 n.22 (1996); *see Shady Grove*, 130 S. Ct. at 1460 (Ginsburg, J., dissenting).

213. *Shady Grove*, 130 S. Ct. at 1441 & n.7 (plurality opinion).

214. *Id.* at 1441–42 (citing Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–04 (2001)); *see* Freer & Arthur, *supra* note 152, at 74. *But see* Dudley & Rutherglen, *supra* note 9, at 722–23 (arguing that *Semtek* created an artificial ambiguity).

215. *Shady Grove*, 130 S. Ct. at 1442 (plurality opinion) (citing Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.9 (1980) ("This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law.")).

216. *Id.* at 1438; *see* Mullenix, *supra* note 205, at 471.

217. *Shady Grove*, 130 S. Ct. at 1438 (plurality opinion).

218. *Id.* at 1437.

219. *Id.*

220. *Id.* at 1436.

Rule 23.[221] Invoking the original *Sibbach* test, Scalia insisted that a Federal Rule is valid so long as it "'really regulate[s] procedure.'"[222] Under the plurality's test, "the substantive nature of [the state] law, or its substantive purpose, *makes no difference*."[223] In fact, Scalia's test would not consider the nature of the state law at all.[224] Procedural rules invariably affect substantive rights, Scalia reasoned, but the proper test should not depend on whether there is an effect on substantive rights.[225] It should depend on "what the rule itself regulates: [i]f it governs only 'the manner and the means' by which the litigants' rights are enforced," rather than "'the rules of decision by which [the] court will adjudicate [those] rights,'" it falls within the Enabling Act's authorization.[226]

In Part II.C of his opinion, which Justice Sotomayor did not join,[227] Justice Scalia insisted that a Federal Rule that "'really regulates procedure'" can displace even state procedural rules that define the scope of substantive rights.[228] Justice Stevens's concern for the substantive nature of the state law, he argued, "mist[ook] what the Federal Rule *regulates* for its incidental *effects*."[229] Scalia reasoned that it is necessary to ignore the state law and consider only the Federal Rule to prevent the Rules' validity from "turn[ing] on the idiosyncrasies of state law."[230] The Federal Rules cannot be "valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others."[231] Even though Scalia's test would promote the kind of forum shopping that *Erie* prohibits, he argued that such an outcome is the "inevitable (indeed, one might say the intended) result of a uniform system of federal procedure."[232]

Applying this test, the plurality decided that Rule 23 only regulates the federal courts' ability to join claims into a single lawsuit and therefore

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221. *See* Mullenix, *supra* note 205, at 472.

222. *Shady Grove*, 130 S. Ct. at 1442 (plurality opinion) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

223. *Id.* at 1444; *see* Debra Lyn Bassett, *Enabling the Federal Rules*, 44 CREIGHTON L. REV. 7, 19–20 (2010) (arguing that a Rule's validity must be determined at "the time of the Federal Rule's promulgation" to avoid "fishing for ways to undermine the Rules Enabling Act by searching for a substantive impact").

224. *See Shady Grove*, 130 S. Ct at 1445 n.10 (plurality opinion).

225. *Id.* at 1442 (citing Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946)). Scalia cited *Hanna*, *Sibbach*, and *Burlington Northern* as instances in which the Court permitted the Rules to have "some practical effect on the parties' rights." *Id.* at 1442–43 (citing Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 8 (1987); Hanna v. Plumer, 380 U.S. 460, 463–65 (1965); *Sibbach*, 312 U.S. at 14–16).

226. *Id.* at 1442 (plurality opinion) (second and third alterations in original) (quoting *Miss. Publ'g Corp.*, 326 U.S. at 446).

227. *See id.* at 1436.

228. *Id.* at 1446 n.13 (quoting *Sibbach*, 312 U.S. at 14).

229. *Id.* at 1445 n.10.

230. *Id.* at 1445 (citing *Sibbach*, 312 U.S. at 14); *see* Bassett, *supra* note 223, at 25 ("The inquiry is not whether some state provision . . . does or could conflict with the Federal Rule; indeed such an approach would turn the Rules Enabling Act on its head by potentially invalidating any Federal Rule when a state law touches on the same area as that Federal Rule.").

231. *Shady Grove*, 130 S. Ct. at 1444 (plurality opinion).

232. *Id.* at 1448.

really regulates "only the process for enforcing [substantive] rights."[233] Although certifying the class increased the potential damages from $500 to $5,000,000, Rule 23 had no impact on Allstate's substantive liability, Scalia reasoned, because Allstate had the same liability whether the plaintiffs proceeded individually or as a class.[234] The increased likelihood that all of these plaintiffs would actually pursue their claims once the district court certified the class action was "just the sort of 'incidental effec[t]'" that did not violate the Enabling Act.[235] Even if C.P.L.R. 901(b) had established a substantive right to be free from class liability, Scalia argued that Rule 23 could displace it and still fall within the Enabling Act's authorization because it really regulates procedure.[236]

B. Justice Stevens's Opinion

Like Scalia, Justice Stevens began his analysis by determining whether Rule 23 and C.P.L.R. 901(b) conflict.[237] Although he joined the plurality's analysis of this issue, he also articulated a new two-step approach to interpreting the Federal Rules' scope.[238] First, a federal court would determine if it is possible to avoid a conflict "'when [the Rule is] fairly construed,' with 'sensitivity to important state interests.'"[239] Although Stevens agreed with the dissent that the Court should continue to interpret the Rules with sensitivity,[240] he did not agree that this command requires the Court to interpret the Rules to avoid any *Erie* problem or "rewrite the rule[s]."[241] Instead, it meant only that the federal courts should avoid interpretations that create "'significant disuniformity between state and federal courts . . . if the text permits'" the court to do so.[242]

If this first step results in a conflict, in the second step, federal courts should determine whether applying the Federal Rule would "'abridge, enlarge or modify *any* substantive right.'"[243] Justice Stevens argued that Congress had not "prescribe[d] procedural rules that [may] interfere with

233. *Id.* at 1443; *see* Mullenix, *supra* note 205, at 473.

234. *Shady Grove*, 130 S. Ct. at 1443.

235. *Id.* (alteration in original) (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946)).

236. *Id.* at 1444.

237. *Id.* at 1450–51 (Stevens, J., concurring).

238. *Id.* at 1450 (advising federal courts to interpret "what the state law and the federal rule mean" at "both steps of the [Enabling Act] inquiry"); *see id.* at 1451–52 (explaining this process).

239. *Id.* at 1451 (quoting Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4 (1987); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996)). Justice Stevens created strange bedfellows by supporting this single proposition with quotes from both *Burlington Northern* and *Gasperini*. *Cf. supra* note 156 and accompanying text (noting that *Gasperini*'s approach to interpreting the Federal Rules contradicted and apparently ignored *Burlington Northern*'s).

240. *Id.* at 1451 n.5.

241. *Id.* at 1456–57.

242. *Id.* at 1451 n.5 (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 37–38 (1988) (Scalia, J., dissenting)).

243. *Id.* at 1451 (quoting Rules Enabling Act, 28 U.S.C. § 2072(b) (2006)).

state substantive law in any number of respects."[244] The Enabling Act prohibits the Rules from affecting "'*any* substantive right.'"[245] Thus, federal courts must analyze the Federal Rule's "application" to the state law: if a Federal Rule would "effectively" alter a substantive right when applied, it would violate the Enabling Act's authorization.[246] In that situation, the second step "bleed[s] back into the first" and Stevens would require the court to try to craft a "'saving' construction" of the Rule that would not violate the Enabling Act.[247] If such a construction is not possible, "federal courts cannot apply the rule."[248] In support of this proposition, Stevens cited, as a comparison, a statement by former Justices Hugo Black and William O. Douglas that suggested that the Rules "'as applied in given situations might have to be declared invalid.'"[249] Aside from this comparison, Justice Stevens never indicated that courts should invalidate the Rules as applied, but instead instructed them to determine which law applied under *Erie*.[250]

Under Stevens's construction, a Rule would violate the Enabling Act, even if it "displace[s] a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right."[251] Because "'any rule can be said to have . . . substantive effects,'" Stevens would establish a high bar for finding an Enabling Act violation,[252] such that a Rule that is "facially valid" under Justice Scalia's test would only rarely violate Justice Stevens's own test.[253] For Stevens, the "mere possibility" that a Federal Rule affects a state right as applied is insufficient to find a violation; the federal court must have "little doubt."[254] Courts should presume that state laws designed as procedural rules only "reflect[] a judgment about how state courts ought

244. *Id.* at 1449.
245. *Id.* at 1451 (quoting 28 U.S.C. § 2072).
246. *Id.*
247. *Id.* at 1452.
248. *Id.*
249. *Id.* (quoting Statement of Mr. Justice Black and Mr. Justice Douglas, 374 U.S. 865, 870 (1963) [hereinafter Black & Douglas Statement]). Justices Black and Douglas expressed that opinion in a statement urging Congress to amend the Enabling Act and remove the Supreme Court's rulemaking authority so that it could avoid the potential embarrassment of invalidating rules it had approved. *See* Black & Douglas Statement, *supra*, at 869–70.
250. *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring).
251. *Id.*; *see* Mullenix, *supra* note 205, at 474–75 ("Justice Stevens' major point of departure from Justice Scalia's analysis, then, is his observation that, under the Rules Enabling Act, not every rule of federal practice and procedure displaces state law."); *cf.* Freer & Arthur, *supra* note 152, at 75 ("Justice Stevens is the first justice ever to engage in assessing whether state procedural rules—or rules of 'form and mode'—are 'bound up' with the state's definition of rights and obligations.").
252. *Shady Grove*, 130 S. Ct. at 1457 (Stevens, J., concurring) (quoting Ely, *supra* note 1, at 724 n.170) (internal quotation marks omitted); *see* Thomas D. Rowe, Jr., *Sonia, What's a Nice Person like You Doing in Company like That?*, 44 CREIGHTON L. REV. 107, 112 (2010).
253. *Shady Grove*, 130 S. Ct. at 1454 n.10 (Stevens, J., concurring).
254. *Id.* at 1457.

to operate"[255] and should not give any weight to factors relevant to the *Erie* analysis, such as the tendency to promote forum shopping.[256]

Justice Stevens decided that C.P.L.R. 901(b) was not such a procedural rule intertwined with a substantive right.[257] Because 901(b) applies to all claims brought in a New York state court, not just claims created by New York law, it cannot define the scope of a state-created right.[258] According to Justice Stevens, the legislative history "reveal[ed] a classically procedural calibration" of how easily class action claims could be litigated in New York courts.[259] Even if there was a "plausible competing narrative[]" that the rule is also substantive, Justice Stevens would still apply Rule 23 because "there must be more than just a possibility" that the law was substantive.[260]

C. The Holding of a Fragmented Court

According to the doctrine announced in *Marks v. United States*,[261] "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[262] The Supreme Court has noted, however, that this doctrine "'is more easily stated than applied.'"[263] Determining the narrowest opinion in *Shady Grove* is especially difficult because the Court's prior decisions had obeyed the de facto rule that the Federal Rules could apply only if *Erie* did not require the application of state law, and *Shady Grove* broke that rule.[264] This section compares Justice Scalia's and Justice Stevens's opinions to the cases examined in Part I to determine how far each approach departs from the Court's precedent.

According to Justice Scalia, the Enabling Act requires federal courts to consider only the nature of the Federal Rule, not the state law.[265] So long as the Rule really regulates procedure, it is valid and preempts the state law,

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255. *Id.*
256. *See id.* at 1459.
257. *See id.* at 1457, 1459–60; Mullenix, *supra* note 205, at 476.
258. *Shady Grove*, 130 S. Ct. at 1457 (Stevens, J., concurring).
259. *Id.* at 1459.
260. *Id.* at 1459–60.
261. 430 U.S. 188 (1977).
262. *Id.* at 193 (alteration in original) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)).
263. Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (quoting Nichols v. United States, 511 U.S. 738, 745–46 (1994)) (recognizing the difficulty lower courts had in discerning the holding of *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), and choosing to follow Justice Powell's opinion without engaging in the *Marks* analysis).
264. *See supra* notes 90–99, 120, 124–30, 155–58, 167–72 and accompanying text (noting instances in which the Court did not apply a Federal Rule, or interpreted it narrowly, where *Erie* required state law to apply); *supra* notes 192–93, 203 and accompanying text (explaining that *Shady Grove* applied a Federal Rule even though its application would violate *Erie*).
265. *See Shady Grove*, 130 S. Ct. at 1442 (plurality opinion).

regardless of any incidental effect on substantive rights.[266] This test was adapted from *Sibbach* and *Hanna*, and is similar to the Court's controlling precedent in *Burlington Northern*.[267] In both *Sibbach* and *Hanna*, however, the Court had determined that the state law was not substantive, and thus *Erie* did not require the Court to apply it.[268] Although *Burlington Northern* never addressed the substantive nature of the state law, the opinion suggested that the state law was only procedural.[269] Justice Scalia's test departs from this precedent by authorizing a Federal Rule to violate *Erie*'s ban on forum shopping.[270] His insistence that the test would authorize the preemption of a state law, no matter how substantive that law is, departs even further from precedent.[271]

Justice Stevens's test, on the other hand, focuses on the substantive nature of the state law.[272] Under his interpretation of the Enabling Act, federal courts cannot preempt state substantive laws, or state procedural laws "so intertwined" with substantive rights that they define the scope of those rights.[273] If the Federal Rule conflicts with this type of state law, federal courts must attempt a "'saving' construction" of the Rule.[274] This approach is similar to those utilized in *Walker*, *Gasperini*, and *Semtek*, which interpreted the Rules narrowly to avoid conflicts with state laws that were substantive.[275] On that point, Justice Stevens's approach differs only because *Erie* considerations are irrelevant to his analysis.[276] His opinion abandons the Court's precedent, however, when it argues that the federal courts cannot apply Federal Rules that would affect substantive rights as applied to a particular state law and are incapable of a saving construction.[277] Although the Court has interpreted certain Rules to avoid exceeding the Enabling Act's authorization,[278] it has never invalidated a

266. *See id*. at 1442–43.

267. *See* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987); Hanna v. Plumer, 380 U.S. 460, 464–65 (1965); Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941); Bassett, *supra* note 223, at 19–24 (arguing that the plurality test is consistent with *Sibbach*, *Hanna*, and *Burlington Northern*).

268. *See Hanna*, 380 U.S. at 469–70; *Sibbach*, 312 U.S. at 10–11, 13–14 (explaining that "if the right . . . [was] one of substantive law, the Rules of Decision Act required the District Court . . . to apply the [state] law," but holding that the right was not substantive).

269. *See supra* note 140.

270. *Shady Grove*, 130 S. Ct. at 1447–48; *cf.* Hanna v. Plumer, 380 U.S. 460, 468 (1965) (stating that one of the "twin aims of the *Erie* rule" is the "discouragement of forum-shopping").

271. *Shady Grove*, 130 S. Ct. at 1444–46 & nn.10 & 13 (plurality opinion).

272. *See id.* at 1449 (Stevens, J., concurring).

273. *Id*. at 1452.

274. *Id*.

275. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508–09 (2001); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996); Walker v. Armco Steel Corp., 446 U.S. 740, 750–52 (1980); *see also* Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533–34 (1949) (reasoning that applying the Federal Rule would violate *Erie*).

276. *See Shady Grove*, 130 S. Ct. at 1459 (Stevens, J., concurring).

277. *Id*. at 1452.

278. *See, e.g.*, *Semtek*, 531 U.S. at 503–04.

Federal Rule for exceeding that authorization.[279] Therefore, *Shady Grove* presents the lower courts with a difficult choice between two precedent-breaking tests.

III. *ERIE* ESCAPES FROM *SHADY GROVE*

Although the *Shady Grove* Court finally applied a Federal Rule where *Erie* would have required state law, the split opinions leave it unclear when other federal courts may do the same. In fact, federal courts even disagree over whether *Shady Grove* permits them to certify class actions under Federal Rule 23 when a particular state law prohibits class recovery. This part illustrates the lower courts' confusion by examining their divergent decisions in situations that are most similar to those presented in *Shady Grove*.[280]

First, Part III.A explores the split between the Second and Third Circuits over the one issue that *Shady Grove* should have resolved: whether federal courts can certify a class action where N.Y. C.P.L.R. 901(b) prohibits class recovery. Next, Part III.B analyzes those decisions that follow Justice Scalia's reasoning and certify class actions even though state law prohibits class recovery. Finally, Part III.C examines those decisions that follow Justice Stevens's approach and refuse to certify the class action because the state laws are intertwined with substantive rights.

A. *The TCPA Split:* Holster *and* Landsman & Funk

In the best example of the federal courts' confusion after *Shady Grove*, the Second and Third Circuits have split over whether federal courts can certify a class action brought under the federal Telephone Consumer Protection Act[281] (TCPA) when only N.Y. C.P.L.R. 901(b) prohibits class

279. *See Shady Grove*, 130 S. Ct. at 1442 (plurality opinion); 4 WRIGHT & MILLER, *supra* note 33, § 1030, at 166–67 & n.9.

280. The federal courts have applied and interpreted *Shady Grove* in many other contexts. *See, e.g.*, All Plaintiffs v. All Defendants, 645 F.3d 329, 332–35 (5th Cir. 2011) (mandatory distribution of unclaimed checks scheme and Federal Rule 23's discretionary review of settlements); Scottsdale Ins. Co. v. Tolliver, 636 F.3d 1273, 1278 n.5, 1279–80 (10th Cir. 2011) (competing offer of judgment rules); Garman *ex rel.* Garman v. Campbell Cnty. Sch. Dist. No. 1, 630 F.3d 977, 980, 983 (10th Cir. 2010) (competing pleading requirements); Godin v. Schencks, 629 F.3d 79, 81–82, 87–91 (1st Cir. 2010) (state "special motion" for petitioning activity and federal standards for dismissal and summary judgment); Goldberg v. Pac. Indem. Co., 627 F.3d 752, 754–55 (9th Cir. 2010) (competing offer of judgment rules); *In re* Katrina Canal Breaches Litig., 401 F. App'x 884, 887 (5th Cir. 2010) (per curiam) (competing interpretations of class certification requirements); Hogan v. Novartis Pharms. Co., No. 06 Civ. 0260, 2011 WL 1336566, at *2–3 (E.D.N.Y. Apr. 6, 2011) (competing rules of evidence); Willever v. United States, 775 F. Supp. 2d 771, 777–778 (D. Md. 2011) (competing expert report and default judgment rules); Estate of C.A. v. Grier, 752 F. Supp. 2d 763, 766–68 (S.D. Tex. 2010) (competing expert report requirements); Lawler v. Miratek Corp., No. EP-09-CV-252-KC, 2010 WL 2838359, at *2 (W.D. Tex. July 16, 2010) (competing pleading standards). Further analysis of these cases is beyond this Note's scope.

281. 47 U.S.C. § 227 (2006).

recovery.[282] The TCPA provides recipients of unsolicited, commercial faxes the right to recover a $500 statutory penalty for each transmission, "if otherwise permitted by the laws or rules of court of a State."[283] Although the TCPA is a federal statute, the Second and Third Circuits both have reasoned that Congress intended it to function as a state law.[284] Thus, both Circuits have held that federal courts lack federal question jurisdiction over TCPA claims, but retain diversity jurisdiction over them as if they were state law claims.[285]

In *Holster v. Gatco, Inc.*,[286] the U.S. District Court for the Eastern District of New York dismissed a putative class action complaint seeking the TCPA's $500 penalty because N.Y. C.P.L.R. 901(b) prohibits class recovery of statutory penalties.[287] On appeal, the Second Circuit affirmed, reasoning that N.Y. C.P.L.R. 901(b) applied for two reasons:[288] *Erie* required the district court to apply C.P.L.R. 901(b),[289] and even if it did not, the TCPA incorporates C.P.L.R. 901(b) because a class action is not "'otherwise permitted by the . . . rules of court of [New York].'"[290]

The Supreme Court granted certiorari in *Holster*, then vacated and remanded because *Shady Grove* abrogated the Second Circuit's *Erie* holding.[291] In a concurring opinion to the Court's order, Justice Scalia argued that *Shady Grove* probably abrogated the alternative holding as well.[292] If the Second Circuit had interpreted the TCPA to require federal courts "to apply *all* state procedural rules that would effectively bar suit," then Justice Scalia admitted there would be no conflict between the TCPA and Rule 23 because the TCPA would not provide a class remedy.[293] Justice Scalia believed such an interpretation was implausible, however, because it would function as a "partial repeal" of the Enabling Act and require federal courts to apply every minor or technical court rule that might bar suit.[294] Instead, he would interpret the TCPA as authorizing a plaintiff to "bring" a claim so long as state courts permit him to do so.[295] Because *Shady Grove* clarified that C.P.L.R. 901(b) "does not prevent a plaintiff from *bringing* 'an action' . . . but only from 'maintain[ing]' such a suit '*as a class action*,'" New York law permits plaintiffs to bring individual TCPA

282. *See* Landsman & Funk P.C. v. Skinder-Strauss Assocs., 640 F.3d 72, 90–92 & n.27 (3d Cir.), *reh'g en banc granted*, Nos. 09-3105, 09-3532, 09-3793, 2011 WL 1879624 (3d Cir. May 17, 2011); Holster v. Gatco, Inc., 618 F.3d 214, 217–18 (2d Cir. 2010).

283. 47 U.S.C. § 227(b)(3).

284. *See Landsman & Funk*, 640 F.3d at 76; Gottlieb v. Carnival Corp., 436 F.3d 335, 342 (2d Cir. 2006).

285. *See Landsman & Funk*, 640 F.3d at 77–78, 89–90; *Gottlieb*, 436 F.3d at 342.

286. 618 F.3d 214 (2d Cir. 2010).

287. *Id.* at 215–16.

288. *Id.* (citing Bonime v. Avaya, Inc., 547 F.3d 497 (2d Cir. 2008)).

289. *Id.*

290. *Id.* at 215–16 (quoting 47 U.S.C. § 227(b)(3) (2006)).

291. Holster v. Gatco, Inc., 130 S. Ct. 1575, 1575 (2010) (mem.); *see id.* (Scalia, J., concurring).

292. *See id.* at 1575 (Scalia, J., concurring).

293. *Id.* at 1575–76.

294. *Id.*

295. *Id.* at 1576.

claims in federal court and *Shady Grove* authorized federal courts to join those claims in a class action.[296]

On remand, the Second Circuit rejected Justice Scalia's arguments and affirmed its earlier decision.[297] It noted that *Shady Grove* had no effect on its TCPA interpretation and that "nothing prevent[ed] [the court] from saying that Congress intended some, but not necessarily all, state 'rules of court'" to apply.[298] Congress intended to give states some control over the TCPA remedy, it reasoned, and "[t]he ability to define when a class cause of action lies and when it does not is part of that control."[299] Thus, it held that the TCPA incorporates C.P.L.R. 901(b) as a measure of the substantive right to recover and refused to certify a class under *Shady Grove* where the relevant substantive law does not authorize class recovery.[300]

In contrast, a Third Circuit panel decided in *Landsman & Funk P.C. v. Skinder-Strauss Associates*[301] that federal courts can certify TCPA class actions, even if N.Y. C.P.L.R. 901(b) otherwise applies.[302] A majority of the panel believed the fact that the TCPA is a federal statute—not a state law—was determinative.[303] Even if that was insufficient reason to apply Rule 23, the majority alternatively held that, "under *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, federal law regarding class actions would be applied in federal courts."[304] It refused to interpret the "if otherwise permitted" language as "carv[ing] out TCPA claims from Rule 23's ambit."[305] Following the *Shady Grove* plurality, it held that Rule 23 "'is authorized by [the Enabling Act] and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights.'"[306] The dissenting judge did not address the *Shady Grove* issue because he disagreed with the majority's decision that federal courts could exercise diversity jurisdiction over TCPA claims, and therefore believed the court lacked subject matter jurisdiction over the case.[307] After creating a split with the Second Circuit, the Third Circuit has decided to rehear the case en banc.[308]

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296. *Id.* (alteration in original) (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1443 (2010) (plurality opinion)).

297. Holster v. Gatco, Inc., 618 F.3d 214, 217–18 (2d Cir. 2010).

298. *Id.* at 217.

299. *Id.* at 218.

300. *See id.*

301. 640 F.3d 72 (3d Cir.), *reh'g en banc granted*, Nos. 09-3105, 09-3532, 09-3793, 2011 WL 1879624 (3d Cir. May 17, 2011).

302. *Id.* at 90–92 & n.27 (citing 47 U.S.C. § 227(b)(3) (2006)).

303. *Id.* at 91.

304. *Id.* (internal citation omitted) (citing Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010)).

305. *Id.* at 91 n.27 (citing Holster v. Gatco, Inc., 130 S. Ct. 1575, 1575–76 (2010) (Scalia, J., concurring)).

306. *Id.* (quoting *Shady Grove*, 130 S. Ct. at 1444 (plurality opinion)).

307. *Id.* at 108 (Garth, J., dissenting).

308. Landsman & Funk PC v. Skinder-Strauss Assocs., Nos. 09-3105, 09-3532, 09-3793, 2011 WL 1879624 (3d Cir. May 17, 2011). The rehearing likely will focus on whether the court has subject matter jurisdiction over TCPA claims—not the *Shady Grove* issue—because that was the primary issue before the court. *See Landsman & Funk*, 640 F.3d at 74

B. Courts Following Justice Scalia

Like the Third Circuit, two courts have followed the *Shady Grove* plurality's reasoning and certified class actions where state law prohibits class recovery. Neither case, however, explicitly engaged in the *Marks* analysis and determined that the plurality decided the case on the narrowest grounds. This section analyzes those opinions.

In *American Copper & Brass, Inc. v. Lake City Industrial Products, Inc.*,[309] the U.S. District Court for the Western District of Michigan also confronted a TCPA class action complaint.[310] American Copper & Brass had sued Lake City for a "blast fax advertisement" sent to 11,000 individuals, seeking the TCPA's $500 statutory penalty on behalf of each recipient.[311] Lake City moved to dismiss because Michigan Court Rule 3.501 prohibits plaintiffs from maintaining their claims as a class action so long as they seek a statutory penalty.[312] Noting the similarity between Michigan Court Rule 3.501 and the procedural rule at issue in *Shady Grove*, the District Court denied the defendant's motion.[313] Citing the plurality opinion, the court reasoned that *Shady Grove* "held" that Rule 23 is procedural and therefore "'valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights.'"[314] Applying this test, the court held that it can certify a class seeking the TCPA's statutory penalty, even if state court rules do not allow it.[315]

In *In re OnStar Contract Litigation*,[316] the U.S. District Court for the Eastern District of Michigan also appeared to follow the plurality's test.[317] There, plaintiffs brought a class action under the Michigan Consumer Protection Act[318] (MCPA) against four car manufacturers and the OnStar Corporation for fraudulently representing that their navigation systems would function for the duration of the vehicles' lives.[319] The MCPA,

("[A] common question arises in our review of each of the [three] cases [on appeal]: whether . . . federal courts can exercise diversity jurisdiction over private suits brought under the TCPA.").

309. No. 1:09-CV-1162, 2010 WL 2998472 (W.D. Mich. July 28, 2010).

310. *Id.* at *3.

311. *Id.* at *1.

312. *See id.* at *1–2.

313. *Id.* at *3; *cf.* N.Y. C.P.L.R. 901(b) (McKinney 2006); Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1436 (2010) (plurality opinion).

314. *Am. Copper*, 2010 WL 2998472, at *3 (quoting *Shady Grove*, 130 S. Ct. at 1444 (plurality opinion)); *cf.* Landsman & Funk P.C. v. Skinder-Strauss Assocs., 640 F.3d 72, 91 n.27 (3d Cir. 2011) (quoting *Shady Grove*, 130 S. Ct. at 1444 (plurality opinion)). The *American Copper* court did not explain why the plurality's opinion serves as *Shady Grove*'s holding. In fact, it never indicated in its citation that this quoted text only came from a plurality opinion. *See Am. Copper*, 2010 WL 2998472, at *3.

315. *Am. Copper*, 2010 WL 2998472, at *3. The court did not consider whether the TCPA's "if otherwise permitted" language incorporates the state court rule, as the Second and Third Circuits had. *See Landsman & Funk*, 640 F.3d at 90–92 & n.27; Holster v. Gatco, Inc., 618 F.3d 214, 217–18 (2d Cir. 2010).

316. No. 2:07-MDL-01867, 2010 WL 3516691 (E.D. Mich. Aug. 25, 2010).

317. *Id.* at *4.

318. MICH. COMP. LAWS ANN. §§ 445.901–.922 (West 2010).

319. *In re OnStar*, 2010 WL 3516691, at *1–3.

however, only provides for "a class action on behalf of persons residing or injured in this state,"[320] and the plaintiffs were non-residents.[321] After reviewing *Shady Grove*, the court decided that Federal Rule 23 and the MCPA conflict, but certified the class of non-residents anyway.[322] The court provided no further insight into its analysis.[323] Because courts that follow Justice Stevens have held that Rule 23 cannot preempt similar state statutes without violating the Enabling Act,[324] the *In re OnStar* court probably relied on the plurality's opinion that Rule 23 is "valid in all jurisdictions, with respect to all claims," as the *Landsman & Funk* and *American Copper* courts had.[325]

C. Courts Following Justice Stevens

Most courts that perform the *Marks* analysis determine that Justice Stevens's opinion decided *Shady Grove* on the narrowest grounds.[326] Although Justice Stevens carefully articulated a two-step process for interpreting the Federal Rules to avoid conflict, these courts primarily rely on his "so intertwined" language to decide that the state law preempts Federal Rule 23. This section examines these opinions.

In *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*,[327] plaintiffs brought a class action under Section 1345.09(B) of the Ohio Consumer Sales Practice Act (OCSPA), alleging that Whirlpool knowingly sold defective machines.[328] Under section 1345.09(B), if a business engages in any unfair or deceptive trade practice after receiving formal notice that the practice is illegal, victims can recover statutory damages of $200, "but not in a class action."[329] A class action may recover only actual damages.[330] The plaintiffs argued, however, that *Shady Grove* permitted federal courts to certify a class seeking statutory damages under section 1345.09(B).[331]

After determining that section 1345.09(B) and Rule 23 conflict, but without articulating its analysis, the U.S. District Court for the Northern District of Ohio examined Rule 23's validity under both the plurality's and

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320. MICH. COMP. LAWS ANN. § 445.911(3); *see In re OnStar*, 2010 WL 3516691, at *1.
321. *See In re OnStar*, 2010 WL 3516691, at *1–3.
322. *Id.* at *4.
323. *See id.*
324. *See generally infra* Part III.C.
325. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1444 (2010) (plurality opinion); *cf. supra* note 314 and accompanying text (noting *American Copper* and *Landsman & Funk*'s reliance on this part of the plurality opinion).
326. In addition to the cases discussed in this Part, see also *Garman ex rel. Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 983 n.6 (10th Cir. 2010); *Godin v. Schencks*, 629 F.3d 79, 87, 89 (1st Cir. 2010); *Estate of C.A. v. Grier*, 752 F. Supp. 2d 763, 767 (S.D. Tex. 2010).
327. No. 1:08-WP-65000, 2010 WL 2756947 (N.D. Ohio July 12, 2010).
328. *Id.* at *1 (citing Ohio Consumer Sales Practice Act, OHIO REV. CODE ANN. § 1345.09(B) (LexisNexis 2006)).
329. OHIO REV. CODE ANN. § 1345.09(B).
330. *See id.*
331. *See In re Whirlpool*, 2010 WL 2756947, at *1.

Justice Stevens's tests.[332] It decided that Rule 23 is valid under the plurality's test because it really regulates procedure, but invalid under Justice Stevens's test because section 1345.09(B) "purports to define Ohio's substantive rights and remedies by creating a cause of action" and therefore is "intimately interwoven with the substantive remedies available."[333] Unlike N.Y. C.P.L.R. 901(b) in *Shady Grove*, section 1345.09(B) governs only a single Ohio state claim and does not apply to claims arising under other law.[334] Because Rule 23 would alter this substantive Ohio right, the Rule is "ultra vires under the Rules Enabling Act, and must give way to [the state law]."[335]

The U.S. District Court for the Middle District of Tennessee faced a similar conflict in *Bearden v. Honeywell International, Inc.*[336] James and Sheila Bearden filed a class action under the Tennessee Consumer Protection Act,[337] alleging that Honeywell misrepresented how much ozone its electronic air cleaners produced and that the excess ozone had injured Mrs. Bearden.[338] Section 47-18-109(a)(1) of the Tennessee statute authorizes victims of an unfair trade practice to "'bring an action individually to recover actual damages,'"[339] which Tennessee courts interpret as prohibiting class recovery.[340] Following *In re Whirlpool*,[341] the district court held that Justice Stevens's opinion decided *Shady Grove* on the narrowest grounds and is the effective holding.[342] According to the court, Rule 23 could not apply because section 47-18-109(a)(1), unlike the procedural rule in *Shady Grove*, is part of the substantive statute and "so intertwined with that statute's rights and remedies that it functions to define the scope of the substantive rights."[343]

Another court in the Northern District of Ohio addressed *Shady Grove* in *McKinney v. Bayer Corp.*[344] Like the plaintiffs in *In re Whirlpool*, George McKinney had filed a class action under the OCSPA, alleging that Bayer falsely advertised that its multivitamin reduced the risk of prostate cancer,

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332. *Id.* at *2.

333. *Id.* (citing Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1456 (2010) (Stevens, J., concurring)).

334. *Id.* (citing *Shady Grove*, 130 S. Ct. at 1457 (Stevens, J., concurring) (reasoning that C.P.L.R. 901(b) applies to all claims brought in New York courts)).

335. *Id.* (internal citations omitted) (citing 28 U.S.C. § 2072(b) (2006); OHIO REV. CODE ANN. § 1345.09(B) (LexisNexis 2006)).

336. No. 3:09-1035, 2010 WL 3239285, at *10 (M.D. Tenn. Aug. 16, 2010).

337. TENN. CODE ANN. §§ 47-18-101 to -130 (2001).

338. *Bearden*, 2010 WL 3239285, at *1–2.

339. *Id.* at *8 (quoting TENN. CODE ANN. § 47-18-109(a)(1)).

340. *See id.* (citing Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d 301, 308–11 (Tenn. 2008)).

341. *See id.* at *10 & n.8 (citing *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., No. 1:08-WP-65000, 2010 WL 2756947, at *6–7 (N.D. Ohio July 12, 2010)).

342. *Id.* at *10 (citing Marks v. United States, 430 U.S. 188, 193 (1977); United States v. Cundiff, 555 F.3d 200, 208 (6th Cir. 2009)).

343. *Id.*; *cf.* N.Y. C.P.L.R. 901(b) (McKinney 2006); Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1457 (2010) (Stevens, J., concurring).

344. 744 F. Supp. 2d 733, 743–44 (N.D. Ohio 2010).

even though it contained an ingredient that could increase that risk.[345] McKinney only sought actual damages under section 1345.09(A), however, and not statutory damages under section 1345.09(B).[346] Subsection (A) authorizes victims of deceptive trade practices to recover actual damages "in an individual action" even where the defendant had no notice that the practices were illegal,[347] but Ohio courts interpret the OCSPA as authorizing class recovery only under subsection (B), which requires prior notice.[348] Agreeing with *In re Whirlpool* and *Bearden*,[349] the district court decided that Justice Stevens's opinion is the narrowest approach because it permits "some state law provisions addressing class actions" to apply, which the plurality test does not.[350] Following *In re Whirlpool*, the court decided that OCSPA's class action restrictions are substantive and thus Rule 23 "is ultra vires under the Rules Enabling Act" because it cannot apply without affecting Ohio's substantive rights.[351]

The U.S. District Court for the Eastern District of Pennsylvania followed all three of these district courts in *In re Wellbutrin XL Antitrust Litigation*.[352] After *Shady Grove*, the class action plaintiffs moved to add two state law antitrust claims to their complaint against Wellbutrin XL's manufacturers, even though state law prohibits class recovery for both claims.[353] The district court decided that Justice Stevens's opinion serves as *Shady Grove*'s holding because Stevens and the four dissenting Justices

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345. *Id.* at 738–39.

346. *Id.* at 747.

347. OHIO REV. CODE ANN. § 1345.09(A) (LexisNexis 2006).

348. *McKinney*, 744 F. Supp. 2d at 748 (citing Bower v. IBM, Inc., 495 F. Supp. 2d 837, 840 (S.D. Ohio 2007)).

349. *Id.* at 747; *see also* Kline v. Mortg. Elec. Sec. Sys., No. 3:08CV408, 2010 WL 6298271, at *3 (S.D. Ohio Dec. 30, 2010) (following *Whirlpool*, *Bearden*, and *McKinney*). In *Kline*, the court was also persuaded by the fact that the Sixth Circuit had quoted Justice Stevens's opinion with approval. *See Kline*, 2010 WL 6298271, at *3 n.4 (quoting Beal *ex rel.* Putnam v. Walgreen Co., 408 F. App'x 898, 901 n.2 (6th Cir. 2010) (quoting Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1448 (2010) (Stevens, J., concurring))). In a footnote in *Beal*, the Sixth Circuit relied on *Shady Grove* in rejecting the plaintiffs' argument that the district court should decide its summary judgment motion under Tennessee's interpretation of its summary judgment rule, instead of the Sixth Circuit's interpretation of the identical Federal Rule. *Beal*, 408 F. App'x at 901 n.2. Although the Sixth Circuit quoted exclusively from Justice Stevens's opinion, the quoted language was not related to the split between Justices Scalia and Stevens and the Sixth Circuit did not decide that issue. *See id.*

350. *McKinney*, 744 F. Supp. 2d at 747.

351. *Id.* at 749 (citing *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., No. 1:08-WP-65000, 2010 WL 2756947, at *2–3 (N.D. Ohio July 12, 2010)).

352. 756 F. Supp. 2d 670, 675 (E.D. Pa. 2010) (citing *McKinney*, 744 F. Supp. 2d at 746–47; Bearden v. Honeywell Int'l, Inc., No. 3:09-1035, 2010 WL 3239285, at *10 (M.D. Tenn. Aug. 16, 2010); *In re Whirlpool*, 2010 WL 2756947, at *1–3). As courts search for guidance in interpreting *Shady Grove*, many courts simply follow *In re Whirlpool*, *Bearden*, and *McKinney* and conclude that Justice Stevens's opinion serves as *Shady Grove*'s holding. *See, e.g.*, *In re* Digital Music Antitrust Litig., No. 06 MD 1780, 2011 WL 2848195, at *18 (S.D.N.Y. July 18, 2011); Tait v. BSH Home Appliances Corp., No. SACV 10-711 DOC, 2011 WL 1832941, at *8–9 (C.D. Cal. May 12, 2011); *In re* Packaged Ice Antitrust Litig., No. 08-MD-01952, 2011 WL 891169, at *15 (E.D. Mich. Mar. 11, 2011); *Kline*, 2010 WL 6298271, at *3.

353. *In re Wellbutrin*, 756 F. Supp. 2d at 672.

formed a majority "call[ing] for an analysis of the state's substantive rights and remedies."[354] Therefore, the court closely analyzed the substantive nature of the two new claims based on the Illinois Antitrust Act[355] and the New York Donnelly Act.[356]

The Illinois Antitrust Act provides that plaintiffs may sue for damages, but authorizes only the Attorney General to maintain a class action "'in any court of this State.'"[357] The district court rejected the plaintiffs' argument that this limiting language means that the class restriction only applies to actions brought in Illinois state courts, because the statute includes the same language in the private cause of action.[358] If the private right of action is enforceable in other courts, the court reasoned, the class action restrictions are also enforceable.[359] Citing *McKinney*, *Bearden*, and *In re Whirlpool*, the court distinguished these class restrictions from the procedural rule in *Shady Grove*[360] because they apply only to the antitrust statute, appear within the same statutory provision as the substantive right, and serve the substantive purpose of precluding duplicative recoveries.[361] Thus, the restrictions are "'intertwined' with the underlying substantive right," and allowing the plaintiffs to add that claim to the class action "would 'abridge, enlarge or modify' Illinois' substantive rights."[362] Under New York law, however, only N.Y. C.P.L.R. 901(b) prohibits class recovery.[363] Because *Shady Grove* held that C.P.L.R. 901(b) does not define any of New York's substantive rights,[364] the court permitted the plaintiffs to add that claim.[365]

IV. THE HIDDEN HOLDING

Part III's examination of the lower courts' confusion reveals that a new episode in the *Erie* odyssey has begun. Originally, *Erie* guided the federal courts' choice between state substantive law and the Federal Rules.[366] After *Hanna* established an independent Enabling Act analysis, *Erie* transformed into a "sensitivity to important state interests."[367] This sensitivity led the courts to interpret the Federal Rules narrowly to avoid

354. *Id.* at 675.

355. *Id.* at 676–77 (citing Illinois Antitrust Act, 740 ILL. COMP. STAT. ANN. 10/1–12 (West 2010)).

356. *Id.* at 677–80 (citing Donnelly Act, N.Y. GEN. BUS. LAW § 340 (McKinney 2004)).

357. *Id.* at 676 (quoting 740 ILL. COMP. STAT. ANN. 10/7(2)).

358. *Id.*

359. *Id.*

360. *Id.* at 677 (citing McKinney v. Bayer Corp., 744 F. Supp. 2d 733, 745–47 (N.D. Ohio 2010); Bearden v. Honeywell Int'l, Inc., No. 3:09-1035, 2010 WL 3239285, at *10 (M.D. Tenn. Aug. 16, 2010); *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., No. 1:08-WP-65000, 2010 WL 2756947, at *1–3 (N.D. Ohio July 12, 2010)).

361. *Id.*

362. *Id.*; *see also In re* Digital Music Antitrust Litig., No. 06 MD 1780, 2011 WL 2848195, at *17 (S.D.N.Y. July 18, 2011) (following *In re Wellbutrin* and dismissing Illinois antitrust claims).

363. *See In re Wellbutrin*, 756 F. Supp. 2d at 678.

364. *Id.* at 679.

365. *Id.* at 682.

366. *See supra* notes 95, 98–99 and accompanying text.

367. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996).

conflicts with those state laws that *Erie* required them to apply.[368] Now, *Erie* has escaped from *Shady Grove* as the "so intertwined" test.[369] Even though Justice Stevens considered procedural laws so intertwined with substantive rights to be rare,[370] a significant number of federal courts have already found several of these intertwined laws to which the Federal Rules must give way.[371] *Erie* has tricked the federal courts again.

There is hope that this fate can be avoided. Contrary to the prevailing wisdom among the lower federal courts, Justice Stevens's opinion did not decide *Shady Grove* on the narrowest grounds. Those courts determining that his opinion did so fail to realize that the "so intertwined" language was not necessary to decide the case because N.Y. C.P.L.R. 901(b) is not a procedural rule that defines the scope of any substantive rights.[372] That so many courts have used this dictum as a tool to invalidate the Federal Rules,[373] despite the Court's consistent endorsements of their general validity,[374] merely demonstrates how far that part of Justice Stevens's opinion departs from precedent.[375]

Because Justice Scalia also opined on whether the Federal Rules can preempt these intertwined laws in Part II.C of the plurality opinion,[376] only one Justice "'concurred in the judgments on the narrowest grounds'"[377]: Justice Sonia Sotomayor. Although she joined the plurality and did not write a separate opinion, she expressed a narrower opinion than Justice Scalia by declining to join Part II.C.[378] If the federal courts follow the position that Justice Sotomayor took in these parts, it would resolve the lower courts' split and finally prevent *Erie* from undermining the Rules'

368. *See supra* notes 173–91 and accompanying text.

369. *See supra* notes 333–35, 343, 351, 355–65 and accompanying text.

370. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1455 n.13 (2010) (Stevens, J., concurring).

371. *See supra* notes 333–35, 343, 351, 355–65 and accompanying text.

372. *See Shady Grove*, 130 S. Ct. at 1457 (Stevens, J., concurring) ("It is therefore hard to see how § 901(b) could be understood as a rule that, though procedural in form, serves the function of defining New York's rights or remedies."); *infra* note 388 (noting that Justices Scalia and Stevens's disagreement was dicta).

373. *See supra* notes 333–35, 351 and accompanying text.

374. *See, e.g.*, Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 6 (1987) ("Moreover, the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, give the Rules presumptive validity under both the constitutional and statutory constraints." (internal citation omitted) (citing Rules Enabling Act, 28 U.S.C. § 2072 (1982); Hanna v. Plumer, 380 U.S. 460, 471 (1965))); *Hanna*, 380 U.S. at 471 ("[T]he court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, 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.").

375. *See supra* notes 277–79 and accompanying text.

376. *See Shady Grove*, 130 S. Ct. at 1445 (plurality opinion); *supra* note 271 and accompanying text.

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

378. *See Shady Grove*, 130 S. Ct. at 1436.

uniformity. This part examines her "opinion" and argues that it should serve as the holding of *Shady Grove*.

First, Part IV.A examines the parts of the plurality opinion that Justice Sotomayor joined for her hidden "opinion." Next, Part IV.B argues that this position is actually the narrowest departure from precedent. Finally, Part IV.C demonstrates how Justice Sotomayor's test would resolve the conflicts in Part III.

A. Justice Sotomayor's Silent Opinion

Although Justice Sotomayor joined most of the plurality opinion and endorsed the validity of Rules that "'really regulat[e] procedure,'"[379] she did not concur in Part II.C.[380] In that portion, Justice Scalia articulated a broader interpretation of the Enabling Act's authorization than he had in the parts that Justice Sotomayor joined. This Section examines Justice Sotomayor's narrower "opinion" as expressed in Parts II.A, B, and D.

In Part II.C, Justice Scalia insisted that the Enabling Act authorizes a Federal Rule to preempt even a state procedural rule "'so bound up with,' or 'sufficiently intertwined with,' a substantive state-law right or remedy 'that it defines [its] scope.'"[381] According to Justice Scalia, displacing "those 'rare' state substantive laws that are disguised as rules of procedure" is the sort of "incidental effect[]" that the Enabling Act permits.[382] This kind of effect, however, would be broader than those that Justice Sotomayor agreed are permissible. In the other parts of the plurality opinion, "the sort[s] of 'incidental effec[t][s]'" identified as not violating the Enabling Act consist of only "practical effect[s] on the parties' rights," such as requiring litigants to submit to court-ordered physical examinations, imposing sanctions for court-related conduct, and increasing the likelihood that plaintiffs will actually bring their claims in a class action.[383] In those instances, "none [of the Federal Rules] altered the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either."[384] In contrast, Justice Scalia would allow a Federal Rule to "pre-empt a conflicting state rule, however 'bound up' [it] is with substantive law."[385]

Justice Sotomayor did agree with the plurality that "the substantive nature of [the state] law, or its substantive purpose, *makes no difference*" in

379. *Id.* at 1442 (alteration in original) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

380. *See id.* at 1436.

381. *Id.* at 1444–45 (plurality opinion) (internal citations omitted) (quoting the concurrence); *see also id.* at 1446 n.13.

382. *Id.* at 1445 n.10 (emphasis omitted); *see* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1987) ("Rules which incidentally affect litigants' substantive rights do not violate [the Enabling Act's] provision if [such effects are] reasonably necessary to maintain the integrity of that [uniform] system of rules."); Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946) (deciding that the Enabling Act was "obviously not addressed to such incidental effects as necessarily attend the adoption of the [Federal Rules]").

383. *Shady Grove*, 130 S. Ct. at 1442–43 (second alteration in original) (quoting *Miss. Pub'g*, 326 U.S. at 445).

384. *Id.* at 1443.

385. *Id.* at 1446 n.13.

determining whether a Federal Rule falls within the Enabling Act's authorization, but she only agreed that such a standard was necessary to prevent a Rule's validity from turning on whether it "frustrate[s]" the operation of a substantive law.[386] She did not agree that the Enabling Act authorizes a Federal Rule to completely "pre-empt" either a substantive law or a procedural rule "'bound-up'" with substantive rights, as Justice Scalia argued in Part II.C.[387] Justice Sotomayor offered no formal opinion on the latter issue, and providing one was unnecessary because C.P.L.R. 901(b) is not this sort of "intertwined" procedural rule.[388] Nevertheless, her decision not to join Justice Scalia in Part II.C suggests that she did not believe the Enabling Act's authorization is that broad.

Of course, Justice Sotomayor also did not support Justice Stevens's opinion that Federal Rules that would displace these "intertwined" procedural rules are invalid as applied.[389] Instead, she noted with the rest of the plurality that the Court has "rejected every statutory challenge to a Federal Rule that has come before [it]."[390] In lieu of invalidating Rules that might violate the Enabling Act, she endorsed the Court's approach in *Semtek*, where it "*interpret[ed]* [a Federal Rule] in a manner that avoid[ed] overstepping its authorizing statute" because "the Rule [was] susceptible of two meanings—one that would violate [the Enabling Act] and another that would not."[391] Because some commentators have suggested that there really was no ambiguity in the Federal Rule at issue in *Semtek*,[392] it is highly unlikely that a Rule will ever prove incapable of such a saving construction, as even Justice Stevens admitted.[393] Therefore, Justice Sotomayor's position is sufficient to resolve almost all conflicts between the Rules and "intertwined" state procedural laws.

Nevertheless, she offered no opinion on whether the Enabling Act authorizes a Rule's validity in those rare instances where it is incapable of a saving construction.[394] The parts she joined, however, suggest that in those very narrow circumstances, she probably would endorse the Rule's validity under the Enabling Act, so long as the Rule is interpreted to "'really regulate[] procedure,'" because she agreed that a uniform system of procedural rules requires an Enabling Act test that considers only "what the

386. *Id.* at 1444.

387. *Id*. at 1446 n.13.

388. *See Shady Grove*, 130 S. Ct. at 1456 (Stevens, J., concurring) (noting that N.Y. C.P.L.R. 901(b) is not a substantive law disguised as a procedural rule). As the issue was not before the Court, Justices Stevens and Scalia's discussion of this topic was only dicta—albeit "considered dict[a]." Ely, *supra* note 1, at 710 (referring to *Hanna*'s decision to address the alternative *Erie* analysis); *cf. supra* notes 121–30 and accompanying text (explaining how *Hanna*'s "considered dictum" allowed *Erie* to escape its holding).

389. *See Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring); *supra* notes 247–50 and accompanying text.

390. *Shady Grove*, 130 S. Ct. at 1442 (plurality opinion).

391. *Id*. at 1441–42 (internal citation omitted) (citing Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–04 (2001)).

392. *See* Dudley & Rutherglen, *supra* note 9, at 722–23.

393. *See Shady Grove*, 130 S. Ct. at 1454 n.10 (Stevens, J., concurring).

394. *See id*. at 1452.

rule itself regulates."[395] Declining to join Justice Scalia's Part II.C suggests that her version of the test does not categorically authorize the Rules to preempt procedural laws so intertwined with substantive rights where saving constructions obviate the need to do so. Yet, declining to join Justice Stevens's opinion suggests that there might be instances in which the Enabling Act's authorization must expand to allow the Rule to operate when it is "reasonably necessary to maintain the integrity of [the uniform] system of rules."[396] This interpretation of Justice Sotomayor's vote would resolve her seemingly inconsistent views that the Court should "reject[] every statutory challenge to a Federal Rule that . . . come[s] before [it],"[397] but that the Enabling Act may not authorize every effect on a state's substantive rights that can be called "incidental."[398] Thus, Justice Sotomayor's "opinion" endorsed a middle ground that decided *Shady Grove* on the narrowest grounds.

B. The Narrowest Opinion

Justice Sotomayor's approach, as described in Part IV.A, would combine the Court's two competing strains of Enabling Act decisions. Following the *Walker*, *Gasperini*, and *Semtek* line of cases, it would interpret the Rules narrowly where necessary to avoid overstepping the Enabling Act's authorization.[399] In keeping with the reasoning of *Sibbach*, *Hanna*, and *Burlington Northern*, however, it would interpret the Enabling Act broadly to promote the Rules' uniformity.[400] This section explains how Justice Sotomayor's approach would resolve this apparent conflict.

Before *Shady Grove*, *Gasperini* urged the federal courts to interpret the Rules with "sensitivity to important state interests."[401] In practice, this doctrine required the courts to avoid interpreting the Federal Rules in a way that would preempt the state laws that *Erie* required them to apply.[402] Although both the plurality and Justice Stevens rejected this practice,[403] many lower courts note that Justice Stevens and the four dissenting Justices formed a majority that would continue to consider the state law's substantive aspects.[404] Because the plurality believed that "the substantive

395. *Id.* at 1442, 1444 (plurality opinion) ("'If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure . . . .'" (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 13–14 (1941))).

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

397. *Shady Grove*, 130 S. Ct. at 1442 (plurality opinion).

398. *Cf. id.* at 1445 n.10 (arguing in Part C that preempting substantive laws "disguised" as procedural rules is a permissible incidental effect).

399. *See supra* note 275 and accompanying text.

400. *See supra* note 267 and accompanying text.

401. *See supra* note 177 and accompanying text.

402. *See supra* notes 178–79 and accompanying text.

403. *See supra* note 203 and accompanying text.

404. *See, e.g.*, Godin v. Schencks, 629 F.3d 79, 87 (1st Cir. 2010); *In re* Digital Music Antitrust Litig., No. 06 MD 1780, 2011 WL 2848195, at *18 (S.D.N.Y. July 18, 2011); *In re* Wellbutrin XL Antitrust Litig., 756 F. Supp. 2d 670, 675 (E.D. Pa. 2010); Estate of C.A. v. Grier, 752 F. Supp. 2d 763, 767 (S.D. Tex. 2010).

nature of [the state] law, or its substantive purpose, *makes no difference*,"[405] those courts decided that Justice Stevens's opinion struck a balance between the plurality and the dissent that resolved *Shady Grove* on the narrowest grounds.[406]

Although Justice Sotomayor agreed with the plurality on that point, she only agreed that the state law's substantive nature makes no difference during the second step of the Enabling Act inquiry—determining whether the Enabling Act authorizes the Rule.[407] If she agreed with Justice Scalia that the substantive nature of the state law is never relevant, she probably would have joined Part II.C, which took this position.[408] *Gasperini* and *Semtek*, however, had required a "sensitive" interpretation during the first step—determining whether the Federal Rule and the state law directly conflict with each other.[409] Justice Sotomayor agreed that this first step requires federal courts to determine "whether [the state law] concerns a subject separate from the subject of [the Federal Rule]," which necessarily requires consideration of the state law's subject.[410] She also would allow the courts to interpret the Rules "in a manner that avoids overstepping [their] authorizing statute," provided that "the Rule[s] were susceptible of two meanings—one that would violate [the Enabling Act] and another that would not."[411] Because she believed a valid Federal Rule could only be construed as "'really regulat[ing] procedure,'"[412] this ambiguity would exist only if the Rule appears to share the same subject as a state law that regulates substantive rights. If they share the same subject in that instance, the Rule must also regulate substantive rights—or at least, it must not "really" regulate procedure. In those circumstances, Justice Sotomayor indicated a federal court could interpret the Rules "'with sensitivity.'"[413]

The parts that Justice Sotomayor joined cited *Semtek* as a proper example of this kind of interpretation,[414] and that decision serves as a good illustration of her approach to this first step. *Semtek* decided that Federal Rule 41, which provides that certain dismissals are adjudications "'upon the merits,'" does not govern whether such dismissals are entitled to preclusive

405. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1444 (2010) (plurality opinion).

406. *See supra* note 404.

407. *See Shady Grove*, 130 S. Ct. at 1444 (plurality opinion); *supra* note 180 and accompanying text. Because the dissent reasoned that Rule 23 and C.P.L.R. 901(b) do not conflict, it never proposed a test for determining the scope of the Enabling Act's authorization. *See Shady Grove*, 130 S. Ct. at 1469 (Ginsburg, J., dissenting).

408. *See Shady Grove*, 130 S. Ct. at 1445–46 & n.13 (plurality opinion).

409. *See supra* notes 176–77 and accompanying text.

410. *See Shady Grove*, 130 S. Ct. at 1438–39; *supra* notes 211–19 and accompanying text.

411. *Shady Grove*, 130 S. Ct. at 1441 (plurality opinion).

412. *Id.* at 1442 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

413. *See id.* at 1441–42 & n.7 (quoting dissent); *cf.* 4 WRIGHT & MILLER, *supra* note 30, § 1030, at 166 & n.8 ("[I]t is clear that a rule will not be interpreted in a manner that will render it invalid as long as an interpretation that preserves the rule's integrity is available to the court.").

414. *See Shady Grove*, 130 S. Ct. at 1441–42 & n.7 (citing Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–04 (2001)).

effect.[415] Thus, litigants may bring their dismissed claims in another state, and even in a federal court in a different state, so long as state law permits them to do so.[416] The Court reached this conclusion because it believed the phrase "upon the merits" in Rule 41 is ambiguous and thus it avoided an interpretation that would violate the Enabling Act.[417] Professors Earl C. Dudley and George Rutherglen have argued that the phrase is not ambiguous and *Semtek* is the only case that has ever construed it as not granting preclusive effect.[418] In light of Justice Sotomayor's opinion, however, the "ambiguity" in *Semtek* was not in the text of the Rule, but in what the Rule appeared to regulate.[419] Rule 41 appeared to share the same subject as state laws that granted preclusive effect to judgments that were "upon the merits." Those types of state laws regulate the existence of a substantive right: the plaintiff's right to pursue a particular claim. If Rule 41 shares that subject, then it would regulate substantive rights in violation of the Enabling Act.[420] Therefore, the Court found a way to plausibly construe the Rule as only regulating procedure.[421]

This method of interpretation maintains *Gasperini* and *Semtek*'s process of avoiding Enabling Act violations, but alters the focus. Whereas *Gasperini* and *Semtek* considered whether the state law was substantive under *Erie*, Justice Sotomayor would ask whether the Federal Rule would regulate substantive rights if it preempts the state law. If the Federal Rule appears to do so, then the court should limit the Rule's function to regulating procedure.[422] This approach only narrowly departs from *Gasperini* and *Semtek* and is generally consistent with Justice Stevens's approach.[423]

Justice Sotomayor only departs from Justice Stevens with respect to Rules that are incapable of saving constructions.[424] Unlike the plurality, Justice Stevens believed that the Enabling Act prohibits the Federal Rules from having "any" effect on substantive rights as applied—even if the Rules really regulate procedure—and thus prohibits the federal courts from

415. *Semtek*, 531 U.S. at 505–06 (quoting FED. R. CIV. P. 41(b)).

416. *See id.* at 508–09.

417. *See id.* at 503–04.

418. *See* Dudley & Rutherglen, *supra* note 9, at 722–23; *supra* notes 168–69; *see also* Whitten, *supra* note 167, at 120 (describing *Semtek*'s construction of the Federal Rule as a "clearly tortured interpretation").

419. *Compare Shady Grove*, 130 S. Ct. at 1438–39 (plurality opinion) ("[T]he question before us is whether [the state law] concerns a subject separate from the subject of *Rule 23* . . . ."), *with id.* at 1441–42 (citing *Semtek* as an example of an ambiguous rule).

420. *See id.* at 1442.

421. *See supra* note 169 and accompanying text.

422. *See supra* notes 412–13 and accompanying text. In a footnote, Justice Sotomayor joined the plurality's argument against interpreting the Rules narrowly only "to avoid doubt as to [their] validity," but there the plurality only meant that the Rules should not be interpreted to avoid *Erie* violations "since a Federal Rule that fails *Erie*'s forum-shopping test is not *ipso facto* invalid." *Shady Grove*, 130 S. Ct. at 1441 n.7.

423. *Cf. supra* notes 238–47 and accompanying text (discussing Justice Stevens's approach to construing the Federal Rules' scope).

424. *Cf. supra* notes 248–50 and accompanying text (noting Justice Stevens's preference not to apply such Rules).

applying a Rule incapable of a saving construction that avoids the improper effect.[425] He instructed courts to engage instead in an *Erie* analysis to determine which law should apply under the Rules of Decision Act.[426] This approach is unprecedented and problematic.

The Supreme Court has never found that a Rule exceeded the Enabling Act's authorization and thus it has never invalidated a Rule.[427] Although Justice Stevens only suggested that Rules may have to be invalidated as applied,[428] this mere suggestion is problematic because a few lower courts actually have invalidated Rules under his approach.[429] The effect of these courts' decisions is unclear because the Supreme Court has never decided that a Federal Rule can be invalid only as applied.[430] If the Enabling Act does not authorize the Federal Rules to have *any* effect on substantive rights, as Justice Stevens interpreted it,[431] then a Rule may lack authorization in all instances if a court finds that it would affect even one substantive right as applied. Those courts that decided that Federal Rule 23 is "ultra vires" probably intended to invalidate it only as applied to the particular state law at issue,[432] but their decisions may have invalidated Rule 23 generally throughout the country. The mere possibility that there is no federal class action rule is obviously problematic.

Even more troubling is that Justice Stevens left open the possibility that a court may apply an unauthorized Federal Rule so long as *Erie* does not require state law to apply.[433] *Semtek* demonstrated that such situations could occur.[434] There, the Court interpreted Federal Rule 41 narrowly so as not to violate the Enabling Act, but it also decided that state law did not apply because the preclusive effect of a federal judgment is a matter of federal law.[435] In that situation, federal common law governs.[436] In

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425. *See Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring).

426. *See id.*; *cf.* Godin v. Schencks, 629 F.3d 79, 86–87 (1st Cir. 2010) (noting that the court still must determine what law applies under *Erie* after determining that the Federal Rule cannot apply under Justice Stevens's test).

427. *See* 4 WRIGHT & MILLER, *supra* note 33, § 1030, at 166–67 & n.9. The Court has declined to apply a Rule, however, when its application would have violated *Erie*. *See supra* notes 95, 98–99 and accompanying text (discussing *Ragan* and *Cohen*). In *Hanna*, the Court distinguished these decisions as instances in which the "the scope of the Federal Rule was not as broad as the losing party urged," and not as instances in which the Rule was invalid. Hanna v. Plumer, 380 U.S. 460, 470 (1965).

428. *See supra* notes 248–50 and accompanying text.

429. *See supra* notes 333–35, 351 and accompanying text.

430. *Cf.* Dudley & Rutherglen, *supra* note 9, at 748 (recommending general invalidation where a conflict is found, which would force the drafters to amend the Federal Rule).

431. *Shady Grove*, 130 S. Ct. at 1451 (Stevens, J., concurring); *see* Rules Enabling Act, 28 U.S.C. § 2072(b) (2006); *supra* notes 244–51 and accompanying text.

432. *See supra* notes 333–35, 351 and accompanying text.

433. *See supra* notes 250, 425–26 and accompanying text; *cf.* Godin v. Schencks, 629 F.3d 79, 86–87 (1st Cir. 2010) (suggesting that state law may not apply even if it does not conflict with a Federal Rule).

434. *See* Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 506–08 (2001) (reasoning that federal common law can apply where there is no federal constitutional provision or statute on point).

435. *See supra* notes 170–71 and accompanying text.

436. *See id.*

Semtek, the court decided that federal common law requires that state preclusion law govern the effect of a federal judgment, but indicated that a different common law rule may be necessary in certain instances to protect federal interests.[437] *Semtek* suggested that a federal common law rule can grant preclusive effect when state law would not, and thus may have the kind of substantive effect that the Federal Rules cannot under the Enabling Act.[438] In his opinion in *Shady Grove*, Justice Stevens provided no further guidance on which rule to adopt in those types of situations.[439] Thus, it is possible that a federal court following his approach can invalidate a Federal Rule as applied, but then decide to adopt that invalidated Rule as a federal common law rule, free of the Enabling Act's restrictions.

Such an outcome would violate *Erie*'s one clear holding: that the federal courts have no constitutional power to announce rules affecting substantive rights.[440] Only Congress has the constitutional power to regulate matters that are both arguably procedural and arguably substantive.[441] Because Congress exercised that power in the Enabling Act to create a uniform system of Federal Rules, the "inevitable (indeed, one might say the intended)"[442] inference is that the Enabling Act should authorize the Rules to apply in situations that are necessary to the existence of a uniform system, notwithstanding the limitation on affecting substantive rights.[443] This is exactly what a unanimous Court held in *Burlington Northern*, the controlling precedent on the scope of the Enabling Act's authorization before *Shady Grove*.[444] There, the Court decided that the Act authorizes a Rule that could "reasonably be classified as procedural," "affects only the process of enforcing litigants' rights," and only "incidentally affect[s]" substantive rights in a way that is "reasonably necessary to maintain the

437. *See Semtek*, 531 U.S. at 508–09.

438. *See* Patrick Woolley, *The Sources of Federal Preclusion Law After* Semtek, 72 U. CIN. L. REV. 527, 592–94 (2003) (analyzing the relationship between the Enabling Act and federal common law rules and noting that "Semtek raises questions . . . about whether federal common-law rules of preclusion can be developed to directly enforce valid Federal Rules").

439. *See Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring) ("[W]hen such a 'saving' construction is not possible and the rule would violate the Enabling Act, federal courts cannot apply the rule. . . . [A] federal court must engage in the traditional Rules of Decision Act inquiry, under the *Erie* line of cases." (citations omitted)).

440. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–80 (1938); *supra* notes 52–56 and accompanying text.

441. *See* Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to . . . regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.").

442. *Shady Grove*, 130 S. Ct. at 1447–48 (plurality opinion).

443. *See* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 (1986) ("The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate [the Enabling Act] if reasonably necessary to maintain the integrity of that system of rules.").

444. *See id.*; *supra* notes 180–83 and accompanying text (discussing controlling precedents before *Shady Grove*).

integrity of [a uniform] system of rules."[445] Thus, the opinion that decided *Shady Grove* on the narrowest grounds would involve the narrowest departure from *Burlington Northern*.

Only Justice Sotomayor's opinion remains true to *Burlington Northern*'s standard. Justice Stevens rejected any approach that would construe the Enabling Act as authorizing the preemption of any state laws "intertwined" with substantive rights.[446] Because his opinion also opens a Pandora's box of unpredictable and problematic outcomes,[447] he could not have decided the case on the narrowest grounds. Nor could Justice Scalia's plurality, which would expand *Burlington Northern*'s exception for incidental effects to permit virtually any effect on substantive rights, including the preemption of a state's definition of its own rights and remedies.[448] Justice Sotomayor's approach, in contrast, would allow a Federal Rule to preempt a state law intertwined with substantive rights when it is "reasonably necessary"[449] for the Rules' uniformity because a narrower construction is impossible.[450] Therefore, she "'concurred in the judgment on the narrowest grounds'" and her "opinion" should serve as *Shady Grove*'s holding.[451]

C. Resolving the Lower Courts' Split

If the lower courts had followed Justice Sotomayor's opinion as the holding of *Shady Grove*, they would have avoided issuing conflicting decisions. Under her approach, the courts should have first determined whether the Federal Rule can preempt the state law without regulating substantive rights.[452] This would have required considering what the state law regulates to determine if they share the same subject.[453] If the Federal Rule shares the same subject as a state law that regulates substantive rights, the courts should have interpreted the Rule to regulate only procedure.[454] Once the court had construed the Rule to "'really regulat[e] procedure,'" it would fall within the Enabling Act's authorization and the court could apply it.[455] This Section examines how application of this approach would resolve the lower courts' confusion demonstrated in Part III.

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445. *Burlington N.*, 480 U.S. at 5, 8; *see supra* notes 136–41 and accompanying text.

446. *See Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring); *supra* notes 243–45, 251 and accompanying text.

447. *See supra* notes 425–41 and accompanying text.

448. *See Shady Grove*, 130 S. Ct. at 1445 n.10, 1446 n.13 (plurality opinion); *supra* notes 381–82 and accompanying text.

449. *Burlington N.*, 480 U.S. at 5.

450. *See supra* notes 396–98 and accompanying text.

451. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)); *see supra* notes 261–63.

452. *See supra* notes 410–22 and accompanying text.

453. *See supra* notes 410–20 and accompanying text.

454. *See supra* notes 419–22 and accompanying text.

455. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (plurality opinion) (alteration in original) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

Part III examined the ways in which courts are dealing with an apparent conflict between Federal Rule 23 and state laws that restrict the availability of a class remedy. Most of these decisions skip the first step of the Enabling Act analysis—interpreting the Rules' scope—which would be decisive in most instances.[456] Each court should have employed a construction of Rule 23 that only regulates procedure, which the *Shady Grove* majority had already provided: Rule 23 regulates only the criteria necessary for plaintiffs to join their claims in a class action, and not the rights or remedies available to them.[457] Therefore, the lower courts only had to determine whether the state law addresses a different subject by regulating substantive rights.

With the exception of the TCPA cases and *American Copper*,[458] each case examined in Part III dealt with a state law that creates an individual right of action, but not a class right of action.[459] These types of state laws are distinguishable from N.Y. C.P.L.R. 901(b), the procedural rule at issue in *Shady Grove*, which "[b]y its terms" addresses the same subject as Rule 23: whether a court could certify a class action.[460] It does not define the scope of any particular substantive right under New York law.[461] The laws at issue in the decisions detailed in Part III, however, "really" regulate

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456. *See supra* Part III.B–C.

457. *See Shady Grove*, 130 S. Ct. at 1437, 1439 & n.4 (plurality opinion); *id.* at 1436 (noting that Justice Stevens joined this part of the plurality opinion); *see also id.* at 1443 (plurality opinion) (deciding "Rule 23 . . . allows willing plaintiffs to join their separate claims against the same defendants in a class action" without "alter[ing] the rights themselves, [or] the available remedies"); *id.* at 1459–60 (Stevens, J., concurring) (deciding that "Rule 23 governs class certification" and rejecting the argument that it "enlarge[s] New York's 'limited' damages remedy" (quoting dissent)).

458. The TCPA cases involved the proper interpretation of the TCPA's "otherwise permitted" language. *See supra* notes 290–300, 304–06 and accompanying text. The resolution of this issue is beyond the scope of this Note. If the Second Circuit's interpretation in *Holster* is correct and the TCPA incorporates any state law or court rule that would prevent class recovery, then TCPA claims should be analyzed like the other cases in which the substantive law creating the right denies a class remedy. *See infra* notes 459–71 and accompanying text. *American Copper*, on the other hand, was distinct in that it analyzed the conflict between Federal Rule 23 and a state procedural rule that is identical to N.Y. C.P.L.R. 901(b). *See supra* notes 312–13 and accompanying text. Because the *Shady Grove* majority held that N.Y. C.P.L.R. 901(b) only regulates procedure, the *American Copper* court was probably correct to conclude that Rule 23 conflicts with and preempts an identical state procedural rule. *Cf. supra* notes 203, 218–19, 233–36, 257–60 and accompanying text (discussing *Shady Grove*'s treatment of N.Y. C.P.L.R. 901(b)).

459. *See* Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d 301, 309–10 (Tenn. 2008) (holding that the state statute only allows individuals to bring actions, including "a next friend or executor, [who] brings an action on behalf of another individual," but prohibits class actions "because they are not actions brought 'individually'" (quoting Tennessee Consumer Protection Act, TENN. CODE ANN. § 47-18-109(a)(1) (2001))); Marrone v. Phillip Morris USA, Inc., 850 N.E.2d 31, 33 (Ohio 2006) (holding that a plaintiff may recover certain damages individually under Section 1345.09(A) of the OCSPA, but may recover "other appropriate relief in a class action" only "if the defendant's alleged violation of the Act is substantially similar to an act or practice previously declared to be deceptive by one of the methods identified in [section] 1345.09(B)" (citing OHIO REV. CODE ANN. § 1345.09 (LexisNexis 2006))); *supra* notes 320–21, 329, 339–40, 347–48, 357 and accompanying text.

460. *Shady Grove*, 130 S. Ct. at 1437 (plurality opinion).

461. *See id.* at 1443; *id.* at 1457 (Stevens, J., concurring).

whether or not a class right of action exists.[462] If Rule 23 preempts these state laws, then it too would regulate substantive rights.[463] For this reason, most of the courts decided that Rule 23 exceeds the Enabling Act's authorization,[464] while a few decided to apply the Rule regardless of its effect on substantive rights.[465] Under Justice Sotomayor's test, both sets of courts should have determined that Rule 23 does not conflict with these state laws and avoided a construction that violates the Enabling Act.[466]

Avoiding this violation is straightforward because *Shady Grove* already provided a valid construction of Federal Rule 23. Rule 23 merely sets forth the criteria a plaintiff must meet if he wants to join his claims in a class action.[467] If a plaintiff meets Rule 23's requirements, the federal court must certify his proposed class and join the claims because it is within the plaintiff's discretion whether to maintain his claim as a class action, not the court's.[468]

Yet Rule 23 does not purport to authorize federal courts to grant the plaintiffs' requested relief. As construed in *Shady Grove*, Rule 23 is merely a rule of joinder—a procedural rule related to proper pleading, but unrelated to adjudicating substantive rights or liabilities.[469] To recover his damages, a plaintiff must state a claim upon which relief may be granted.[470] In diversity actions, state law provides the grounds on which the court may

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462. *See Walker*, 249 S.W.3d at 310 (deciding that "'[t]he Act limits private actions to individual claims' and, '[a]ccordingly, class actions cannot be maintained'" (alterations in original) (quoting Tucker v. Sierra Builders, 180 S.W.3d 109, 115 n.9 (Tenn. Ct. App. 2005))).

463. *Cf. supra* notes 410–13, 419–20 and accompanying text (arguing that Justice Sotomayor's approach would consider whether the state law regulates substantive rights).

464. *See generally supra* Part III.C.

465. *See supra* notes 304–06, 322–25 and accompanying text.

466. *See supra* notes 413, 420–22 and accompanying text.

467. *See supra* note 457 and accompanying text.

468. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1438 (2010) (plurality opinion) ("Courts do not maintain actions; litigants do."). Justice Stevens joined this part of the plurality opinion. *See id.* at 1448 (Stevens, J., concurring).

469. *See id.* at 1443 (plurality opinion) ("A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged."); *cf.* FED. R. CIV. P. 18 advisory committee's note (1966 Amendment) ("It is emphasized that amended Rule 18(a) [regarding permissive joinder of claims] deals only with pleading."); Leimer v. Woods, 196 F.2d 828, 833 (8th Cir. 1952) (holding that joinder under Rule 18(a) "simply affords a vehicle for convenience, facilitation and economy in litigation procedurally, and it does not have as its object to put it within the power of one party or the court thereby to produce a substantive impingement upon any right or liability"); 7 WRIGHT & MILLER, *supra* note 33, § 1652 at 398 & n.8 (3d ed. 2001 & Supp. 2011) (noting that permissive party joinder under Rule 20(a) "does not alter the substantive rights of the parties").

470. *See* FED. R. CIV. P. 8(a)(2); Bower v. IBM, Inc., 495 F. Supp. 2d 837, 840–41 (S.D. Ohio 2007) (considering only whether the "class claim made by the Plaintiffs should be dismissed because they have failed to allege a material element of such a cause of action"); *cf.* Marrone v. Phillip Morris USA, Inc., 850 N.E.2d 31, 34 (Ohio 2006) (noting that "[i]n order to maintain a class action, plaintiffs must meet the prerequisites set forth in Civ.R. 23 [Ohio's class action rule]," but that the issue before the court was whether the plaintiff pled a claim under the substantive statute, not whether the plaintiff complied with that procedural rule).

grant relief, but in these types of cases, the state statutes do not provide for class recovery.[471] Thus, federal courts have no authority to grant the requested relief and such a complaint should be dismissed for failure to state a claim.[472]

If the lower courts apply this test, they would avoid reaching conflicting results. Courts that would have followed Justice Scalia's plurality would avoid applying Rule 23 in a way that creates a right to relief that does not exist, in violation of the Enabling Act.[473] Those courts that would have followed Justice Stevens would avoid the problematic conclusion that Rule 23 is "ultra vires."[474] This simple resolution further illustrates that Justice Sotomayor's opinion decided *Shady Grove* on the narrowest grounds and eliminated *Erie*'s confusing influence.

CONCLUSION

After nearly a century of futility, the Supreme Court in *Shady Grove* should have finally defeated *Erie*'s influence and developed an independent Federal Rules analysis. Instead, the Court split into competing opinions that are creating confusion among the lower courts and allowing *Erie* to transform and escape. In its new form, *Erie* is convincing courts to invalidate Federal Rules that would preempt state laws "intertwined" with substantive rights. Justice Sotomayor's hidden "opinion," however, would prevent this result. Because it decided the case on the narrowest grounds and because it promotes the Federal Rules' uniformity and integrity, her "opinion" should serve as *Shady Grove*'s holding.

471. *See supra* note 459 and accompanying text.

472. *See* FED. R. CIV. P. 12(b)(6); McKinney v. Bayer Corp., 744 F. Supp. 2d 733, 742 (N.D. Ohio 2010) ("[D]ismissal pursuant to Rule 12(b)(6) is proper as to the OCSPA class claim . . . ."); *Bower*, 495 F. Supp. 2d at 841 (holding that "pursuit of this claim as a class action is improper" because the complaint's allegations did not satisfy the statute's requirements and therefore dismissing "the Plaintiffs' claims brought on behalf of the proposed class"); *see also* FED. R. CIV. P. 12(f) (providing motion to strike parts of a pleading); Bearden v. Honeywell Int'l Inc., No. 3:09-1035, 2010 WL 3239285, at *10 (M.D. Tenn. Aug. 16, 2010) (deciding to "strike the class allegations" because the state statute limits recovery to individual claims).

473. *See supra* notes 304–06, 320–25 and accompanying text.

474. *See supra* notes 333–35, 351 and accompanying text.