FOREWORD TO THE
SHADY GROVE OPINIONS

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In the early morning hours of July 27, 1934, Harry Tompkins – a 27-year-old metal worker who had been laid off in the depths of the Great Depression – was returning to his house in Hughestown, Pennsylvania. He had been visiting his mother-in-law’s home several miles away. He had gotten an automobile ride that took him most of the way back. He was let out near a pathway that ran alongside the Erie Railroad’s tracks that cut through Hughestown; the path led in the direction of Tompkins’s house. Tompkins was walking west along the path as one of the Erie Railroad’s freight trains approached him, headed east. Tompkins was close to the train as it passed, but was unafraid as he had walked the path before. Just as he was about to reach the point where he would turn onto another path leading away from the tracks, he saw a black object racing towards him. Tompkins later testified that it looked like an open door on one of the freight cars and he put his hands up to defend himself. When he awoke in the hospital he discovered that his right arm had been torn off.

When Tompkins stepped onto that path, he surely had no idea the events that would transpire would so profoundly change the law. Almost as probably, he was unaware that Pennsylvania common law would treat him harshly. Under Pennsylvania law he was a trespasser, even though the path he walked must have been trod by thousands of people before him and nobody seeing him that fateful night would have given him a second glance. The general common law rule was to treat someone such as Tompkins as a licensee, and therein lay the critical difference. As a licensee Tompkins could win by proving mere negligence; as a trespasser he would have to show

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2. Id. at 1013.
3. Id.
4. Id.
5. Id. at 1014.
6. Id.
7. Id.
8. Id.
9. Id. at 1012, 1014.
10. Id. at 1014.
11. Id. at 1016.
“wanton negligence” on the Erie Railroad’s part, a showing he could not make.12

Tompkins’s lawyers were no fools13 and they filed in federal court asserting diversity jurisdiction, hoping that the federal court would apply the general rule as it had for a century or more under what had become known as the doctrine of Swift v. Tyson.14 The lower courts did exactly that and Tompkins won a sizeable verdict.15 But then came the Supreme Court’s decision in Erie Railroad Co. v. Tompkins,16 which changed all that. No more would federal courts sitting in diversity apply the general (or “federal general” as the Court termed it) common law rule.17 Indeed, said the majority, there was no such thing.18 Rather diversity courts would apply the state rule, which meant Tompkins lost.

All of this seems simple enough (though tragic for Tompkins), but then came the rub. Applying obviously substantive state rules like the standard of care was a straightforward enough proposition. But what about issues less central to the substance of the case such as the appropriate statute of limitations,19 whether the judge or a jury acts as a fact finder,20 whether a tort plaintiff must undergo a medical exam at the defendant’s insistence,21 whether service of process on the spouse of the defendant suffices,22 what standard must be applied by appellate courts to review the excessiveness of a verdict,23 or the preclusive effect of an earlier dismissal on limitations grounds?24 Now things got harder, because the Supreme Court came to understand that the federal courts sitting in diversity could not replicate every aspect of the state court experience. Moreover, shortly after the Erie decision was handed down came the Federal Rules of Civil Procedure which rendered obsolete the old Conformity Act, which had called upon federal

12. Id. at 1014.
13. Id. (describing extensive research done by Tompkins’s lawyers regarding the appropriate court in which to file the case).
14. 41 U.S. 1 (1842). Although the doctrine had become associated with the Court’s decision in Swift because of the extensive explication of it there, federal courts had since the drafting of the first Judiciary Act applied general common law rules in diversity cases. See RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 3 (1977) (the antecedents of Swift dated to 1789).
15. Younger, supra note 1, at 1021.
16. 304 U.S. 64 (1938).
18. Erie, 304 U.S. at 78 (“There is no federal general common law.”).
courts to apply their state court counterparts' rules of procedure. This pulled in the opposite direction from Erie, making federal courts act less like state courts. So, in rough terms, the Supreme Court came to say that diversity courts had to apply state substantive law, but need not conform to state court procedural law. But where lay this fuzzy boundary between substance and procedure? Nobody could say for sure.

All of this has been of great interest to scholars of federal courts, civil procedure, conflict of laws and related disciplines. Every few years, the Supreme Court ventures forth to referee some dispute in the hinterland between procedure and substance. While the cases are almost always noteworthy, the Court's latest effort in Shady Grove Orthopedic Associates. v. Allstate Insurance Co. is particularly so. A medical provider, Shady Grove, tendered a claim to Allstate Insurance Company, which allegedly did not pay within the required 30 days and failed to pay statutory interest on the claim. Shady Grove sued, not just individually, but on behalf of all others who claimed to have been disadvantaged by Allstate's dilatory payment practices. Shady Grove sought for itself and others similarly situated a statutory penalty of $500, which New York law allows without requiring the party to prove actual damages. Shady Grove brought the action in a New York federal court on diversity grounds and sought to invoke Federal Rule of Civil Procedure 23, which allows for class actions assuming requirements such as commonality and typicality of the claims are met. But then came the rub that makes for Erie cases. New York has a statute contained in its Civil Practice Law and Rules specifically forbidding class action treatment of claims for statutory penalties.

That New York statute collided with Rule 23. Or did it? The United States Court of Appeals for the Second Circuit ruled that the New York law and the federal rule were not really in conflict, which caught the Supreme Court's attention. Five to four the Supreme Court ruled that Rule 23 must win out, but the Court produced no majority opinion at its most critical junctures.

29. Id.
30. Id. at 1436 (quoting FED. R. CIV. PROC. 23 (a)).
31. N.Y. C.P.L.R. 901(b) (McKinney 2010).
Justice Scalia announced the judgment of the Court and thought the matter simple enough. Rule 23 and the New York statute collided and because Rule 23 was validly promulgated under the Rules Enabling Act it must trump the New York rule. In other words, Justice Scalia saw the issue as being binary; either Rule 23 is valid for all purposes or invalid for all purposes, and being valid it must override all conflicting state laws. But his opinion here garnered only four votes.

Justice Stevens arrived at the same destination, but by a different route. Justice Stevens agreed that Rule 23 and the New York statute collided. But he was far less categorical in his desire to have the Federal Rules of Civil Procedure displace state rules. Rather Justice Stevens advocated carefully examining the purposes behind the applicable rules to see if in a particular case applying the Federal Rule might overstep the bounds of the Rules Enabling Act or the Constitution. In that regard, Justice Stevens might have persuaded Justice Sotomayor who refused to join the portion of Justice Scalia's opinion specifically taking issue with Justice Stevens on this point. However, even applying his more nuanced test, Justice Stevens also decided that the New York rule must give way.

Justice Ginsburg wrote for the four dissenters. Justice Ginsburg saw the case as essentially a matter of election of remedies. Either Shady Grove could claim the penalty but go it alone, or it could bring a class action but limit itself to actual damages (presumably interest on the amounts of the late payments). To allow Shady Grove to have it both ways — get the benefit of class treatment under Rule 23 and the New York statutory damage rule — was to "transform a $500 case into

33. Shady Grove, 130 S. Ct. at 1443 (“we think it obvious that rules allowing multiple claims ... are valid.”).
35. Shady Grove, 130 S. Ct. at 1444 (“A Federal Rule of Civil Procedure is not valid in some jurisdictions and invalid in others – or valid in some cases and invalid in others ...”).
36. Id. at 1435 (Part II-B joined only by Justices Roberts, Thomas and Sotomayor).
37. Id. at 1447 (Stevens, J., concurring in part and concurring in the judgment) (joining parts I and II-A of Justice Scalia’s opinion).
38. Id. at 1449 (Stevens, J., concurring in part and concurring in the judgment) (Federal Rules must be applied by federal court if applicable “unless doing so would violate the [Rules Enabling] Act or the Constitution.”).
39. Id. at 1435 (Part II-C joined only by Justices Roberts and Thomas).
40. Id. at 1457-60 (Stevens, J., concurring in part and concurring in the judgment).
41. Id. at 1465 (Ginsburg, J., dissenting) (“Rule 23 prescribes the considerations relevant to class certification and postcertification proceedings – but it does not command that a particular remedy be available when a party sues in a representative capacity.”).
42. Id. at 1467 (Ginsburg, J., dissenting) (“Plaintiffs seeking to vindicate claims for which the State has provided a statutory penalty may pursue relief through a class action if they forgo statutory damages and instead seek actual damages ...”).
a $5,000,000 award," a result Justice Ginsburg saw as thwarting the basic federalism principle of *Erie*.

*Shady Grove* will surely launch scores of student notes and dozens of tenure articles, all of which is well and good. The editors of the *Creighton Law Review*, however, have hit upon a perhaps more expeditious and effective route to testing the rationales of the competing opinions. They asked several well-known scholars of federal jurisdiction, procedure, and the conflict of laws to write their own opinions in *Shady Grove*. What follows are our efforts.

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43. *Id.* at 1460 (Ginsburg, J., dissenting).
44. *Id.* at 1468 (Ginsburg, J., dissenting).