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BLACK-AND-WHITE JUDGING IN A WORLD OF GRAYS

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One need not live that long to see how short the present is. Just six years into the artificially designated period, "The Roberts Court," it is already worth comparing the present with the (equally artificial) period before it, "The Rehnquist Court." As with any nineteen-year span of legal history, many important doctrinal changes occurred in Rehnquist's time as Chief Justice. But the Rehnquist Court's most remarkable characteristic might be its stasis — in personnel. During the eleven years from 1994 to 2005, the Supreme Court's members were not only "nine scorpions in a bottle," as Holmes once wrote, they were exactly the same nine scorpions in the very same bottle.[1] These nine Justices served together longer than any nine in Supreme Court history.[2] Year after year, case after case, from New Federalism to *Bush v. Gore* to the Wars on Drugs and Terrorism, these individuals who publicly disagreed with each other had to work together to decide the nation's most difficult cases.

Now times have changed. Five years have brought four new faces to the Court with their own backgrounds, personalities, and philosophies of judging. Court-watchers expect new Justice changes to affect — as they already have — high-visibility areas such as abortion, affirmative action, campaign finance, the law of religion, and gun control.[3] In effect, most of these shifts have come from replacing Justice O'Connor with Justice Alito. While some analysts deplore the Roberts Court's decisions in these fields as aggressive, others laud them as overdue corrections to a faithless past.

This essay considers a different site of change on the Roberts Court, which draws far less attention despite its potential signs of "aggression." *Shady Grove Orthopedic Associates v. Allstate Insurance* was perhaps the Court's most important "*Erie* decision" in almost fifty years.[4] The Court was divided, with a five-Justice majority joining only

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1. John A. Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. TIMES MAG., Feb. 20, 1983, at 22.

2. JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 4 (2008). History buffs who recall the Marshall Court from 1811-1826 will note that (a) the Court included only seven Justices at that time, and (b) 1811-1825 was a *very* long time ago, thereby confirming the Rehnquist Court's extraordinary longevity. Most relatively "long" periods of nine Justices serving together are five years or sometimes six.

3. *Compare* Stenberg v. Carhart, 530 U.S. 914, 946 (2000), *and* Grutter v. Bollinger, 539 U.S. 306, 343 (2003), *and* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 397-98 (2000), *with* Gonzales v. Carhart, 550 U.S. 124, 168 (2007), *and* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747-48 (2007), *and* Randall v. Sorrell, 548 U.S. 230, 262 (2006). *Cf.* Dist. of Columbia v. Heller, 554 U.S. 570, 636 (2008).

4. As we shall see, one of the contested issues in *Shady Grove* was whether or to what extent the

the barest explanation for its result.[5] *Shady Grove* illustrates the tenuous, shifting institution that the "Early Roberts Court" has become. Using ordinary assumptions about Chief Justice Roberts's health and career, "his Court" should have a long history ahead of it. However, as time passes and more Justices change, *Shady Grove* may augur ill for the Court's precedents and lawmaking function.

Part I of this essay explains *Shady Grove*'s result, with necessary attention to the reasoning of different Justices in the case. Part II critiques the decision from an internal perspective, dissecting the Court's opinions on their own terms. Part III concludes with thoughts about a jurisprudential future that may arrive all too fast.

I. THE COURT'S LOGIC IN *SHADY GROVE*

Shady Grove is a case about class actions, or a case about statutory civil penalties, or maybe both. Shady Grove treated Sonia Galvez for injuries from a car accident.[6] Galvez assigned to Shady Grove her benefits under a policy with Allstate Insurance, and Shady Grove requested payment from Allstate. New York statutory law gave Allstate thirty days to deny or pay the claim; then, interest would accrue at a statutorily prescribed rate of two percent per month. Allstate paid Shady Grove's claim late, but refused to pay $500 in statutory interest. Instead of suing on that individual claim in state court, Shady Grove filed a class action in federal court, claiming that Allstate had failed to pay some 1,000 claims like this one and therefore owed over $5,000,000 in statutory interest.[7]

As a side note, cases like Shady Grove's could not have been heard in federal court before 2005. Plaintiffs suing only for violations of state law usually entered federal court through diversity jurisdiction, which required individual plaintiffs — in a class action or otherwise — to claim that they themselves suffered more than $75,000 in damages.[8] The Class Action Fairness Act (CAFA), however, provided more expansive federal jurisdiction to hear cases like Shady Grove's, but *only if* the district court agreed to certify the requested class action under Federal Rule of Civil Procedure 23.[9]

In Shady Grove's case, however, the district court did not certify the requested class action and did not rely on Rule 23. Instead, the district court looked to a certain provision of state law. Although New York Civil Practice Section 901(a) authorizes class actions under basically the same conditions as Rule 23, Section 901(b) states a crucial restriction: "Unless a statute creating or imposing a penalty . . . specifically authorizes . . . recovery . . . in a class action, *an action to recover a penalty . . . may not be maintained as a class action.*"[10] Because statutory interest would be deemed a "penalty" under section 901(b), the district court refused to certify Shady Grove's class

application of state substantive and federal procedural law under the Rules Enabling Act should mirror analysis of state substantive and federal procedural law under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

5. As we shall see, the decisive personnel change in *Shady Grove* was to exchange Justice Sotomayor for Justice Souter.

6. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1436 (2010).

7. *Id.* at 1443.

8. 28 U.S.C. § 1332(a) (1996).

9. Class Action Fairness Act, 28 U.S.C. § 1711(2) (2005). With certain exceptions, CAFA generally grants federal jurisdiction to class actions that seek more than $5,000,000. 28 U.S.C. § 1332 (d)(2).

10. N.Y. C.P.L.R. 901(a)-(b) (MCKINNEY 2011) (emphasis added).

action, and the Second Circuit affirmed. The Supreme Court granted certiorari and reversed, holding that Shady Grove's class action should have been analyzed under Rule 23 regardless of section 901(b). The Justices offered four sets of arguments to support that result and one dissent, and although their interaction is somewhat elaborate, each must be considered to understand the decision's full meaning.

A. Shady Grove*'s Majority*

Justice Scalia wrote the Supreme Court's lead opinion, but only half was joined by a majority of the Court.[11] The Court held that, except where Congress says otherwise, Rule 23 sets conditions for certifying class actions in all federal cases, including Shady Grove's.[12] Because section 901(b) makes an exception for class actions that seek statutory penalties, and because Rule 23 makes no such exception, the Court held that Rule 23 and section 901(b) "flatly contradict" each other as a matter of "clear text."[13]

The majority next held that applying Rule 23 in *Shady Grove* was valid under the Rules Enabling Act of 1934 ("REA"), but the Justices disagreed about why. The REA allows the federal judiciary to prescribe "rules of practice and procedure," but the statute limits that power by declaring that such rules "shall not abridge, enlarge or modify any substantive right."[14]

B. Scalia's Four-Justice Plurality

Writing for a plurality that included Chief Justice Roberts, Justice Thomas, and Justice Sotomayor, Scalia declared that there is a massive difference between, on one hand, the doctrinal test separating "substance" and "procedure" under the REA, and on the other hand, the test separating "substance" and "procedure" under *Erie*, which did not involve a Federal Rule of Civil Procedure.[15] In the *Erie* context, Scalia noted that "substantive law" is to be identified by its significant effect on litigative outcomes. Changing this kind of law would prompt distinctive levels of "forum shopping" and "inequitable results," and all other law is deemed "procedural."[16] By contrast, Scalia claimed that law is classified as "procedural" under the REA if it "really regulates procedure" by creating the "manner and means" of enforcing and administering substantive law.[17] Scalia wrote that a Federal Rule would violate the REA only if it

11. *Shady Grove*, 130 S. Ct. at 1436-48

12. *Id.* at 1438. The Court noted that Congress has made explicit statutory exceptions to Rule 23, none of which was applicable in *Shady Grove*. *Id.*

13. *Id.* at 1440-41.

14. 28 U.S.C. § 2072 (1988).

15. *Shady Grove*, 130 S. Ct. at 1442-44, 1447-48.

16. *Id.* at 1447-48. The Rules of Decision Act has been doctrinally fused with *Erie* case law, on the theory that substantive rules that determine forum shopping and intersystemic equity are, in effect, the "rules of decision" for a particular case. The Rules of Decision Act, 28 U.S.C. § 1652; Gasperini v. Ctr. for Humanities, 518 U.S. 415 (1996); *cf. Shady Grove,* 130 S. Ct. at 1448-60 (Stevens, J., dissenting). Scalia's plurality opinion confounds this sometimes confusing issue by itself quoting language about "rules of decision" in the context of the Rules Enabling Act, even as he is struggling to sharply separate Rules cases from *Erie* cases. *Id.* at 1442. As we will see, I have my doubts about the force and usefulness of Scalia's sharp distinction between Rules and non-Rules cases.

17. *Shady Grove*, 130 S. Ct. at 1442, 1444.

regulated law that is not "rationally capable of classification" as procedure.[18] For Scalia, the landmark opinion that solidified this framework was the Court's 1965 decision in *Hanna v. Plumer*.[19]

In applying this approach, Scalia found it "obvious" that Rule 23's standard for litigating numerous class-members' claims together constitutes valid "procedural law" that satisfies the REA's statutory limit. "A class action, no less than traditional joinder . . . 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."[20] In any event, Scalia wrote with emphatic italics that "[t]he test is not whether the rule affects a litigant's substantive rights; most procedural rights do. What matters is what the rule itself *regulates* . . ."[21]

Without affirmatively explaining how to identify what a federal rule "really" *regulates*, Scalia explained that Rule 23's effect on the substantive outcome of "some (even many)" cases was categorically irrelevant.[22] Scalia recognized that plaintiffs like Shady Grove might recover $5,000,000 in a class action, instead of $500 in an individual suit; and that, for defendants like Allstate, the "*consequence* of excluding certain class actions may be to cap the damages a defendant can face in a single suit . . . ."[23] Yet Scalia dismissed such implications as merely "incidental effects" of Rule 23's regulation of procedure.[24]

Likewise, Scalia claimed that "the substantive . . . nature" of New York's section 901(b) should "make no difference" as a doctrinal matter. Even if New York did pass section 901(b) as a substantive limit on statutory penalties, for exclusively substantive purposes, Scalia wrote that "it is not the substantive or procedural nature or purpose of the affected state law that matters . . ."[25] On the contrary, Scalia's only doctrinal concern was to determine the "procedural nature of the Federal Rule."[26]

C. *Scalia's Three-Justice Plurality*

Joined only by Roberts and Thomas, Scalia argued that the Court in *Shady Grove* was required by precedent to ignore state substantive law; as authority, Scalia cited the 1941 decision, *Sibbach v. Wilson*, and its alleged refortification in *Hanna*.[27] According to Scalia, if the Court were to give any attention to state law, that would be "to overrule [*Sibbach*], (or, what is the same, to rewrite it)," and would require federal courts impractically to consider "the idiosyncrasies of state law" in evaluating the Federal

18. *Id.* at 1442 (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965)).
19. *Id.* at 1437.
20. *Id.* at 1443.
21. *Id.* at 1442 (citation omitted) (emphasis added).
22. *Shady Grove*, 130 S. Ct. at 1443, 1447-48.
23. *Id.* at 1443 (emphasis original).
24. *Id.* (quoting Mississippi Publishing Co. v. Murphree, 326 U.S. 438 (1946)).
25. *Id.* at 1444.
26. *Shady Grove*, 130 S. Ct. at 1444. In the alternative, Scalia expressed "doubt" that section 901(b) is substantive because the statute applies to various kinds of law in New York courts. This argument figures prominently in Justice Stevens's concurrence and will be discussed *infra*, Section I.D.
27. *Id.* at 1444.

Rules' validity under the REA.[28]

Scalia acknowledged that his singular attention to the Federal Rule — ignoring the state law at stake — "gives short shrift to the statutory text" of the REA.[29] With understatement, he wrote that

> it is hard to understand how it can be determined whether a Federal Rule 'abridges' or 'modifies' substantive rights without knowing what state-created rights would obtain if the Federal Rule did not exist. *Sibbach*'s exclusive focus on the challenged Federal Rule . . . . is hard to square with [the REA's] terms.[30]

Nonetheless, Scalia refused to apply Congress's chosen text because *Sibbach* is "settled law" that has allowed subsequent Courts "to muddle through well enough" as the decades have passed.[31] Scalia concluded as a matter of judicial policy that "[t]he more one explores the alternatives to *Sibbach*'s rule, the more its wisdom becomes apparent."[32]

D. Stevens's Concurrence

Justice Stevens was *Shady Grove*'s fifth majority vote, but he disagreed with Scalia on two key points. First, Stevens proposed a more nuanced approach in determining whether a Federal Rule conflicts with state law. According to Stevens, the Court should interpret Federal Rules with appreciable "'sensitivity to important state interests and regulatory policies.'"[33] Indeed, if a federal rule does "appear[] to abridge, enlarge, or modify a substantive right," Stevens urged federal courts to reconsider "whether the rule can reasonably be interpreted to avoid that impermissible result."[34]

Second, Stevens proposed a different standard for evaluating whether a Federal Rule violates the REA. Stevens claimed that a Rule impermissibly modifies substantive rights when it violates a state law that "actually is part of a State's framework of substantive rights or remedies."[35] Notwithstanding the plurality's analysis, Stevens insisted that under the REA, "the balance Congress has struck turns, in part, on the nature of the state law that is being displaced by a federal rule."[36] Even though the "form" of a certain state law might appear procedural under Scalia's approach, Stevens noted that the state law might be "so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy."[37] Where "seemingly procedural rules . . . make it significantly more difficult to bring or to prove a claim," Stevens claimed that federal courts must invalidate particular *applications* of a Federal Rule that would preempt such state laws, even though the Rule might otherwise be *facially valid*

28. *Id.* at 1445.
29. *Id.* at 1445.
30. *Id.*. at 1446.
31. *Shady Grove*, 130 S. Ct .at 1445-47.
32. *Id.* at 1446-47.
33. *Id.* at 1452 (quoting Gasperini v. Ctr. for Humanities, 518 U.S. 415, 427 n.7 (1996)).
34. *Id.* at 1452.
35. *Id.* at 1449.
36. *Shady Grove*, 130 S. Ct. at 1447.
37. *Id.* at 1450.

under the REA.[38]

As a matter of precedent, Stevens disputed Scalia's reliance on *Sibbach* because that decision upheld a Federal Rule against a facial challenge without having to consider whether the Rule trenched on state substantive law.[39] Stevens also quoted *Hanna against* Scalia's categorical insistence on ignoring state law and practical effects: "[A] court, in measuring a Federal Rule against the . . . the Enabling Act . . . need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts."[40] Finally, Stevens cited the Court's 1996 decision, *Gasperini v. Center for Humanities, Inc.*, which relied heavily on analysis of state law and practical impacts. Five times, Stevens quoted *Gasperini*'s doctrine that, in applying the REA, federal courts should "interpret[] the Federal Rules . . . with sensitivity to important state interests and regulatory policies."[41]

Even under Stevens's more flexible approach to interpreting the Federal Rules, he found that Rule 23 "squarely governed" class certification in Shady Grove's case.[42] Stevens wrote that to follow section 901(b) in this context would go beyond proper respect for federalism; it would simply "rewrite" Rule 23.[43] Having found that Rule 23 and section 901(b) irreconcilably conflict, Stevens further concluded that Rule 23 did not violate the REA by modifying substantive rights. Stevens asserted that because "the bar for finding an Enabling Act problem is a high one . . . [t]here must be little doubt."[44] Stevens found that section 901(b) did provide such certitude because the statute "applies not only to claims based on New York law but also to claims based on federal law or the law of any other state."[45] Given such ecumenical application, Stevens doubted that section 901(b) was truly linked to New York's interests in controlling the substantive availability of statutory damages.[46]

Stevens acknowledged certain legislative history indicating that section 901(b) was enacted to avoid imposing upon defendants the "annihilating punishment" of class--aggregated statutory damages.[47] For Allstate, of course, the Court's judgment changed a $500 individual claim to a $5,000,000 class action. But Stevens did not find such statements to be "*particularly strong evidence* that section 901(b) serves to define who can obtain a statutory penalty or that certifying such a class would enlarge New York's remedy."[48] As Stevens wrote, "[a]ny device that makes litigation easier makes it easier for plaintiffs to recover damages," and he believed that class-action relief was just

38. *Id.* at 1450.

39. *Id.* at 1452. The three-Justice plurality almost conceded this detail about *Sibbach* and instead cited *Hanna* in response: "To the extent *Sibbach* did not address the Federal Rules' validity vis-à-vis contrary state law, *Hanna* surely did, and it made clear that *Sibbach*'s test still controls . . . ." *Id.* at 1445 n.9 (citations omitted).

40. *Id.* at 1457.

41. *Shady Grove*, 130 S. Ct. at 1449, 1451, 1451 n.5, 1452, 1457 (Stevens, J., concurring in part),

42. *Id.* at 1456.

43. *Id.*

44. *Id.* at 1457.

45. *Id.*

46. *Shady Grove*, 130 S. Ct. at 1457.

47. *Id.* at 1458.

48. *Id.* at 1458 (emphasis added).

another "device," comparable in kind to "setting filing fees or deadlines for briefs."[49]

E. Ginsburg's Dissent

When Justice Ginsburg wrote for the *Gasperini* majority in 1996, she was joined by Justices O'Connor, Kennedy, Souter, and Breyer.[50] Scalia wrote a fierce dissent, claiming that the Federal Rule in that case should be uniformly applied regardless of state regulatory policy.[51] When similar doctrinal issues surfaced in *Shady Grove*, Ginsburg was joined by Kennedy, Breyer, and O'Connor's successor Justice Alito. Yet without the vote of Justice Souter's successor, Justice Sotomayor, Ginsburg's analysis changed from *Gasperini*'s majority to *Shady Grove*'s dissent.[52]

Ginsburg claimed that section 901(b) and Rule 23 do not conflict. In contrast to the majority's interpretation — which she decried as "relentless[]," "immoderate," and "mechanical"[53] — Ginsburg asserted that these state and federal provisions cannot possibly conflict because they concern different subjects, have different purposes, and when properly construed, lie on opposite sides of the doctrinal line between "substance" and "procedure."

For Ginsburg, section 901(b) was legally equivalent to a statutory damages cap, which has nothing to do with Federal Rule 23. As *Shady Grove* demonstrates, to disallow class relief in litigation that involves statutory damages "controls the penalty to which a defendant may be exposed in a single suit."[54] Ginsburg drew a sharp contrast between section 901(a), which like Federal Rule 23 controls "only the procedural aspects of class actions," and section 901(b), which was designed to avoid the "'excessively harsh results,'" "'overkill,'" and "annihilating punishment" that might often result from aggregating statutory penalties.[55] According to Ginsburg, section 901(b) "was not designed with the fair conduct or efficiency of litigation in mind."[56] On the contrary, "New York's decision . . . to block class-action proceedings for statutory damages . . . makes scant sense except as a means to a manifestly substantive end: Limiting a defendant's liability in a single lawsuit in order to prevent the exorbitant inflation of penalties . . . ."[57] Section 901(b) "is as much a part of the [substantive] delineation of the claim for relief as it would be were it included claim by claim in the New York Code."[58]

Ginsburg conceded that similarities between the language and the form used in section 901(b) and Rule 23 produce a superficial contradiction. Nonetheless, she sought

49. *Id.* at 1458-59.

50. 518 U.S. 415, 418 (1996).

51. *Id.* at 467-68 (Scalia, J., dissenting). Stevens agreed with almost all of the majority's analysis but dissented from the Court's decision to remand. *Id.* at 439 (Stevens, J., dissenting).

52. Stevens again agreed with much of Ginsburg's approach, but as we have seen, he viewed Rule 23 and section 901(b) as unavoidably contradictory. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1457 (2010) (Stevens, J., concurring) ("Although it reflects a laudable concern to protect 'state regulatory policies,' Justice Ginsburg's [interpretation of Rule 23] would, in my view, work an end run around Congress' system of uniform federal rules, and our decision in *Hanna*.").

53. *Id.* at 1460-61, 1464 (Ginsburg, J., dissenting).

54. *Id.* at 1464.

55. *Id.*

56. *Id.* at 1465.

57. *Shady Grove*, 130 S. Ct. at 1465.

58. *Id.* at 1466.

to avoid that conflict by applying *Gasperini*'s "sensitivity to important state interests and regulatory policies," and *Hanna*'s attention to whether Rule 23 "makes the character and result of the federal litigation stray from the course it would follow in state courts." In *Shady Grove*, to apply Rule 23 would increase Allstate's potential liability 10,000 times over, and would thereby undermine New York's interest in controlling substantive liability. For Ginsburg, that showed why the purely procedural Rule 23 should be construed not to conflict with the deeply substantive section 901(b), and also why section 901(b) should apply in a federal diversity case.

II. THE COURT'S ILLOGIC IN *SHADY GROVE*

Having sketched inconsistencies among the Justices in *Shady Grove*, we can now excavate deeper problems within those positions, which may in turn reveal why this field remains so doctrinally challenging. This essay cannot solve the fundamental problems posed by *Shady Grove*; instead, my narrower hope is to shed fresh light on the Court's analysis, with consequences for how "*Erie*" and "REA" cases might be framed by Courts and Justices in the future. Accordingly, let us consider three questions that were raised in *Shady Grove* and explore the merits of three new answers.

A. What Does Section 901(b) Regulate?

At one level, what split the Court in *Shady Grove* were different characterizations of section 901(b) itself. Each group of Justices expressed a distinct view of the statute — often through a featured analogy — which anchored their doctrinal conclusions. On one hand, Scalia described section 901(b) as regulating when class actions are available, which he compared to joinder rules and thus deemed paradigmatically procedural.[59] Under standard assumptions about litigation, it makes no substantive difference whether two plaintiffs bring their claims as part of one lawsuit or in two separate suits.

The practical function of class actions, however, is quite different from this picture of joinder. Especially with respect to small-value claims like Shady Grove's, the class action is not just a way to meld many plaintiffs' cases into one. The device of "representative plaintiffs" is by definition lacking in joinder contexts, and this is what allows the numerous claims of absentee plaintiffs — who have not and never will come

59. *Id.* at 1436-1448. As a technical matter, Scalia compared class actions to joinder in the context of Rule 23; he claimed that section 901(b)'s substantive or procedural nature was categorically irrelevant. *Id.* at 1457. This argument raises at least a paradox, however, and it may be a fallacy. A crucial part of Scalia's argument — and his main dispute with Ginsburg — is the claim that section 901(b) and Rule 23 "expressly and unambiguously" conflict, not just incidentally or in their mere effects, but as a direct and quite unavoidable collision. *Id.* If Rule 23 is "truly procedural" and section 901(b) is "truly substantive," however, that seems impossible. Phrased differently, if Rule 23 and section 901(b) are to directly collide with each other, and "answer the same question," the two laws must "really regulate" the same regulatory objects. And regardless of whether that field of direct regulatory conflict bears the label "substantive," "procedural," or something in-between, it's hard to see how there could be one label for the Federal Rule and a different one for the (by hypothesis *directly colliding*) state statute. Similarly problematic is Scalia's statement that section 901(a) addresses a "separate subject" from section 901(b). *Shady Grove*, 130 S. Ct. at 1438. If section 901(a) and Rule 23 clearly address the *same* subject, and if section 901(b) addresses a different subject from section 901(a), that necessarily implies that section 901(b) addresses a different subject from Rule 23. When pressed, Scalia seemed to give up these spurious technicalities and opined directly on the "nature" of section 901(b) as procedural law: "[Section] 901(b) does conflict [with Rule 23] because it addresses not the remedy, but the procedural right to maintain a class action." *Id.* at 1439 n.4.

to court — to be litigated. Likewise, lawyers who work for payment might pursue their share of $5,000,000 in one case, with a manageably small number of "representative plaintiffs," even if they would never seek fractions of 1,000 cases worth $500, with 1,000 independent clients. For defendants like Allstate, disputes over class certification are not the difference between one big lawsuit and many small ones; it is more like one big suit or virtually no litigation at all.[60]

On the other hand, Ginsburg viewed section 901(b) as equivalent to a statutory damages cap, not least because she had previously used this example of "substantive law" in *Gasperini*. Ginsburg's comparison to damages caps, however, is just as imperfect as Scalia's analogy to joinder. For example, although Ginsburg characterized section 901(b) as limiting the amount of statutory damages that Shady Grove can recover, any class recovery greater than $500 would not have belonged to Shady Grove at all. Such moneys will belong to other class plaintiffs, and more immediately to lawyers for the class who will be paid their fees and costs. Ginsburg's so-called damages cap does not apply to Shady Grove at all; it limits only other plaintiffs and (in effect) the litigating attorneys.

Likewise, Ginsburg noted that, from Allstate's perspective, section 901(b) caps the statutory damages that a defendant may confront in a single lawsuit. But the typical damages cap achieves much more than this. Under standards of claim preclusion, a damages cap often limits the damages a defendant will pay to a plaintiff *with respect to a particular set of events*. Thus, if a plaintiff's claim for $5,000 is statutorily capped at $1,000, that plaintiff cannot win $1,000 in one lawsuit, and then sue the defendant again to recover the rest. Scalia was therefore quite correct that, unlike a damages cap, any denial of class certification in *Shady Grove* would not formally impede other plaintiffs' from pursuing $4,999,500 against Allstate in 4,999 other lawsuits.

In his concurrence, Stevens compared section 901(b) to filing fees and concluded that the statute involves "a classically procedural calibration." He stressed that although "the class vehicle may have a greater practical effect on who brings lawsuits than do low filing fees, . . . that does not transform [section 901(b)] into a damages 'proscription' or 'limitation.'"[61] Stevens's approach has at least the implicit benefit of shifting analytical focus toward lawyers, who often pay such fees and expenses in contingent-fee litigation.

On the other hand, there may be an even closer analogy that would reverse Stevens's conclusion. Stevens is surely right that to disallow class certification may increase *litigation costs*, through multiple filings, evidence preparation, and suchlike. Far more important, however, is class certification's radical effect on the monetary *benefits of litigation*, especially including lawyers' ability to recover fees. A vital consequence of aggregating plaintiffs' monetary claims is the resultant power to attract lawyers who want large payments. Certification may thus be more like attorney's fees provisions than a court's filing-fee schedule. The problem for Stevens is that attorney's-fee provisions are paradigmatically "substantive law," even though filing fees are paradigmatically

60. Stephen B. Burbank & Tobias B. Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 57 (2010).

61. *Shady Grove*, 130 S. Ct. at 1459 (Stevens, J., concurring) (quoting Ginsburg, J., dissenting).

"procedural."[62] If section 901(b)'s most important function is to stop lawyers from drawing their fees out of large, aggregated pots of money in cases like *Shady Grove*, one might argue that the statute is substantive after all — which is the exact opposite of Stevens's proposed result.

B. Do Rule 23 and Section 901(b) Conflict?

For some readers, the foregoing problems may illustrate general flaws in analogical reasoning. Perhaps instead of comparing section 901(b) to other laws, one could just accept that the statute is unlike other examples that straddle lines between substance and procedure. Whatever section 901(b) regulates, why not ask directly whether the statute conflicts with Rule 23? Scalia and Ginsburg took varied approaches to this question as well, which in turn point to foundational differences in jurisprudential methodology.

Scalia focused on "clear text." For him, Rule 23 provides general conditions under which class actions can be "maintained," and section 901(b) says that a specific group of class actions cannot be "maintained." Given that unambiguous and unavoidable textual conflict, Scalia looked no further.

REA jurisprudence, however, has not been a hothouse for judicial textualism. For example, Scalia must struggle to explain how *Walker v. Armco Steel Corp.* found "no direct conflict" between, on one hand, a Federal Rule that civil actions are "commenced by filing a complaint" and, on the other, a state law that civil actions are "commenced . . . [when the summons] is served."[63] Scalia noted that the *Walker* statute applied its term "commenced" to statutes of limitations, while the Federal Rule did not restrict what "commenced" was supposed to mean.[64] Yet the textualist problems remain stark. *Walker*'s Federal Rule said in general terms that lawsuits "commence" at filing, and the state law marked a specific exception for statutes of limitation. In *Walker*, the Court concluded solely from this pattern that the Federal Rule did not "purport[]" to control state statutes of limitations.[65]

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62. 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 54.78[1] (3d ed. 2000). REA specialists might compare Stevens's analysis of filing fees to the *Cohen* Court's analysis of security bonds. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). *Cohen* considered a Federal Rule that set forth various conditions for filing a derivative action. *Id.* (At the time, by coincidence, this rule was numbered "Rule 23," though it is now Rule 23.1.) State law required plaintiffs in derivative lawsuits to file a security bond; the Federal Rule did not require such a bond. *Cohen* ordered federal courts to apply state law and require the security bond. Justice Wiley Rutledge, in his last few weeks as a Justice, filed a dissent suggesting that — in part *because* "substantive" and "procedural" law are so hard to separate — federal procedural rules should ordinarily trump state law. *Id.* at 559-61 (Rutledge, J., dissenting). There are unique echoes between Rutledge's *Cohen* dissent and the concurring opinion of his once-law-clerk, Stevens, whose opinion in *Shady Grove* was filed during the last few weeks of his own tenure as a Justice.

63. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 742, 752 (1979).

64. *Shady Grove*, 130 S. Ct. at 1440 n.6.

65. Quoted here in full, the *Walker* Court's *ipse dixit* offers no help to the textualist: "There is no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations. In our view, in diversity actions Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations." *Walker*, 446 U.S. at 751-52. The *Walker* Court looked far beyond the declared legal texts — including legal scholarship and advisory notes — to uncover federal regulatory purposes, and it also looked to state regulatory interests to distinguish the state statute's function from that of the Federal Rule. Another element justifying *Walker*'s result was stare decisis, insofar as the very same issue had been decided in *Ragan*

In *Shady Grove*, one could likewise ask whether Rule 23 "purported" to control the availability of statutory damages under state law. The Federal Rule's general term "maintained" says nothing about statutory damages under state law, any more than the terms of section 901(b) speak about cases heard in federal court.

Similar problems for Scalia's clear-textualism arose in a case that he did not mention, *Cohen v. Beneficial Industrial Loan Corp.*[66] The Federal Rule in *Cohen* prescribed several seemingly comprehensive requirements for filing a corporate derivative lawsuit in federal court. Unlike the Federal Rule, state law required plaintiffs to proffer a security bond to cover the defendants' litigation expenses and lawyer's fees. Measured against Scalia's analytical framework, the *Cohen* Court did everything wrong. The majority began with *Erie* and the Rules of Decision Act, rather than the Rules Enabling Act and *Sibbach*, and it analyzed whether the state law was substantive or procedural, rather than looking exclusively at the Federal Rule. The *Cohen* Court found that state law could add requirements to a Federal Rule's otherwise comprehensive requirements. And most of all, *Cohen* followed other REA cases in its departure from textualism in order to serve the Court's perception of federal, state, and judicial interests.

To be sure, these deviations from textualism in the past may not fully justify future decisions to do so. Yet some of textualism's standard claims to promote democratic accountability seem weaker in REA cases than in other contexts. As an initial matter, one should note that states can indisputably redraft statutes to accomplish what New York attempted through section 901(b). Although Scalia played coy about a true damage cap's validity, one might imagine a statute providing that "statutory penalties shall not be available to any plaintiff who pursues class relief." In both effect and terms, such a statute would cap statutory damages for class plaintiffs at zero. Applying Scalia's metaphysics, this hypothetical statute would be perfectly valid because it would not prevent any class action from "coming into existence,"[67] yet it would render such class actions as useless as if they had never been born. Another hypothetical statute might declare that "the statute of limitations for any class action pursuing statutory penalties is one millisecond after the plaintiff's injury." Ever since *Guaranty Trust*, nothing is more doctrinally certain than the holding that state statutes of limitations are "substantive law" that must be applied in federal court and that do not conflict with federal procedures.[68] This imaginary statute, like section 901(b), would completely gut state-law class actions in federal court, yet it would fully satisfy Scalia's analysis in *Shady Grove*.

What could possibly be gained by forcing states to draft their statutes like my hypotheticals instead of section 901(b)? The *Shady Grove* majority suggests that a "state-friendly approach" would be to "accept the law as written" and measure its terms against the Federal Rule.[69] But such hyperliteralism is triply lame in this context. First, to post hoc "rewrite" section 901(b) in *Shady Grove*'s REA analysis would work no mischief on the law's application in state court, or on any statutory purpose that any state could

v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1948). This essay will discuss the role of stare decisis *infra*.

66. 337 U.S. 541 (1949).

67. *Shady Grove*, 130 S. Ct. at 1439.

68. Guar. Trust Co. v. York, 326 U.S. 99, 110-112 (1945).

69. *Shady Grove*, 130 S. Ct. at 1440.

possibly value. Second, it seems a deep irreality to imagine that states would draft their laws with an eye to how those laws might be applied by federal courts in diversity cases as they relate to Federal Rules. The vast majority of cases governed by section 901(b) are state-court cases, and the statute was drafted accordingly. To split Scalia's chosen textualist hair, in this particular context, seems distant from any system for enforcing any codified "legislative intent," much less any "democratic will." Third, this argument seems almost uniquely preposterous with respect to *Shady Grove* and section 901(b). From the state law's enactment in 1975 until 2005, there was no jurisdictional possibility for small-claims class actions like Shady Grove's to be heard in federal court. It would have been nothing short of miraculous for New York's legislature to anticipate the Class Action Fairness Act and consider how they might wish their law about statutory damages to interact with Rule 23 under that novel grant of jurisdiction.

Another argument defending Scalia's approach might claim that textualism is always valuable because it is "easier" for courts to apply and for various law-watching audiences to understand, or because it is a more ideologically "legitimate" use of judicial power. Scalia's own opinion in *Shady Grove*, however, offers a striking counter-argument in favor of precedent and stare decisis,[70] and we will reexamine the latter jurisprudential principles in Part III.

As a last thought on textualism, I should rebut the Court's assertion that the terms of Rule 23 and section 901(b) really do unavoidably conflict. The first step is to construe Rule 23 as not "purport[ing]" to control the state-law application of statutory penalties. If a state, through some textually appropriate mechanism, were to disable class actions in cases involving statutory penalties, that carve-out would not violate or undermine Rule 23 in any way. On this construction, Rule 23 categorically does not address the availability of remedies. Instead, the Rule *presumptively* allows plaintiffs to seek through class actions all remedies that applicable substantive law makes available; where Congress or state law says otherwise, that presumption yields.[71] Although section 901(b) is not by terms a limit on statutory damages, it is certainly an explicit effort to make statutory damages unavailable to class-action plaintiffs. Accordingly, under this approach, section 901(b) would control Shady Grove's ability to recover statutory damages without violating any explicit provision of Rule 23. I do not intend to endorse

70. *Id.* at 1446. As we have seen, Scalia claimed that federal courts should completely ignore state law when judging whether a Federal Rule "modif[ies]" substantive rights. *Id.* at 1444. Scalia admitted that this approach is "hard to square with [the REA's] terms," because "it is hard to understand . . . whether a Federal Rule 'abridges' or 'modifies' substantive rights without knowing what state-created rights would obtain if the Federal Rule did not exist." *Id.* at 1445-46. In response to this concern, the Court's arch-textualist defended *Sibbach* as "settled law . . . for nearly seven decades," decried offering Congress "a moving target," and feigned indifference to pursuing textualism in a context where (according to Stevens's otherwise disagreeable concurrence) doing so "would not affect the result." *Id.* at 1446. Scalia's characterization of this field of law as "settled," much less as settled "for nearly seven decades," and least of all as having settled upon his own unprecedented view of the REA is nothing short of heroic. *Shady Grove*, 130 S. Ct. at 1446. Likewise, his quip that the Court has "managed to muddle through well enough in the 69 years since *Sibbach*" would be wonderful irony, except for the strange possibility that it might be in earnest. *Id.* at 1447. A doctrinal muddle is exactly what the Court's decisions have produced over the decades, and that condition persists today.

71. Congress has several times restricted class actions' availability in particular legal contexts. Writing for the Court, Scalia construed those actions as post-enacted statutory abrogations of Rule 23. *Shady Grove*, 130 S. Ct. at 1438. One might fairly wonder whether the same analysis would apply to pre-REA federal statutes. If successful, the approach described *supra* would recharacterize such congressional actions as consistent with Rule 23.

or undermine the foregoing, irenical approach to Rule 23 and section 901(b). Instead, this paragraph simply shows that — especially in view of *Walker* and *Cohen* — the two provisions' textual conflict was not inevitable.

In contrast to Scalia's textualist interpretation, Ginsburg claimed that Rule 23 and section 901(b) did not conflict because the two provisions served categorically different goals. She viewed Rule 23 as serving procedural interests, while section 901(b) served substantive ones. The core of Ginsburg's analysis was her characterization of section 901's legislative history, which sharply separated section 901(a) from section 901(b). The original draft of New York's statute included only section 901(a), specifying requirements for class actions that tracked standards in Federal Rule 23: numerosity, typicality, adequate representation, and the like. Ginsburg characterized these provisions — both state and federal — as addressing "*only* the procedural aspects of class actions."[72] She therefore suggested that Rule 23 should properly override section 901(a) wherever those two might diverge.

Before New York's bill was enacted, however, constituent groups added section 901(b) to foreclose "annihilating punishment of the defendant," "overkill," and "excessively harsh results" in cases concerning statutory penalties. For Ginsburg, this limitation was "*not designed* with the fair conduct or efficiency of litigation in mind"; instead, it was purely substantive in nature.[73] This difference in goals between section 901(b) and Rule-23-via-section 901(a) is what triggered Ginsburg's doctrinal "sensitivity to important state interests and regulatory policies," and is also what undergirded her conclusion that section 901(b) and Rule 23 do not conflict. Because Ginsburg saw the two provisions as governing categorically different fields, for categorically different purposes, she argued that any formal textual collision was at most a superficial conflict that could be adequately managed.

Ginsburg's confidence about legal purpose mirrors Scalia's self-assurance about text, and although each Justice's interpretation is certainly plausible, neither one seems necessary. Complications for Ginsburg's analysis stem from modern practical realities of class action litigation. Even more than other lawsuits (which is saying something), class actions almost never reach trial, much less judgment with an award of damages. Instead, the crucial stage is class certification: if a class is not certified, the litigation goes away, and if the class is certified, settlement becomes almost inevitable.[74] From this perspective, New York's cited risks of "overkill" and "annihilation" with respect to class-action defendants are not just about fears of "too much justice" as a matter of substantive liability. There may also be procedural coercion in the fact of aggregation itself, such that defendants who face massive settlement pressure in cases where "individual proof of damages is unnecessary" will not get a sufficiently fair hearing of their defense.

To be clear, my concern here is not to argue that settlement pressures in statutory-

72. *Id.* at 1464 (emphasis added).

73. *Id.* at 1465 (emphasis added).

74. Burbank & Wolff, *supra* note 60, at 19 ("The prospect of class certification is the single most important factor in the dynamics of litigation or settlement in any proceeding in which class treatment is on the table. Certification can transform unenforceable negative-value claims into an industry-changing event and dramatically alter the litigation or settlement value of high-stakes individual claims.").

penalty class actions are fundamentally different from dynamics in other kinds of cases. New York apparently thought so, and my point is simply that all procedural systems are concerned with maintaining some fair balance between plaintiffs and defendants as lawsuits proceed. With respect to plaintiffs, legal systems might try to avoid procedural barriers that block meritorious claims, even as the system simultaneously tries to shelter defendants from nuisance suits and legalized extortion. All of these interests, on every side of class action or individual litigation, seem quite procedural in nature.

Ginsburg's wall between substantive and procedural purposes may, on reflection, be just as controversial as Scalia's proposed textual conflict between Rule 23 and section 901(b). Section 901(b) was indeed passed to stop plaintiffs from seeking statutory damages through class actions. But one cannot say whether this policy stemmed from "substantive" fears that statutory damages were "too high" and should be effectively scaled back, or instead from "procedural" fears that class actions might unfairly skew the legal terrain toward the plaintiff's negotiation and settlement interests.[75]

By comparison, Rule 23 also incorporates a significant blurring of procedure and substance. The Rule may have originated from such ostensibly procedural goals as "efficiency" in processing large numbers of similar cases. Yet the greatest consequence of class actions has been to alter plaintiffs' ability to enforce substantive law, whether through massive aggregations of small-claim plaintiffs or innovative use of structural injunctions.[76] Likewise, when New York enacted section 901(a), class actions' substantive consequences were obvious if not demonstrably intended, thereby leaving the "substantive" or "procedural" purposes of Rule 23, section 901(a), and section 901(b) much less distinct than Ginsburg would admit.

C. *What Law Determines Whether Section 901(b) Is Substantive or Procedural?*

We have thus far seen that *Shady Grove* simply will not yield an easy answer — not by common-sense analogy, textualism, or purpose-based interpretation. If "substantive" and "procedural" law cannot be identified by disembodied intuition or judicial ideology, one might ask just where courts should look in deciding such issues. The Court's division on this source-of-law question illustrates doctrinal options for future cases, and it frames my own view of how cases like *Shady Grove* should come out.

Writing for the plurality, Scalia espoused an old-regime doctrinal framework: in cases like *Shady Grove*, where a Federal Rule is involved, the substance/procedure stems

75. Stevens's concurrence reveals similar confusion on this point. *See Shady Grove*, 130 S. Ct. at 1459. He claims that section 901(b) is procedural because New York's legislators determined that "there was no *need* . . . for . . . class actions" in cases involving statutory damages; accordingly, they "wanted to exclude the class vehicle when it appeared to be unnecessary." *Id.* at 1458-59 (Stevens, J., concurring). Unnecessary for what? If Stevens means necessary to achieve the proper level of compliance with substantive law, that could easily be characterized as a substantive policy decision. Presumably strict liability, treble damages, attorney's fees, and many other "substantive" rights and remedies aim to do what is "necessary." If, under Stevens's argument, New York believed that either statutory damages *or* aggregate litigation was "necessary" to remedy unlawfulness — but not both — that choice about how to control out-of-court behavior seems at least arguably substantive. *Cf.* Hanna v. Plumer, 380 U.S. 460, 474-75 (1964) (Harlan, J., concurring).

76. Burbank & Wolff, *supra* note 60, at 57-58.

from the REA, and the Court has proudly "rejected every statutory challenge to a Federal Rule that has come before [it]." Following Chief Justice Warren's framework in *Hanna*, Scalia construed the test for "procedure" broadly and the limitation concerning "substantive rights" narrowly, thereby concluding that Rule 23 should be upheld and applied.[77] Scalia drew a contrast, however, between *Hanna* cases that do involve Federal Rules and *Erie* cases that do not. Whereas *Hanna* cases are "statutory" decisions under which Federal Rules are never invalid, Scalia claimed that *Erie* applied *the Constitution* and turned on practical considerations such as "forum shopping" between state and federal courts.[78]

I have challenged *Erie*'s constitutional basis at some length,[79] and it is regrettable that Justice Sotomayor approved this part of Scalia's analysis without comment. By contrast, Stevens and Ginsburg implicitly rejected *Erie*'s so-called constitutional source. Both of these Justices (representing a majority of the Court) viewed *Erie* cases as based upon the Rule of Decision Act, rather than the Constitution,[80] and this may count as an important step.

As a matter of application, however, Stevens's interpretation of "substance" and "procedure" endorsed the same separation between Rules-cases and non-Rules-cases that drove Scalia's analysis. Stevens wrote that "the tests are different" in these two kinds of cases in order to "reflect that 'they were designed to control very different sorts of decisions.'"[81] He argued that forum shopping should be relevant to cases without Federal Rules, but not to cases like *Shady Grove*. And he claimed — like Scalia — that "the bar for finding an Enabling Act problem is a high one," requiring courts to find "little doubt" that a Rule impermissibly alters substantive rights.[82]

Ginsburg's opinion marked an importantly different approach to analyzing REA cases, which she had also voiced in *Gasperini*. Rather than viewing Rules and non-Rules cases as fundamentally separate and divergent, Ginsburg characterized the two fields as more coherent: "Recognizing that the Rules of Decision and the Rules Enabling Act simultaneously frame and inform the *Erie* analysis, we have endeavored in diversity suits to remain safely within the bounds of both congressional directives."[83]

Though the Court has never invalidated a Federal Rule under the REA, Ginsburg marshaled examples where the Court has non-textually "interpreted" Rules to avoid conflicts with state law, and also where the Court's interpretive "restraint . . . diminish[ed] prospects for the success of such challenges."[84] Ginsburg showed how the Court's REA cases and non-Rule *Erie* cases have often applied the same normative

77. *Shady Grove*, 130 S. Ct. at 1442-43.

78. *Id.* at 1431, 1442-43.

79. *See* Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595, 596 (2008); Craig Green, Erie *and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661, 662-63 (2008) [hereinafter Green, Erie *and Problems of Constitutional Structure*].

80. *Shady Grove*, 130 S. Ct. at 1449, 1456-57, 1459-60 (Stevens, J., concurring). *Id.* at 1460-61, 1471, 1473 (Ginsburg, J., dissenting). "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." 28 U. S. C. § 1652.

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

82. *Id.* at 1457 (Stevens, J., concurring).

83. *Id.* at 1461 (Ginsburg, J., dissenting).

84. *Id.* at 1468 n.10 (Ginsburg, J., dissenting).

principles of federalism, judicial administration, substantive enforcement, and procedural fairness. And why not? Should (as Scalia and Stevens imply) the REA's definitions of "substance" and "procedure" differ so widely from those applicable to non-Rule cases under *Erie* and the Rules of Decision Act?

Stephen Burbank has thoughtfully argued that this last answer should be "yes," in fidelity to the REA's peculiar legislative history and separation-of-powers principles that apply especially strongly in cases concerning Federal Rules.[85] I am less sure. Federal Rules cases under *Hanna* and non-Rules cases under *Erie* both appear to involve high levels of judicial discretion and little if any legislative guidance. The REA and Rules of Decision Act may implicitly embody different values, and they apply to circumstances that only partly overlap. Yet the common upshot from both statutes is that their vague legislative terms ("substance," "procedure," and "rules of decision") are to be given content only through incremental decisions by federal courts themselves. Such decisions might formally be called "statutory interpretation," if one prefers that label, but the yawning absence of legislative guidance must resemble "federal common law."[86]

Justice Rutledge long ago described the Court's REA jurisprudence as follows: "What is being applied is a gloss on the *Erie* rule, not the rule itself."[87] Now sixty years later, the modern Court has applied glosses on glosses on glosses, to the point that any original surface is barely visible. *Shady Grove* illustrates that, in this context, the content of judicial rulings, their methodology, and even the source of law subject to "interpretation" are all matters of disputed construction by the Court itself. Especially if Ginsburg's synthetic approach can be reconciled with Burbank's analysis of the overlapping values in REA and *Erie* cases, her *Shady Grove* dissent could mark a historically significant advance with respect to this persistently complex subject.

III. HOW TO DECIDE CASES LIKE *SHADY GROVE*

This essay itself will not explicitly resolve the simple question whether section 901(b) should regulate class actions in diversity suits. Thus, it might seem unfair to dissect the contents of imperfect answers proffered by Justices with great time pressures and collective-action problems on a divided Court. There is, however, a seemingly ordinary methodological flaw in Scalia's approach that demands attention. The plurality in *Shady Grove* contradicted the Court's most recent applicable precedent, *Gasperini*, with hardly a citation.[88] In relevant part, *Gasperini* concerned whether Federal Rule 59's standard for retrial trumped state law concerning excessive damages. After evaluating the state's interests and applying due interpretive "sensitivity" for those state policies, the Court held that state law and Rule 59 could be reconciled.[89]

85. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106-12 (1982) (claiming that the Rules Enabling Act's procedure/substance dichotomy was designed to limit the prospective lawmaking power granted to the Supreme Court under the Act and to maintain separation of powers).

86. Any irony that *Erie* itself might be common law is only superficial, as *Erie* only barred "federal *general* common law," which had a specific meaning under the regime of *Swift v. Tyson*. *See* Green, *Erie* and Problems of Constitutional Structure, *supra* note 79, at 664.

87. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 558 (1949) (Rutledge, J., dissenting).

88. *See Shady Grove*, 130 S. Ct. at 1442 n.7.

89. Gasperini v. Ctr. for Humanities, 518 U.S. 415, 419 (1996).

Scalia's dissent in *Gasperini* roared that "[t]he *principle* that the state standard governs is of great importance, since it bears the potential to destroy the uniformity of federal practice and the integrity of the federal court system."[90] He wrote that Rule 59's text was "undeniabl[y]" broad enough "to cause a direct collision with the state law . . . thereby leaving no room for the operation of that law."[91] Yet because six of Scalia's colleagues did not agree, *Gasperini*'s reasoning served as binding precedent for almost fifteen years.

Scalia made literally no effort to reconcile *Shady Grove* and *Gasperini*. Indeed, he cited the latter case only once, in order to condemn its "sensitivity" as "just as standardless as the 'important or substantial' criterion we rejected in *Sibbach v. Wilson & Co.*"[92] With no sense of paradox, Scalia lectured Stevens for failing to follow *Sibbach*'s precedent and seeking to "overrule it (or what is the same, to rewrite it)."[93] As for *Gasperini*, Scalia rewrote nothing; his success in attracting votes said quite enough.

Some readers may be unimpressed that Scalia disregarded *Gasperini*'s precedent. Haven't we seen this before? In one high-profile context after another, Court-watchers measure the effect of personnel changes by determining which 5-4 cases retain precedential force even as other decisions are overruled, eviscerated, or simply ignored.

The difference is that *Shady Grove* is no high-profile case. Despite the Justices' gestures toward textualism and judicial simplification, REA jurisprudence is not a major battleground for judicial methodologies. Nor is it fraught with the political charge that electrifies cases about abortion, gun control, or even the Commerce Clause. Judge Posner famously criticized the Supreme Court as by nature a "political court."[94] But if there are indeed any legalist precedents that bind, one might have hoped to find them safely nestled in technical fields like the REA and *Erie*. Does it matter if, in *Shady Grove*, we don't?

One disappointment is topical. The allocation of state and federal law in REA cases like *Shady Grove*, and in non-Rule cases like *Erie*, lacks any "natural answer" of overarching principle or statutory authority. Thus, the best that the Court might hope for are common-law virtues of stability, predictability, and clarity. In *Shady Grove*, Scalia hoped to make judicial decision making easier by making it simpler. But such debatable simplicity was delivered through a non-binding plurality opinion, which neither overruled nor cohered with recent precedent, and whose novel interpretations seem vulnerable to foundational critiques. As with many areas of ordinary law, *Shady Grove* may be an instance where being correct and being consistent are both important, and the plurality may not have succeeded on either front.

A different concern relates to the Court's future well beyond *Shady Grove*. Perhaps every judicial opinion seeks to shape the future, and Scalia's plurality in *Shady Grove* is no exception. Yet if the force of stare decisis is discarded even in ostensibly "non-political" cases, that might incrementally reduce future courts' power to establish law

90. *Id.* at 467 (Scalia, J., dissenting).
91. *Id.* at 468.
92. *Shady Grove*, 130 S. Ct. at 1442 n.7.
93. *Id.* at 1445.
94. Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31 (2004).

that endures. Such lawmaking authority may be quite important within the foreseeable future, as one should expect a decisive number of new Justices to join the Court within (at most) the next eight years. These years of the "Early Roberts Court" may not be memorable for their own sake; rather, they may only mark a transitional route to a new "equilibrium" that will arrive indeterminately soon.

Depending on the imponderables of presidential politics, new Justices might tend to follow Scalia in discarding recent precedents (*Gasperini*) and canonizing selected decisions from the past (*Sibbach* but not *Cohen*). Under this hypothesis, the future Roberts Court might indeed be "aggressive," including in unexpected areas like the REA and otherwise, perhaps to a degree that will make the current Court nothing more than "aggressive-in-waiting."

By contrast, if the pivotal new Justices have judicial outlooks contrary to Scalia's, then any precedential shifts that happened during the "Early Roberts Court" may themselves be summarily reversed. For example, how could any future Justice convince her peers to follow *Shady Grove* as a matter of precedent (rather than preference) in light of *Gasperini*'s unapologetic abuse? Under this scenario, some conservatives who are currently on the Court might have long tenures of vigorous dissents, not unlike the later years of Justice Brennan and Justice Marshall.

Neither scenario offers that much to celebrate, and of course *Shady Grove* is mainly a symptom not a cause of the Court's underlying dynamics. Nevertheless, insofar as participants in (and readers of) this symposium value judicial legalism and watch for judicial "aggression," there may be much to learn from cases like *Shady Grove*, as indications of other precedents may fare in the hands of the "Mature Roberts Court" that is yet to come.