

SHADY GROVE V. ALLSTATE: A CASE STUDY IN FORMALISM VERSUS PRAGMATISM

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Our favorite Supreme Court opinions are 5-4 splits with unusual lineups and Justices apparently voting counter to type. The close vote signals that the case involves a genuinely difficult legal issue. An unusual lineup eliminates ideology as a likely explanation for the outcome. And votes against type indicate that forces contrary to policy preferences are at work. Often, these cases reveal something interesting about the Justices' approaches to interpreting law.

Measured by these criteria, the recent decision in Shady Grove Orthopedic Associates v. Allstate Insurance Company, is a treasure trove.¹ The vote is close: 5-4 in some parts, 4-1-4 in others, and 3-1-4 in others still. The lineup is certainly unusual: Justice Scalia, joined in varying parts by Chief Justice Roberts and Justices Stevens, Thomas, and Sotomayor, is squared off against Justice Ginsburg, joined by Justices Kennedy, Breyer, and Alito. Moreover, as the press has trumpeted, the two primary authors could hardly be voting more strongly against type. Justice Scalia—"the scourge of liberals and plaintiff lawyers everywhere"—votes to require federal courts to allow a class action to proceed for statutory penalties under a New York state-law claim, even though New York law expressly precludes that result.² On the other side, Justice Ginsburg—the erstwhile champion of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all"³—votes to stop "Shady Grove's attempt to transform a \$500 case into a \$5,000,000 award."⁴ "File this one under man bites dog," a commentator wrote the day the decision was released.⁵

Actually, file this one under the category of "interpretive theory matters." Of the various prisms for viewing the result in Shady Grove—federalism versus national preeminence, "conservative" versus "liberal"—the only one that fits is formalism versus pragmatism. The formalist majority saw a New York state law plainly stating that certain claims "may not be maintained as a class action" and concluded that it could not be reconciled with Rule 23's statement that "[a] class action may be maintained."⁶ The pragmatic dissent saw a New York law plainly intended to preclude the recovery of statutory penalties in a class action—something that a majority of the Court (and perhaps every member) believes New York has the power to do—and found it easy to reconcile with Rule 23's control over class action procedure. Justice Stevens, joining the majority to produce

a judgment but staking out a middle interpretive ground, expressed sympathy for the dissent's approach but ultimately could not get past the New York statute's plain language.

In this article, we summarize the factual and legal background of the Shady Grove decision, address the predictable theories of federalism and political preferences for explaining the result and decide they do not fit, and conclude that the difference between formalist and pragmatic approaches to interpreting state law explains the result. We assess the likely consequences of the majority's and dissent's positions in light of the standard arguments for and against formalism. Finally, we offer some predictions regarding Shady Grove's impact on states' approaches to fashioning laws that intersect with Federal Rule of Civil Procedure 23. Because we view the decision as turning more on the phrasing of New York's law than on a substantive disagreement about principles of federalism or federal preemption, we think its implications will be modest and short-lived, lasting only until states amend their laws to take the proper form.

I. The Factual and Legal Background of Shady Grove

In 2006, Shady Grove Orthopedic Associates sought payment from Allstate Insurance Company for services provided to a patient. Allstate paid the claims, but paid late, triggering a claim for statutory interest under New York law. When Allstate refused to pay the interest, Shady Grove sued in federal court on behalf of itself and a class of all others to whom Allstate made late payments.⁷ Shady Grove asserted federal jurisdiction under the Class Action Fairness Act ("CAFA"), which Allstate did not dispute.⁸ Instead, Allstate moved to dismiss, arguing that the New York law under which Shady Grove sued prohibited it from maintaining the case as a class action. The law at issue, New York Civil Practice Law & Rules § 901(b) ("Section 901(b)"), stated:

Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

According to Allstate, since the statutory interest sought by Shady Grove was a "penalty," Section 901(b) precluded the suit from proceeding as a class action—whether in state or federal court.⁹

The Eastern District of New York agreed with Allstate and held that Section 901(b) barred a class.¹⁰ The Second Circuit affirmed, holding that section 901(b) was "a substantive law that must be applied in the federal forum, just as it is in state court."¹¹

The Supreme Court granted certiorari and reversed, holding that Rule 23 was controlling. Although its 5-4, 4-1-4, and 3-1-4 decisions reflect impassioned disagreement among the Justices, they do not reflect disagreement about the

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key components of federal doctrine addressing when federal procedural rules preempt state law. All nine Justices agreed that two cases, *Erie v. Tompkins*¹² and *Hanna v. Plumer*,¹³ and the two federal statutes underlying those cases, the Rules of Decision Act¹⁴ and the Rules Enabling Act,¹⁵ provided the applicable legal framework for resolving the case.¹⁶ The Rules of Decision Act “prohibits federal courts from generating substantive law in diversity actions”¹⁷ and is implemented by the *Erie* analysis, which requires federal courts sitting in diversity to apply state substantive law and federal procedural law.¹⁸ The Rules Enabling Act, on the other hand, authorizes the Supreme Court to “‘prescribe general rules of practice and procedure’ for the federal courts, but with a crucial restriction: ‘Such rules shall not abridge, enlarge or modify any substantive right.’”¹⁹ *Hanna*—decided twenty-seven years after *Erie*—clarified that the *Erie* analysis does not apply when a Federal Rule of Civil Procedure “cover[s] the point in dispute.”²⁰ “[W]hen a situation is covered by a federal rule, the Rules of Decision Act inquiry by its own terms does not apply. Instead, the Rules Enabling Act . . . controls.”²¹

The Court’s first task in *Shady Grove* was thus to decide whether the question before it fell in the *Erie*/Rules-of-Decision-Act category or the *Hanna*/Rules-Enabling-Act category by “determin[ing] whether Rule 23 answers the question in dispute.”²² If it did, the Court would have to determine under *Hanna* whether Rule 23 “exceeds statutory authorization or Congress’s rulemaking power.”²³ If Rule 23 did *not* answer the question in dispute, however, the Court would have to turn to the “murky waters” of *Erie* to determine whether Section 901(b) is substantive or procedural.²⁴

Justice Scalia concluded that *Hanna* applied because Rule 23 directly answered the question in dispute. In his view, Rule 23 “creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.”²⁵ Calling Rule 23 a “one-size-fits-all formula for deciding the class-action question,” he found a direct conflict between it and Section 901(b) because Section 901(b) “attempts to answer the same question” as Rule 23.²⁶ Whereas Rule 23 states that “[a] class action may be maintained,” Section 901(b) states that a plaintiff’s suit “may not be maintained as a class action.”²⁷ Because of this direct conflict, *Hanna* controlled the analysis, and Rule 23 trumped state law. Justice Scalia expressly wrote, however, that the majority was not addressing “whether a state law that limits the remedies available in an existing class action”—as opposed to a state law that limits whether a class action can exist—“would conflict with Rule 23.”²⁸ In the majority’s view, Section 901(b) “says nothing about the remedies a court may award; it prevents the class actions it covers from coming into existence at all.”²⁹

Writing on behalf of the dissenters, Justice Ginsburg disagreed that Section 901(b) conflicted with Rule 23 and argued that it was intended to accomplish the substantive result of prohibiting the award of certain damages in a class action. Whereas the majority had compared the text of Rule 23 to the text of Section 901(b), she argued that the Court’s role was to compare the *purpose* of Rule 23 against the *purpose* of Section 901(b).³⁰ Rather than focusing on the conflict between “may” and “may not,” Justice Ginsburg asked why Rule 23 authorizes

class actions and why the State of New York enacted Section 901(b)—then compared the answers.³¹ As she saw it, Rule 23 was created to afford “a fair and efficient way to aggregate claims for adjudication,” whereas Section 901(b) “responds to an entirely different concern.” “The fair and efficient conduct of class litigation is the legitimate concern of Rule 23; the *remedy* for an infraction of state law, however, is the legitimate concern of the State’s lawmakers and not of the federal rulemakers.”³² Hence *Hanna* did not apply because the “legitimate concern” of Rule 23 and the “legitimate concern” of Section 901(b) did not conflict. Without a federal rule on point, *Erie* controlled. And, under *Erie*, Section 901(b) controlled because its intent was plainly substantive.

Justice Stevens filed a solo concurrence³³ suggesting a third approach to the case. He agreed with the plurality that Rule 23 “squarely governed” the determination whether Shady Grove’s case could proceed as a class action, so the *Hanna* analysis controlled.³⁴ Thus, the district court’s job was to ask “whether application of the federal rule ‘represents a valid exercise’ of the ‘rulemaking authority . . . bestowed on this Court by the Rules Enabling Act.’”³⁵ Examining the text of the Act, which authorizes the Court to prescribe procedural rules provided they do not “abridge, enlarge or modify *any* substantive right,”³⁶ Justice Stevens concluded that the question of preemption “turns, in part, on the nature of the state law that is being displaced by a federal rule.”³⁷ He articulated his proposed governing rule this way: “A federal rule . . . cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.”³⁸ Justice Stevens ultimately agreed with the plurality that Section 901(b)’s plain language made it procedural, but along the way he reviewed Section 901(b)’s legislative history to determine whether the apparently procedural rule was “so intertwined with a state right or remedy” that it functioned to define the scope of the right it created. Because the legislative history of Section 901(b) created “two plausible competing narratives,” Justice Stevens concluded that it could not overcome the effect of the plain text.³⁹

II. Federalism and Policy Preferences Do Not Explain *Shady Grove*

So what caused the Justices to split so closely and unusually in *Shady Grove*? The dissent attempted to frame the dispute as a fight about federalism, arguing that the majority gave too little deference to states’ rights. Justice Ginsburg argued that, previously, the Court had “avoided immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest,”⁴⁰ and had cautioned lower courts to interpret the federal rules “with sensitivity to important state interests.”⁴¹ If the majority had only given the history of Section 901(b) “respectful consideration,”⁴² and read the federal rules “with due restraint,”⁴³ the Court could have avoided the “erod[ing] of *Erie*’s federalism grounds.”⁴⁴

We do not find the dissent’s framing persuasive. For one thing, Justices who have historically favored federalism appear on both sides of the vote. Justice Ginsburg’s deference to state’s rights is well-established⁴⁵—most prominently appearing in her

disent in *Bush v. Gore*⁴⁶—so it is no surprise to find her arguing that the Court should have deferred to New York’s interest in enacting Section 901(b). But Chief Justice Roberts and Justices Scalia and Thomas have all written or joined majority decisions endorsing federalism principles just as strongly as Justice Ginsburg.⁴⁷ Their presence on the opposite side of the decision makes it difficult to attribute the vote in *Shady Grove* to a disagreement about federalism. Another problem with Justice Ginsburg’s characterization is that there was no real disagreement among the majority, plurality, concurrence, or dissent over the interpretation of Rule 23. No one argued that Rule 23 did not control the question whether a class action can be certified. The real dispute was over whether the text or purpose of Section 901(b) should govern its interpretation. Something other than federalism drove *Shady Grove*’s outcome.

The result in *Shady Grove* also cannot be explained by the typical political divisions seen on the Court. The five Justices appointed by Republican Presidents and typically thought of as more conservative (Roberts, Scalia, Kennedy, Thomas, and Alito) split three to two, with Roberts, Scalia, and Thomas voting for the “liberal” position of allowing the class action to proceed, and Kennedy and Alito voting for the “conservative” position of barring it from going forward. The three Justices appointed by Democratic Presidents and typically thought of as more liberal (Ginsburg, Breyer, and Sotomayor) split two to one, with Sotomayor voting for the “conservative” position and Ginsburg and Breyer voting for the “liberal” one. Justice Stevens, the lone Justice appointed by a Republican President who is typically thought of as “liberal,” ultimately voted for the “liberal” position of allowing the class action to proceed.⁴⁸ Of the other 5-4 decisions issued during the October 2009 Term as of the time this article went to press, none had this lineup. Trying to explain *Shady Grove* along political lines simply does not work.

III. *Shady Grove*’s Outcome Turns on the Difference between Formalism and Pragmatism

We think the lineup in *Shady Grove* is best explained by the continuum that runs between purely formalistic and purely pragmatic approaches to interpreting state laws in diversity cases. The Justices in the majority took a formalist approach to interpreting Section 901(b), while the dissenters took a pragmatic approach.

“Formalism” has been defined many ways, but we are using the term in the way Cass Sunstein defined it when he identified three commitments that form the basis of formalist interpretive strategies: (1) “promoting compliance with all applicable legal formalities (whether or not they make sense in the individual case);” (2) “ensuring rule-bound law (even if application of the rule . . . makes little sense in the individual case)” and (3) “constraining the discretion of judges in deciding cases.”⁴⁹ As Sunstein wrote:

[F]ormalism is an attempt to make the law both autonomous, in the particular sense that it does not depend on moral or political values of particular judges, and also deductive, in the sense that judges decide cases mechanically on the basis of preexisting law and do not exercise discretion in individual cases. Formalism therefore

entails an interpretive method that relies on the text of the relevant law and that excludes or minimizes extratextual sources of law. It tends as well to favor judicial holdings that take the form of wide rules rather than narrow settlements of particular disputes.⁵⁰

The opposite of formalism is antiformalism, or what is more widely called pragmatism. Sunstein defines antiformalism as an approach that “insist[s] that interpretation requires or permits resort to sources other than the text.”⁵¹ Judge Richard A. Posner—one of the foremost defenders of legal pragmatism—has written that the “ultimate criterion of pragmatic adjudication is reasonableness”⁵² and that pragmatism is “a grab bag that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker’s authority, metaphor, analogy, precedent, custom, memory, experience, intuition, and induction.”⁵³

No one is a pure formalist, blind to all consequences. Nor is anyone a pure pragmatist, unconstrained in any way by text. Judges fall on a continuum, where “[o]ne pole is represented by those who aspire to textually driven, rule-bound, rule-announcing judgments” and the other “is represented by those who are quite willing to reject the text when it would produce an unreasonable outcome, or when it is inconsistent with the legislative history, or when it conflicts with policy judgments of certain kinds or substantive canons of construction.”⁵⁴

The majority and plurality opinions in *Shady Grove* are a case study in formalist interpretive logic, which is no surprise given that Justice Scalia is the foremost formalist on the Court. His book *A Matter of Interpretation* endorses an explicitly formalist approach to interpretation,⁵⁵ and his opinion in *Shady Grove* implements that approach. His analysis begins—and largely ends—with the text of the two provisions. Section 901(b) states that a class action “may not be maintained”; Rule 23 states that a class action “may be maintained.” To a formalist, this unambiguous language creates a conflict that cannot—and should not—be explained away. Justice Scalia declares that the Court cannot rewrite the text of the statute “to reflect our perception of legislative purpose”—an unambiguously formalist position.⁵⁶ He also predicts that attempting to decipher the state legislature’s intent from sources other than enacted text is “destined to produce ‘confusion worse confounded’”—another formalist staple.⁵⁷ Finally, he expresses concern that rewriting Section 901(b) would create a rule that district court judges would find difficult to implement because they “have to discern in every diversity case, the purpose behind any putatively preempted state procedural rule, even if its text squarely conflicts with federal law.”⁵⁸ This would “condemn” federal judges to the unsavory task of “poring through state legislative histories,” which may be “less easily obtained, less thorough, and less familiar than its federal counterpart.”⁵⁹ This prediction—that the difficulty in implementing a pragmatic approach will outweigh the gains in interpretive accuracy that such an approach can sometimes yield—is another core formalist tenet.

The dissent, in contrast, attacks the formalist majority in an exasperated paean to pragmatism. Chiding the majority’s “mechanical,” “insensitive,” and “relentless”⁶⁰ reading, Justice Ginsburg decries its myopic focus on text. To Justice Ginsburg,

the intent of the New York legislature is obvious: it wanted to preclude the recovery of statutory penalties in class actions. To accomplish that purpose, it drafted Section 901(b) to state that claims for statutory penalties could not be maintained as a class action. It could have equally drafted it to state that statutory penalties could not be recovered in a class action. This latter phrasing would accomplish precisely the same result, and it would also clearly be an enforceable substantive limit on remedies in diversity cases brought under Federal Rule 23. That the legislature failed to word the law with the particularities of *Hanna* and *Erie* in mind should make no difference. Instead, what should drive the Court's interpretation are all the adverse consequences of the majority's needlessly formalist approach: New York's regulatory policy is now "thwarted,"⁶¹ every state has been denied the power to limit monetary awards in federal diversity cases,⁶² and *Erie's* federalism grounding has been eroded.⁶³ In addition, the majority's decision has produced substantial variations in judgments awarded under Section 901(b), depending on whether the case was litigated in federal or state court, and thus will lead to forum-shopping.⁶⁴ Rather than send the case back to the federal district court to proceed as a class action—and make the New York legislature scramble to re-word a decades-old statute—the Court should have given force to Section 901(b) and allowed the "narrow settlement of this particular dispute."⁶⁵

Justice Stevens takes an interpretive middle ground in his concurrence. He agrees with the dissent that legislative history should not be completely out of bounds. But he maintains that legislative history will rarely override the interpretation of a state law that is procedural on its face. As Justice Steven sees it, district courts must interpret federal rules with "some degree of 'sensitivity to important state interests and regulatory policies.'"⁶⁶ This is a "tricky balance" that turns on "whether the state law actually is part of a State's framework of substantive rights or remedies."⁶⁷ A state procedural rule may be "so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy."⁶⁸ Thus, "[w]hen a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice."⁶⁹ Justice Stevens rejects Justice Scalia's argument that looking into the intent behind the state law would create difficulties for district courts, stating that the question "is not what rule *we* think would be easiest on federal courts."⁷⁰ Rather, the question is what Congress established when it passed the Rules Enabling Act: "Although, Justice Scalia may generally prefer easily administrable, bright-line rules, his preference does not give us license to adopt a second-best interpretation of the Rules Enabling Act."⁷¹ Justice Stevens summarizes his measured formalism in one cutting line: "Courts cannot ignore text and context in the service of simplicity."⁷² Applying this rule, Justice Stevens concludes that the text of Section 901(b) is so clearly procedural in nature that it must fall to Rule 23.⁷³

IV. Which Approach Is Empirically Justified?

So who has the better approach in *Shady Grove*, the formalists or the pragmatists? Sunstein argues that formalism "must be defended by empirical claims about the likely

performance and activities of courts, legislatures, administrative agencies, and private parties" and proposes three ways to measure formalism's application: first, "whether a formalist or nonformalist judiciary will produce more mistakes and injustices"; second, "whether the legislature will anticipate possible mistakes or injustices in advance, and whether it will correct them after they occur, and do so at relatively low cost"; and third, "whether a nonformalist judiciary will greatly increase the costs of decision, for courts, litigants, and those seeking legal advice, in the process increasing the costs associated with unpredictability."⁷⁴ The same could equally be said of pragmatism. In Sunstein's framework, "the ultimate issue is what interpretive strategy will create lower costs of decision and costs of error," where the term "cost" is understood to mean "the real-world difficulties—in terms of unpredictability of outcomes—that might follow from one or another interpretive strategy."⁷⁵ Sunstein characterizes "decision costs" as costs faced by courts when the attempt to discern the legal rule in deciding a case and costs faced by potential litigants and litigants who have to pay lawyers to figure out the content of the law.⁷⁶ Error costs, on the other hand, "involve both the number of mistakes and the magnitude of mistakes."⁷⁷

Shady Grove is a compelling case study for applying Sunstein's proposed method because both authoring justices supported their positions with empirical claims about the consequences of their approaches. Justice Ginsburg's pragmatic approach would have created several types of decision costs. First, the dissent's approach would have complicated the analysis of whether any given state statute regulating penalties in a class action would be preempted by Rule 23. Respondent Allstate noted in its briefing to the Court that many existing laws prohibit class actions, like Section 901(b).⁷⁸ Under a pragmatic approach, parties would have to litigate in each instance whether indications that the legislature intended the law to be substantive were sufficiently clear to outweigh its facially procedural appearance.⁷⁹ This would lead to high decision costs for litigants on both sides, not to mention the district court at issue. Second, a pragmatic approach would postpone the date when the governing rules would be certain by making it unclear whether any given state statute would be enforced. State legislatures would have little incentive to act until a court battle had been litigated and either won or lost. In the meantime, the law would remain unclear. Although it is difficult to quantify with any precision the decision costs that would have been incurred had the dissent's pragmatic approach prevailed, it is safe to say that they would have been considerable.

It is not clear that Justice Steven's more measured approach—which is the rule of the case—will result in fewer decision costs than those that would have been incurred had the dissent prevailed. His approach requires district courts to give at least some consideration of a state law's legislative history when deciding whether it is "so intertwined with a state right or remedy that it functions to define the scope of the state-created right."⁸⁰ But he also emphasizes that "the bar for finding an Enabling Act problem is a high one," and largely gives the legislative history of Section 901(b) the back of his hand, noting that "[t]he mere possibility that a federal rule would alter a state-created right is not sufficient. There must be little

doubt.”⁸¹ Thus, while Justice Stevens’ rule leaves an opening for the consideration of legislative history in determining whether a applying a Federal Rule would “effectively” violate the Enabling Act, his analysis of Section 901(b) establishes that district courts should set aside the Federal Rule only in extraordinary circumstances.⁸²

In contrast to Justice Ginsburg’s and Justice Stevens’ insistence that the legislative history should play at least some role in deciding how to interpret state laws that facially conflict with Federal Rules, the plurality insists that a direct conflict between a Federal Rule and a state law requires the application of the Federal Rule. This rule would have created three positive results that would have increased certainty and reduced decision costs. First, it would have simplified the analysis district courts must undergo in applying state laws in diversity cases, creating long-term stability and consistency in how the preemption inquiry is applied. Second, it would have provided state legislatures with a road map for how to draft statutes limiting penalties that will be enforced. Third, it would have created certainty for litigants, who face little or no ambiguity regarding the terms under which they will be allowed to proceed with state claims involving Federal Rule 23 under the diversity statute. Together, these results would have reduced the costs of decision for courts, litigants, and people seeking legal advice over the long term.⁸³ In addition, state legislatures would have had an incentive to immediately amend any laws that facially conflict with Federal Rule 23.

But decision costs are only part of the calculus. As the dissent emphasizes, the plurality’s formalist approach—and the concurrence’s measured formalist approach as applied in this case—will increase forum-shopping and will foster divergent outcomes between state—and federal-court litigation of claims brought under the exact same law—a contention neither the concurrence nor the plurality disputes.⁸⁴ In addition, in at least some cases involving existing state statutes, the formalist approach has the cost of denying effect to what the state legislature plainly intended to accomplish—which is a serious cost of the approach, albeit one that is again difficult to quantify.

V. Concluding Observations

In our view, the formalist majority has the better of the argument in *Shady Grove*. Its rule provides long-term stability and certainty at the cost of a relatively small number of decisions in the short term that may allow statutory penalties to be recovered in a class action, contrary to the state legislature’s original intent. This cost will linger only as long as it takes state legislatures to revise their codes to regulate remedies directly instead of regulating them indirectly by manipulating the rules of class certification. The cost may be even lower if state legislatures are able to make their revisions retroactive, a question we think is interesting but do not attempt to answer here.

One final note is that, although *Shady Grove* necessarily provides the most information about the interpretive approaches of the authoring Justices, it also provides information about the Justices who joined the respective sides as well. Justice Sotomayor, who voted to allow class actions to proceed, did so

by joining the formalist plurality rather than Justice Stevens’ more pragmatic concurrence. But she refused to join the portions of the plurality deriding Justice Stevens’ analysis. To us, her vote indicates some formalist inclinations to limit the interpretive discretion afforded to federal district court judges, but it also indicates some unwillingness to attack her new colleagues in print—which suggests a distinct pragmatism of its own.

Endnotes

1 130 S. Ct. 1431 (2010).

2 Posting of Daniel Fisher to On The Docket Blog, <http://blogs.forbes.com/docket/2010/03/31/stop-the-presses-scalia-defends-class-actions/> (Mar. 31, 2010, 11:55 EST).

3 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)).

4 130 S. Ct. at 1460 (Ginsburg, J., dissenting).

5 Fisher, *supra* note 2.

6 *See* 130 S. Ct. at 1437.

7 *Id.* at 1436-37.

8 CAFA jurisdiction was proper because the alleged class had more than 100 members, at least one plaintiff and one defendant were diverse, and the aggregated damages of the alleged class—calculated according to the New York’s statutory interest statute—exceeded \$5,000,000. *See* 28 U.S.C. § 1332(d)(2), (4). If *Shady Grove* had proceeded only on its own behalf, its individual damages of \$500 would not have satisfied the amount in controversy requirement of the diversity statute. *See* 28 U.S.C. § 1332(a).

9 The New York law at issue was enacted in 1975 and Federal Rule 23 has existed in its current form since 1966. But the preemption question in *Shady Grove* arose only after the enactment of the Class Action Fairness Act of 2005, which provides federal jurisdiction over putative class actions raising state-law claims, provided they meet the criteria specified in note 8, *supra*. Before CAFA, the amount in controversy requirement could not, as a general rule, be satisfied by aggregating the claims of the putative class members. *See, e.g., Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1422 (2d Cir. 1997). Thus, in cases where each named plaintiff had a small, distinct claim under laws like Section 901(b), the amount in controversy could not be met, precluding federal jurisdiction.

10 *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467 (E.D.N.Y. 2006).

11 *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 549 F.3d 137, 145 (2d Cir. 2008).

12 304 U.S. 64 (1938).

13 380 U.S. 460 (1965).

14 28 U.S.C. § 1652 (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”).

15 28 U.S.C. § 2072 (“The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals. . . . Such rules shall not abridge, enlarge or modify any substantive right.”).

16 *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010); *id.* at 1448-49 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 1460-63 (Ginsburg, J., dissenting).

17 *Id.* at 1460-61 (Ginsburg, J., dissenting).

18 In *Erie* the Court considered “the constitutional power of federal courts

- to supplant state law with judge-made rules.” 130 S. Ct. at 1442; *see* Eric v. Tompkins, 304 U.S. 64, 78 (1938). (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”).
- 19 130 S. Ct. at 1461 (Ginsburg, J., dissenting) (quoting 28 U.S.C. § 2072).
- 20 *Hanna v. Plumer*, 380 U.S. 460, 470 (1965).
- 21 130 S. Ct. at 1448 (Stevens, J., concurring in part and concurring in the judgment).
- 22 *Id.* at 1437.
- 23 *Id.*
- 24 *Id.*
- 25 *Id.*
- 26 *Id.*
- 27 *Id.* at 1438.
- 28 *Id.* at 1439.
- 29 *Id.*
- 30 *See id.* at 1466.
- 31 *Id.*
- 32 *Id.*
- 33 Justice Stevens’ concurrence provides the holding of the Court. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”) (internal quotation marks omitted).
- 34 130 S. Ct. at 1456 (Stevens, J., concurring in part and concurring in the judgment).
- 35 *Id.* at 1451 (quoting *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987)).
- 36 130 S. Ct. at 1451 (Stevens, J., concurring in part and concurring in the judgment). *See also* 28 U.S.C. § 2072.
- 37 130 S. Ct. at 1449 (Stevens, J., concurring in part and concurring in the judgment).
- 38 *Id.* at 1452.
- 39 *Id.* at 1459.
- 40 *Id.* at 1461 (Ginsburg, J., dissenting).
- 41 *Id.* at 1463 (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996)).
- 42 130 S. Ct. at 1464 (Ginsburg, J., dissenting).
- 43 *Id.* at 1468 n.10.
- 44 *Id.* at 1473.
- 45 *See, e.g.*, David L. Franklin, *Justice Ginsburg’s Common-Law Federalism*, 43 *NEW ENG. L. REV.* 751 (2009); Russell A. Miller, *Clinton, Ginsburg, and Centrist Federalism*, 85 *IND. L.J.* 225 (2010).
- 46 531 U.S. 98 (2000).
- 47 *See, e.g.*, *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006).
- 48 Because the Court’s holding is articulated by Justice Stevens’ concurrence, the lineup of votes suggests that the case could have come out differently had it come before the Court in the October 2010 Term, after Justice Stevens’ retirement.
- 49 Cass R. Sunstein, *Must Formalism be Defended Empirically?*, 66 *U. CHIC. L. REV.* 636, 638 (Summer 1999).
- 50 *Id.* at 638-39.
- 51 *Id.* at 639.
- 52 RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 59 (2003).
- 53 RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 73 (1990).
- 54 Sunstein, *supra* note 49, at 640.
- 55 ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997).
- 56 *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1440 (2010).
- 57 *Id.* at 1441-42 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).
- 58 130 S. Ct. at 1441.
- 59 *Id.*
- 60 *Id.* at 1464, 1467 n.7, (Ginsburg, J., dissenting).
- 61 *Id.* at 1464.
- 62 *Id.* at 1468.
- 63 *Id.* at 1473.
- 64 *Id.* at 1471-72.
- 65 Sunstein, *supra* note 49, at 638.
- 66 130 S. Ct. at 1449 (Stevens, J., concurring in part and concurring in the judgment) (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996)).
- 67 130 S. Ct. at 1449 (Stevens, J., concurring in part and concurring in the judgment).
- 68 *Id.* at 1450.
- 69 *Id.*
- 70 *Id.* at 1454.
- 71 *Id.*
- 72 *Id.*
- 73 *Id.* at 1459-60.
- 74 Sunstein, *supra* note 49, at 641.
- 75 *Id.* at 641-42.
- 76 *Id.* at 647.
- 77 *Id.*
- 78 Brief for Respondent Allstate Insurance Company at 42, *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010).
- 79 Of course, the dissent’s proposed rule would have applied not only to state laws that facially conflict with Rule 23, but all state laws that facially conflict with any Federal Rule.
- 80 130 S. Ct. at 1452 (Stevens, J., concurring in part and concurring in the judgment).
- 81 *Id.* at 1457.
- 82 *See id.* at 1451-52.
- 83 *See* Sunstein, *supra* note 49, at 641.
- 84 130 S. Ct. at 1447-48 (plurality opinion); *see id.* at 1456-57 (Stevens, J., concurring in part and concurring in the judgment).

