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Jeffrey W. Stempel

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Stempel, Jeffrey W. (2011) "Shady Grove and the Potential Democracy-Enhancing Benefits of Erie Formalism," *Akron Law Review*: Vol. 44: Iss. 4, Article 2.

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SYMPOSIUM: *Erie* Under Advisement: The Doctrine After *Shady Grove*

SHADY GROVE AND THE POTENTIAL DEMOCRACY-ENHANCING BENEFITS OF ERIE FORMALISM

Jeffrey W. Stempel*

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I. DIVIDED JUSTICES, DIFFICULT DOCTRINE, AND THE DIFFICULTIES IN DEMARCATING SUBSTANCE, PROCEDURE, AND DEGREE OF DEFERENCE TO STATE LAWMAKING

In Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company, the United States Supreme Court issued its most significant Erie opinion of the relatively young twenty-first century, one seemingly in tension with its prior most recent major pronouncement on the subject in Gasperini v. Center for Humanities, Inc. Both cases involved New York civil rules ostensibly conflicting with Federal Rules of Civil Procedure. In Gasperini, N.Y. C.P.L.R. § 5501(c) which governs judicial review of monetary awards trumped Federal Rule 59 (new trial), while in Shady Grove, N.Y. C.P.L.R. § 901(b) failed to dislodge Federal Rule 23 governing class actions—a seeming inconsistency.

The Gasperini-Shady Grove divide also featured a "clash of the titans" division of the Court as well in that Justice Ruth Bader Ginsburg's more functional approach, arguably too solicitous of state

^{1. 130} S. Ct. 1431 (2010).

^{2.} By "Erie opinion," I refer to court decisions facing the issue of whether in a case in federal court on which state law provides the rule of decision pursuant to 28 U.S.C. § 1652, the court is to apply federal procedural rules or state law, which may be embodied in either a state statute or procedural rule. The body of law stems from the Court's decision in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), which held that where a federal court has jurisdiction founded on diversity of citizenship per 28 U.S.C. § 1332 state law should be applied rather than any "general federal common law," thus reversing nearly a century of jurisprudence dating from Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). See generally STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN & THOMAS O. MAIN, CIVIL PROCEDURE: DOCTRINE, PRACTICE, & CONTEXT 817-64 (3d ed. 2008) (devoting entire, albeit relatively short chapter of first-year civil procedure casebook to Erie issues). See also LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE ch. 5 (4th ed. 2009); FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE §§ 2.35-2.39 (5th ed. 2001); CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS §§ 54-60 (4th ed. 1983).

^{3. 518} U.S. 415 (1996).

^{4.} I use the term "ostensibly" with some hesitation because it seems like unnecessary hedging, but I want to try to be accurate in describing the *Erie* doctrine. Where a federal procedural rule and a state substantive law (whether denominated as a substantive statute or imbedded in a state procedural rule) directly conflict, the court appears to agree that the state law or rule must yield. Often, the means of resolving the issue is a finding that the federal and state provisions are not in direct conflict and that a federal rule override of the state provision is therefore not necessary. *See, e.g.*, Walker v. Armco Steel Corp., 446 U.S. 740 (1980), (FED. R. CIV. P. 3, which states that federal action is commenced by filing of complaint, not in direct conflict with Oklahoma statute of limitations requiring that action be commenced by service upon defendant within two years of tort injury; Rule 3 deemed to govern only issues of timing within the federal procedural system, rather than an expression of federal policy regarding timely commencement of actions for purposes of state limitations periods); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (same as to ostensible federal procedural conflict with Kansas law).

law, prevailed in *Gasperini* ⁵ only to be relegated to a dissent in *Shady Grove*. By contrast, *Gasperini* dissenter Justice Antonin Scalia emerged victorious ⁶ in a more formalist, ⁷ perhaps overly federal court-empowering plurality opinion reminiscent of Chief Justice Earl Warren's *Hanna v. Plumer* ⁸ majority opinion. Critics might term the Scalia plurality in *Shady Grove* as "*Hanna* on steroids" (or at least a pumped-

Formalism is distinct from instrumentalism, which is sometimes called functionalism. Formalism attempts to apply rules through classification of the instant case under a general rule or principle and rigorous, deductive application of the selected rule for decision. Instrumentalist adjudication does not disregard the governing rule but application of the rule may be modified if strict application would undermine or fail to further the function intended to be achieved by the rule or the legal system of which it is a part.

Id. at 145

Applied to *Shady Grove* and the *Erie* doctrine, Justice Scalia is a formalist in that he embraces a rule or set of rules (e.g., apply federal procedural rules in federal court diversity cases if there is an applicable federal rule) while Justice Ginsburg is a functionalist in that she devotes greater attention to furthering the public policy goals underlying a doctrine (e.g., avoid differing outcomes in state and federal court and discourage federal-state forum shopping) even if at first glance a broad application of the general rule (apply federal procedure in federal court) would appear to end the inquiry. As discussed below, broad application of the rule does not end the inquiry for Justice Ginsburg because she is concerned that a state procedural rule conflicting with the federal rule may in fact embody a state public policy and that failure to apply the state rule will lead to disparate results and increased forum shopping. *See infra* note 13 and accompanying text.

To state the differences between formalism and functionalism is almost itself enough to indicate why functionalism has greater support among legal scholars (*see infra* note 22 and accompanying text). Functionalism just sounds more sophisticated and reasonable while formalism seems mechanical and capable of negative unintended consequences. But as demonstrated by *Shady Grove* itself and the derivation of the New York rule at issue, formalism can have advantages not only of greater simplicity, consistency, and predictability but can also achieve equal or better policy outcomes while reducing the risk that functionalist judges will unduly elevate misguided, ill-thought special interest legislation to the level of important state policy.

8. 380 U.S. 460 (1965) (where Federal Rule of Civil Procedure is validly promulgated pursuant to the Rules Enabling Act, 28 U.S.C. 2072 (1934), it controls where on-point and actually regulating procedural matters rather than constituting substantive law exceeding the scope of judicial authority to promulgate rules pursuant to the Enabling Act.). See infra note 12 and accompanying text (discussing *Hanna* and Warren/Scalia approach to *Erie*).

^{5.} Compare Gasperini, 518 U.S. at 418 (Ginsburg, J., delivering opinion of the court, joined by Justices Sandra Day O'Connor, Anthony Kennedy, David Souter and Stephen Breyer) with id. at 448 (Scalia, J., joined by Chief Justice William Rehnquist and Justice Clarence Thomas) and id. at 439 (Stevens, J., dissenting, joined by Justice Scalia).

^{6.} Compare Shady Grove, 130 S. Ct. at 1436 (Scalia, J., joined by Chief Justice John Roberts, Justice Clarence Thomas, and Justice Sonia Sotomayor (except as to Part II.C. of plurality opinion) with id. at 1460 (Ginsburg, J., dissenting, joined by Justices Anthony Kennedy, Stephen Breyer and Samuel Alito); id. at 1448 (Steven, J., concurring).

^{7. &}quot;Under a formalist regime, the law is seen as a series of first principles laid down for application by society to recurring disputes or problems. Lawyers and judges are to reason deductively, from the general rules to specific conclusions, using the first principles in order to decide particular cases." *See* BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW 143 (1994).

up *Hanna*) in its aggressive view that federal procedural rules eject contrary state procedural codes, even where they embody substantive state law or policy, so long as the federal rule is actually procedural and on point.⁹

But *Shady Grove* lifted Federal Rule 23 over its state counterpart only with the support of Justice John Paul Stevens who provided the crucial fifth vote regarding the case holding.¹⁰ Further, Justice Stevens's support and Justice Scalia's reaction to it had a "with friends like this, who needs enemies?" tone in that both Justices took strong issue with each other's *Erie* jurisprudence.¹¹ Justice Stevens used a functionalism reminiscent of Justice John Harlan,¹² an approach somewhat less deferential to state law than the functionalism of Justice Ginsburg that arguably walked in the footsteps of Justice Felix Frankfurter.¹³ Justice Sonia Sotomayor declined to join that portion of the plurality opinion.¹⁴

In *Hanna*, 380 U.S. 460, the Court embarked on a two-track approach to *Erie* questions: one for cases where a Federal Civil Rule is directly on point (the approach used in *Hanna*) and one a for other conflicts of federal practice and state law, in which the *York* outcome determinative test still governs. *See* TEPLY & WHITTEN, *supra* note 2, at ch. 5; JAMES, JR. ET AL., *supra* note 2, §§ 2.35-2.39; WRIGHT, *supra* note 2, §§ 54-60.

Justices Harlan and Stevens, while accepting the tests in general urged more judicial reflection on whether any difference in outcome would significantly intrude upon state lawmaking prerogatives. If not, they were inclined to defer to the federal approach so long as the conflict fell within the ambit of a federal procedural rule, even at the cost of some federal-state differences in outcome and some potential for forum shopping. *See Shady Grove*, 130 S. Ct. at 1448 (Stevens, J., concurring); *Hanna*, 380 U.S. at 476 (Harlan, J., concurring) ("Whereas the unadulterated outcome and forum-shopping tests may err too far toward honoring state rules, I submit that the Court's 'arguably procedural, *ergo* constitutional' test moves too fast and far in the other direction') (emphasis in original).

Justice Ginsburg might be offended at the suggestion that her approach to *Erie* issues is as robotic as *York*'s outcome determinative test, which has been criticized for attempting to turn federal judges into "ventriloquist's dummies." *See* Daniel J. Meador, *Transformation of the American Judiciary*, 46 ALA. L. REV. 763, 765 (1995) (quoting Second Circuit Judge, Yale Law

See infra notes 29-32 and accompanying text (discussing plurality, dissent, and concurrence in Shady Grove).

^{10.} Shady Grove, 130 S. Ct. at 1448 (Steven, J., concurring).

^{11.} Compare id. at 1444-47 (in Part II.C. of the opinion, Justice Scalia engages in extensive criticism of Justices Stevens's approach to case) with id. at 1448-60 (Stevens, J., concurring) (disagreeing with much of Scalia's approach; accepting some of Justice Ginsburg's basic fundamentalist analysis but disagreeing as to its application).

^{12.} See Hanna, 380 U.S. at 474 (Harlan, J., concurring) (agreeing with Chief Justice Earl Warren's opinion as to holding on the merits but taking issue with Warren's approach as too formulaic and insufficiently appreciative of potentially serious state interests that might be undermined by Warren's approach).

^{13.} See Guar. Trust Co. v. York, 326 U.S. 99 (1945) (majority opinion by Justice Frankfurter enunciates "outcome determinative" test for *Erie* issues, which asks whether application of federal procedural rule would provide different outcome in federal court than would obtain in state court. If so, *Erie* commands application of the state rule to avoid different outcomes and encouragement or undue tolerance of forum shopping).

Shady Grove was also a wonderful departure from the Court's seemingly predictable ideological divide that has characterized other close cases in recent years. The majority upholding Federal Rule 23 included conservatives Scalia, Chief Justice John Roberts and Justice Clarence Thomas combined with liberals Sotomayor and Stevens while the dissenters attempting to privilege the state law were liberals Ginsburg and Stephen Breyer joined by conservatives Anthony Kennedy and Samuel Alito. The division of the Court cut against type, which both illustrated the difficulty of *Erie* issues and provided a bit of reassurance that case outcomes are not completely predictable according to the Justices' overall ideology or outcome preferences. The conservative-led majority permitted the plaintiff considerably more leverage over a large commercial defendant than it would have obtained under state law, a result opposed by the liberal-led dissenters.

With Stevens's departure from the Court and replacement with Justice Elena Kagan, one can hardly be confident that *Shady Grove* would come out the same way were it reargued today. And although *Shady Grove* will surely enjoy the stare decisis accorded *Erie* decisions, even when their underlying rationale appears to have shifted, ¹⁶ the Justices' divisions over approaches to *Erie* questions leaves litigants,

Dean, and 1938 Federal Civil Rules Reporter Charles E. Clark to this effect). *See also* Richardson v. Comm'r, 126 F.2d 562, 567 (2d Cir. 1942) (expression of similar sentiments by Second Circuit Judge and former Yale Law professor Jerome Frank). Certainly, Justice Ginsburg's *Shady Grove* dissent and *Gasperini* majority opinion are less rote in focusing on outcome difference. But like Justice Frankfurter's approach, Justice Ginsburg's approach is highly deferential to state law, perhaps unwisely and naively so, as discussed in Part II, *infra*.

- 14. See Shady Grove, 130 S. Ct. at 1435 (Part II.C. of Scalia opinion criticizing Justice Stevens concurrence and rationale joined by Chief Justice John Roberts and Justice Clarence Thomas; Justice Sotomayor, who joined the rest of the Scalia opinion, declined to join Part II.C.). It appears, at least to me, that Justice Sotomayor must have declined to join Part II.C. of the Scalia opinion because of disagreement with the strong formalism favoring federal procedural rules or because she may have seen it as too much of an on Justice Stevens, or both. See infra note 88-94 and accompanying text (noting that Scalia plurality and Stevens concurrence were at times sharply critical of one another).
 - 15. See infra Part II, discussing Shady Grove opinions and Court division.
- 16. For example, after *Hanna v. Plumer*, 380 U.S. 460 (1965), many questioned the continued vitality of Ragan v. Merchants Transfer Co., 337 U.S. 530 (1949). *See, e.g.*, John J. McCoid, II, Hanna v. Plumer, *The* Erie *Doctrine Changes Shape*, 51 U. PA. L. REV. 884 (1966); *see also Hanna*, 380 U.S. at 374, 476 (Harlan, J., concurring) (arguing that *Ragan* "if still good law" would have counseled a different outcome in *Hanna*; suggesting that *Ragan* was wrongly decided and *Hanna* was rightly decided, but for reasons different than given in *Hanna* majority opinion). But despite the arguable inconsistency between *Hanna*'s federal-rule-trumps-contrary-state-practice approach, the Court in Walker v. Armco Steel Corp., 446 U.S. 740 (1980) reaffirmed *Ragan*, refusing to read FED. R. CIV. P. 3 sufficiently broadly to conflict with state procedural law measuring the running of the statute of limitations according to whether a complaint against the defendant was served within the applicable time period rather than merely filed in federal court.

lawyers, and policymakers uncertain as to precisely when their state laws will or will not displace a federal civil rule in federal court.

In the few months since its issuance, a good deal has been written about *Shady Grove*, with more surely to come in a mix of criticism and praise. To some have reservations about the straight-ahead formalism of the Scalia plurality opinion and its revival-cum-enshrinement of *Sibbach v. Wilson & Co., Inc.* and argue it is too crude a blade for engraving the boundaries of the *Erie* doctrine while others see considerable

^{17.} See, e.g., Jay Tidmarsh, Procedure, Substance, and Erie, 64 VAND. L. REV. (forthcoming 2011) (finding Shady Grove correctly decided but criticizing methodology and orientation of all opinions in case. Rather, "[a] single principle – apply state-court rules only when they affect the ex ante expected value of a claim in a costless and outcome-neutral procedural world"); Adam N. Steinman, Our Class Action Federalism: Erie and the Rules Enabling Act after Shady Grove, 86 NOTRE DAME L. REV. (forthcoming 2011); W. Daniel "Dee" Miles, II, Shady Grove v. Allstate: An Erie Sequel(?) and its Effects Moving Forward, AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION CLE MATERIALS (July 15-16, 2010) (Shady Grove "has grabbed the attention of both litigators and intellectuals alike. The opinion may either create confusion, consternation, or celebration among the legal community, but certainly gives a 21st Century flavor to the Erie doctrine and the line of cases which have developed and the result on class action litigation going forward." (footnote omitted)); Jennifer S. Hendricks, Why the Supreme Court Should Stop Freelancing and Go Back to Drawing Lines Between Substance and Procedure (2010), available at http://works.bepress.com/jennifer hendricks/10 (criticizing Ginsburg's approach in Gasperini and advocating greater use of Scalia's plurality approach in Shady Grove for future Erie cases); Andrew J. Ruzicho & Louis A. Jacobs, Forum Shopping, 33 EMPL. PRAC. UPDATE, No. 1 (June 2010) (criticizing Shady Grove due to its expansion of opportunities for federal-state forum shopping). See also Lucas Watkins, How States Can Protect Their Policies in Federal Class Actions, 32 CAMPBELL L. REV. 285 (2010) (generally approving of the trial court and Second Circuit decisions in Shady Grove on grounds similar to Ginsburg dissent in Shady Grove); Armando Gustavo Hernandez, The Head-On Collision of Gasperini and the Derailment of Erie: Exposing the Futility of the Accommodation Doctrine (2010), available at http://ssrn.com/abstract=1510890 (apparently writing prior to Shady Grove; criticizing Gasperini approach and urging more direct, simplified Erie jurisprudence more akin to Scalia plurality opinion in *Shady Grove*); Abbe R. Gluck, *Intersystemic* Statutory Interpretation: Methodology as "Law" and the Erie Doctrine, 120 YALE L.J. (forthcoming May 2011).

^{18.} Sibbach v. Wilson & Co., Inc., 312 U.S. 1 (1941). See infra note 32 & 72 and accompanying text (discussing Sibbach and its place in Scalia plurality opinion in Shady Grove).

^{19.} See, e.g., Jack Friedenthal, Defining the Word "Maintain"; Context Counts, 44 AKRON L. REV. 1139 (2011) (criticizing Scalia's approach and Shady Grove outcome); Joseph P. Bauer, Shedding Light on Shady Grove: Further Reflections on the Erie Doctrine From a Conflicts Perspective, 86 NOTRE DAME L. REV. (forthcoming 2011) (advocating more use of state interest analysis in resolving Erie questions, although characterizing Shady Grove as case that "does not break new ground") ("The values which are reflected in the Erie doctrine, and in particular the importance of federalism, will be enhanced if the Court would take seriously, rather than merely pay lip-service to, the agreed benefits of identifying and then deferring to, state interests."); Catherine T. Struve, Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act, NOTRE DAME L. REV. (forthcoming 2011), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=1676022http://ssm.com/abstract_1676022http://ssm.com/abstract_1676022http://ssm.com/abstract_1676022, manuscript at 9 (finding, like Professor Ides, infra note 69, that neither Sibbach nor Hanna compels

benefit to *Shady Grove*'s more formal simplification of *Erie*. ²⁰ In the academy, formalism generally enjoys lower status than functionalism

Shady Grove result; suggesting excessive formalism in Scalia approach at odds with public policy and constitutional concerns underlying Erie doctrine); Stephen B. Burbank & Tobias Barrington Wolff, Redeeming the Missed Opportunities of Shady Grove, 159 U. PA. L. REV. 18, 44 (2010), available at http://ssrn.com/abstract=1677608 (similar criticisms of Scalia plurality and reiterating long-standing criticism of Professor Burbank that Court should not view Enabling Act as concerned about federalism when separation of powers was its animating principle) (Shady Grove "path is wrong because it perpetuates the federalism myth that Sibbach initiated and Hanna reaffirmed. It is also wrong because, not laid out to reflect that the Act exists primarily to allocate lawmaking power prospectively, it leads those who take it to seek substantive rights in the wrong places."); Heather Gerken, Foreword: Federalism All the Way Down, 124 HARV. L. REV. 4, 320-30 (2010) (criticizing Shady Grove and defending Gasperini approach and holding); Kermit Roosevelt, III, Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove, (University of Pennsylvania Law School Public Law and Legal Theory Research Paper Series, Working Paper No. 10-28, 2010), available at http://ssrn.com/abstract=1665092 (arguing that traditional substance/procedure dichotomy of Erie doctrine heavily relied upon in Scalia plurality in Shady Grove is unwise and Erie questions would be better addressed by standard choice of law methodology, a result that I view as likely privileging state law more frequently in state-federal conflict); Allan Ides, The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The Shady Grove Debate Between Justices Scalia and Stevens (Loyola Law School Legal Studies, Working Paper No. 2010-36, 2010), available at http://ssrn.com/abstrct=1667228 (arguing that Stevens approach is both more accurate in assessing precedential value of Sibbach v. Wilson and better for deciding Erie questions). Professor Friedenthal is particularly critical in his assessment.

The *Shady Grove* case required much more serious consideration than it was given by Justice Scalia and those who signed onto his opinion. The consequences of the decision are of substantial significance. It effectively permits a final substantive outcome in the case that is at odds with what would have been decided in a New York court. It thus results in forum shopping of an extreme nature. One can only wonder if the Rules Enabling Act should be read to permit such a determination. The case travels far beyond the scope of other decisions regarding application of a federal rule in a diversity case.

Friedenthal, supra 19, at 1144.

For the reasons set forth in this article, I largely disagree with Professor Friedenthal's assessment of the alleged unwisdom of the Scalia approach. In addition, the theoretical availability of a class action in federal court hardly leaves Allstate defenseless. They still may argue against certification based on the other considerations set forth in FED. R. CIV. P.23 (and are simply deprived of the categorical procedural defense available under New York's class action rule) and may defend fully on the merits. In addition, Professor Friedenthal's analysis does not consider the somewhat tainted bona fides of N.Y. C.P.L.R. § 901(b) described in Part II, *infra*, and the prospect that the formalism of the *Shady Grove* plurality may spur greater transparency and reflection in state lawmaking as well as making *Erie* adjudication simpler.

20. See, e.g., Aaron D. Van Oort & Eileen M. Hunter, Shady Grove v. Allstate: A Case Study in Formalist Versus Pragmatism, 11 ENGAGE 105, 109 (Sept. 2010) ("In our view, the formalist majority has the better of the argument in Shady Grove); Kevin M. Clermont, The Repressible Myth of Shady Grove, 37-39 (2010), available at http://ssrn.com/abstract=1633541) (noting that after Shady Grove, previously difficult questions or reconciling differences between FED. R. CIV. P. 56 and state summary judgment rules become relatively easy). See also Jeffrey O. Cooper, Summary Judgment in the Shadow of Erie, 43 AKRON L. REV. 1245 (2010); Bernadette Bollas Genetin, Foreword: Summary Judgment and the Influence of Federal Rulemaking, 43 AKRON L. REV. 1107, 1130-38 (2010).

(often also labeled pragmatism or instrumentalism),²¹ even though law at its most basic remains a formalist enterprise, with functional application of judgment coming into play for more complex or nuanced cases.²² Just as the Ginsburg majority opinion in *Gasperini* appeared to enjoy wider acceptance in the academy than the Scalia plurality in *Shady Grove* ²³ (and Ginsburg generally gets higher marks than Scalia among academics),²⁴ functionalism is generally preferred to formalism.²⁵

- 21. See, e.g., RICHARD A. POSNER, OVERCOMING LAW (1995); KUKLIN & STEMPEL, supra note 7, at 141-45; Peter Nash Swisher, Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function, 52 Ohio St. L.J. 1037 (1991). This is not to say, however that formalism does not have its prominent and forceful defenders. See, e.g., FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE (1991); ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Ernest J. Weinrib, Legal Formalism: On the Imminent Rationality of Law, 97 YALE L.J. 949 (1988). Although a precise empirical tallying of the legal literature is beyond the scope of this article (and what's left of my working life), I am confident that were one to poll law faculty at length, one would find considerably more of them supporting functionalism or characterizing themselves as functionalist than the other way around.
- 22. I realize that this assertion, like that accompanying the preceding footnote, may be difficult to demonstrate to skeptics absent a massive empirical project outside the scope of this article. But it seems to me inarguable that while formalism governs much of the daily application of law and holds an important place in jurisprudence, that most legal scholars and arguably the profession as a whole is functionalist, at least when faced with difficult cases or cases where rigid application of a formalist approach would lead to results at odds with prevailing concepts of justice, fairness, and substantive social and economic policy. Perhaps the greatest proof of formalism's fade in the academy is the degree to which it was dethroned by legal realism and the extent to which a post-realist, largely functionalist bent characterizes the vast bulk of legal scholarship. See KUKLIN & STEMPEL, supra note 7, at 149-64 (discussing "vulnerability of high formalism," influential scholars Oliver Wendell Holmes and Roscoe Pound as precursors to the Legal Realist movement as well as the movement's displacement of formalism as the dominant school in the legal academy, despite some taming of realism by the Legal Process movement). See also Anthony J. Sebok, Legal Positivism and the Growth of Twentieth Century American Jurisprudence (1993) (unpublished Ph.D. dissertation, Princeton University) (on file with author).
- 23. See, e.g., Gerken, supra note 19, at 320-30 (criticizing Shady Grove and defending Gasperini approach and holding).
- 24. Compare Symposium, The Jurisprudence of Justice Ruth Bader Ginsburg: A Discussion of Fifteen Years on the U.S. Supreme Court, 70 OHIO ST. L.J. 1095 (2009) (collection of articles generally praising Ginsburg's work with little criticism); Symposium, The Jurisprudence of Justice Ruth Bader Ginsburg, 43 NEW ENG. L. REV. 799 (2009) (same); Symposium, A Celebration of the Tenth Anniversary of Justice Ruth Bader Ginsburg's Appointment on the Supreme Court of the United States, 104 COLUM. L. REV. 1 (2004) (same) with Bret C. Birdsong, Justice Scalia's Footprints on the Public Lands, 83 DEN. U. L. REV. 259 (2005) (viewing Scalia approach to natural resources and public lands issues as detrimental); William N. Eskridge, Jr., The New Textualism, 37 UCLA L. REV. 621 (1990); Larry Kramer, Judicial Asceticism, 12 CARDOZO L. REV. 1789 (1991) (emphasizing that Scalia's formalism is still subject to judicial discretion); David A. Strauss, Tradition, Precedent, and Justice Scalia, 12 CARDOZO L. REV. 1699 (1991) (commenting on the conflict between Scalia's adherence to tradition, but lack of regard for precedent).
- 25. See KUKLIN & STEMPEL, supra note 7, at 141-64 (characterizing formalism as tending to be overly simplistic and viewing functionalism or instrumentalism as generally superior legal

For the most part, I plead guilty to being part of this conventional wisdom (at least in the academy if not the legal profession at large), particularly when the formalism is accompanied by an excessively narrow approach to interpreting text (of a constitution, statute, contract, or rule)²⁶ or lacks humility about the quantum of agreement reasonable readers might have regarding the meaning of text.²⁷ On this score, Justice Scalia, a textual absolutist who seems to just "know" when there are no other reasonable constructions of a word or phrase, again gets more than his share of academic criticism, ²⁸ perhaps deservedly.

Despite such criticism, Justice Scalia has continued to defend his formalism without contrition. After *Shady Grove*, perhaps his critics (me included) should be grateful about his combative, unabashed formalism. In addition to reinvigorating a *Sibbach-Hanna* approach that is far simpler to apply as a template for *Erie* decisions, it also may have the added effect of enhancing democracy in the states and making the policymaking process modestly less susceptible to interest group manipulation that flies under the radar of public scrutiny.

Justice Ginsburg's *Shady Grove* dissent is premised on the notion that by applying Federal Rule 23 without the limitation on penalty class actions found in § 901(b), the Court has done violence to an important

method, noting the rise of functionalism and its eventual displacement of formalism as primary school of intellectual legal thought). See also supra notes 21-24.

- 28. See, e.g., Eskridge, supra note 24; Kramer, supra note 24, at 1797.
- 29. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997); Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175 (1989).

^{26.} See, e.g., Jeffrey W. Stempel, The Insurance Policy as Social Instrument and Social Institution, 51 WM. & MARY L. REV. 1489 (2010) (excessive literalist focus on insurance policy text can mislead court regarding function and purpose of insurance agreement); Jeffrey W. Stempel, The Insurance Policy as Thing, 44 TORT, TRIAL, & INS. L.J. PRAC. 813 (2009) (unduly textualist approach to construing insurance policies can lead to decisions at odds with intended function of insurance product).

See Lawrence Solan et. al., False Consensus Bias in Contract Interpretation, 108 COLUM.
REV. 1268 (2008) (empirical survey dates reflects readers erroneously believing that nearly all others share their interpretation of text).

^{30.} See, e.g., Jeffrey W. Stempel, Chief William's Ghost: The Problematic Persistence of the Duty to Sit, 57 BUFF. L. REV. 813, 906-07 (2009) (criticizing Justice Scalia's recusal practices and rationale); Jeffrey W. Stempel, The Rehnquist Court, Statutory Interpretation, Inertial Burdens, and a Misleading Version of Democracy, 22 U. Tol. L. REV. 583 (1991) (criticizing Justice Scalia and Court majority for several 1989 Term civil rights and job discrimination decisions (eventually legislatively overruled in part) unduly limiting reach of statutes through narrow formalist and textualist construction).

^{31.} See infra notes 70-76 and accompanying text, discussing Sibbach v. Wilson & Co. and Hanna v. Plumer.

^{32.} See Clermont, supra note 20, at 1 ("In the end, Shady Grove has not fundamentally altered Erie, but it mercifully makes it more comprehensible").

and well-considered New York policy, undermining the *Erie* doctrine's aspiration for state's rights and state-federal symmetry of litigation outcomes. The *Shady Grove* dissent lauds § 901(b) as "the result of a compromise among competing interests," designed in part "as a means to a manifestly substantive end. Limiting a defendant's liability in a single lawsuit in order to prevent the exorbitant accumulation of penalty remedies the New York Legislature created with individual suits in mind." Similarly, the Stevens concurrence, although less deferential to the legislation, saw New York's carving out of statutory penalty claims from class action eligibility as reflecting rational, public-regarding policymaking. 35

With all due respect to the laudable functionalist orientation of the Shady Grove dissent and concurrence, a more searching review of the legislative history and environment surrounding enactment of § 901(b) presents a far less sanguine picture of the genesis of this class action As discussed below, ³⁶ this limitation on an otherwise generally pro-plaintiff, pro-consumer class action legislation was designed (perhaps ironically in light of the subsequent Shady Grove litigation) to bring state practice in accord with the federal approach. Consequently, § 901(b) looks more suspiciously like interest group dilution of progressive legislation through back door channels largely hidden from public scrutiny, with little examination of the substantive merits of the issue by political elites. Although not smelling completely of the smoke-filled room, the legislative background of § 901(b) hardly provides assurance that "the people" of New York viewed this constriction on vindication of rights as an integral part of state public policy.

When § 901(b) is seen in this light, the case for the functionalism of the Stevens concurrence gets considerably stronger while the dissent's tears over federal overriding of state legislation looks wildly excessive. Moreover, the case for the formalism of the Scalia plurality opinion becomes considerably stronger. In addition to removing from the analysis the burden of scrutinizing state lawmaking which Justices Ginsburg and Stevens shouldered and making unnecessary any judicial

^{33.} Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 130 S. Ct.1431, 1464 (2010) (dissent) (quoting Sperry v. Crompton Corp., 863 N.E. 2d 1012, 1015 (N.Y. 2007)).

^{34.} Shady Grove, 130 S. Ct. at 1465 (footnote omitted).

^{35.} Id. at 1458.

^{36.} See infra text and accompanying note 79, at 139-44 (reviewing legislative history of New York class action law and criticizing characterization of § 901(b) found in *Shady Grove* concurrence and dissent).

reflection over the importance of a particular law to the state (a burden shared by the Harlan concurrence in *Hanna*),³⁷ Justice Scalia's approach also arguably makes it harder for special interests to have their way with state law in a manner that trumps federal law. Under the methodology of the *Shady Grove* plurality, interest groups seeking a particular substantive result (e.g., immunity from class action treatment to which other claims and defendants are subject), must get such results enshrined in substantive law rather than through the stealthier means of engrafting private-regarding law onto seemingly non-substantive procedural litigation. In this way, the substantive goals sought by the interest group are likely to be more widely and openly assessed by a greater segment of both elite policymakers and the public, with the rationale undergirding such laws subject to greater critical scrutiny.

A closer look at the legislative background of § 901(b) suggests it was more like the much decried "earmarks" of modern legislation³⁸ than the result of serious and sound substantive policymaking. But under the Scalia plurality opinion, one need not engage in an assessment of whether § 901(b) is public-regarding public policy or a special underthe-radar favor for interest groups. Once § 901(b), has been denominated a "procedural" provision by New York, it logically must yield to a clear Federal Rule 23 governing class action litigation. Future application of the plurality's approach to *Erie* questions, although sure to have problems of its own, promises not only greater simplicity and predictability but also places more pressure on political actors to win their legislative victories in plain sight after giving more persuasively reasoned consideration to their proposals.

II. THE SHADY GROVE LITIGATION

Like many eventually high profile Supreme Court cases, Shady Grove began with an incident that hardly seemed the stuff of

^{37.} See Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

^{38.} See Jack M. Beermann, The Turn Toward Congress in Administrative Law, 89 B.U. L. REV. 727, 761-62 (2009) ("[A]lthough earmarks do involve direct congressional involvement in spending decisions, they are infected with the stench of backroom politics and abandonment of sensible standards."); Jason Heaser, Note, Pulled Pork: The Three Part Attack on Non-Statutory Earmarks, 35 J. LEGIS. 32, 32 (2009) ("[A] salient feature of earmarks is that they involve funding directives in areas that would otherwise demand some sort of competitive bidding process."); Brian Griffith, Note, Lobbying Reform: House-Cleaning or Window Dressing?, 75 U. CIN. L. REV. 863, 883 (2006) ("[N]o single act would solve more of the ethical problems in Washington than an elimination of earmarks in legislation."). But see Rebecca M. Kysar, Listening to Congress: Earmark Rules and Statutory Interpretation, 94 CORNELL L. REV. 519 (2009) (presenting earmarks in more complex, partially favorable light).

constitutional law and complex procedural analysis. Sonia Galvez was injured in an auto accident on May 20, 2005. A Maryland resident, Galvez sought care from Shady Grove Orthopedic Associates, P.A. pursuant to a no-fault automobile policy issued by Allstate Insurance Company, a citizen of Illinois, its state of incorporation and site of its corporate headquarters. The policy provided, as do standard no-fault auto policies, for the payment of personal injury protection or "PIP" benefits, including medical care (up to applicable policy limits).

As part of the treatment process, Galvez assigned her right to PIP benefits to Shady Grove in return for Shady Grove's medical care. In turn, Shady Grove sought payment from Allstate as Galvez's assignee. Despite the Maryland locus of injury and treatment, plaintiffs invoked New York insurance law as applicable to policyholder Galvez's relations with her insurer. New York Insurance Law § 5106 (supplemented by part 653 of title 11 of the New York Code of Rules and Regulations, the state's administrative enforcement of the statute), provides that insurers must pay undisputed medical bills within thirty days of properly documented submission, with unpaid claims accruing interest charges at the rate of two percent per month.

Under New York State's Motor Vehicle No-Fault Insurance Law (the "no-fault statute"), automobile insurers are required to reimburse policyholders (or insureds), for certain "basic economic loss" (also known as "no-fault benefits"). See N.Y. Ins. Law § 5102(a)(1). Insureds can assign their right to payment for no-fault benefits to health care providers who, in turn, may submit claims directly to insurance companies and receive payment for the claims.

To effectuate the prompt and efficient resolution of claims under the no-fault statute, the New York State Superintendent of Insurance, in 1977, adopted regulations establishing time frames in which to submit forms and notices pertaining to such claims. See generally Medical Soc'y v. Serio, 800 N.E.2d 728, 768 (N.Y. 2003). In their current form, the regulations require that the insured, or her assigned provider, submit proof of loss arising from medical treatment within 45 days from the date of treatment. See N.Y.C.R.R. tit. 11 § 65-1.1(d). The insurance company, in turn, has thirty days from receipt of the claim to (i) pay the policyholder (or the medical provider if the claim was assigned) or (ii) deny the claim. See N.Y. Ins. Law §5106(a); N.Y.C.R.R. tit. 11 § 65-3. Payments made by the insurance company after the 30-day period are deemed "overdue" and subject to a penalty of two percent interest calculated monthly. See N.Y. Ins. Law § 5106(a); N.Y.C.R.R. tit. 11 §§ 65-3.8(a), 65-3.9(a). The 30-day period can be extended under certain circumstances if the insurer timely request verification of the medical services for which reimbursement is sought. See N.Y.C.R.R. tit. 11 § 65-3.5. In that situation, payment must be made within 30 days after the information is supplied to the insurer. See N.Y. Ins. Law § 5106(a). In sum, the no-fault statute was enacted to

^{39.} See Shady Grove Orthopedic Assoc., P.A. et. al. v. Allstate Ins. Co., 466 F. Supp. 2d 467, 469-70 (E.D.N.Y. 2006).

^{40.} See Shady Grove, 466 F. Supp. 2d at 470.

^{41.} See id. at 471. The Shady Grove trial court summarized the law's application to cases such as the Shady Grove medical treatment of Galvez as follows:

In a scene unfortunately familiar to medical providers and policyholders, Allstate failed to make timely payment of the doctor's bill. Invoking the prompt payments law and seeking recompense pursuant to the mandatory interest provisions, Shady Grove and Galvez brought suit in April 2006

on behalf of themselves and all others similarly situated. The proposed class, as defined in the complaint, includes all persons to whom Allstate owes interest under [§ 5106 and accompanying regulations] with respect to claims for first-party no-fault benefits arising since April 20, 2000. Plaintiffs contend that Allstate routinely fails to pay covered claims for first-party no-fault benefits within the statutorily mandated time period and routinely ignores its obligation to pay the statutory interest owed in such cases. Additionally, plaintiffs allege that Allstate routinely and falsely claims to have never received the insured's proof of loss in the first instance, so as to avoid violation of the statutory time restrictions.

. . . .

. . . As a class, plaintiffs seek a declaration establishing the parties' rights, duties, status or other legal relations under affected insurance contract. Finally, plaintiffs seek compensatory damages in the form of interest owed to Shady Grove, Galvez and all others similarly situated.

Allstate moved to dismiss the claim for lack of subject matter jurisdiction. Although there was complete diversity between Maryland citizen Shady Grove and Illinois citizen Allstate, the amount at issue in the Galvez claim, even with the two percent per month interest charges sought against Allstate amounted to only approximately \$500, 43 well short of the \$75,000 minimum amount in controversy required to sustain diversity jurisdiction. 44 Only if Shady Grove's unpaid or past due claims could be joined with those of the putative class could Shady

provide prompt payments of uncontested medical bills.

Shady Grove, 466 F.Supp.2d at 471 (italics of statute and regulations omitted) (footnotes omitted).

^{42.} *Id.* at 470. Galves was eventually dismissed as a party due to lack of standing because she had completely assigned the right to collect from Allstate to Shady Grove. *See id.* at 473-74.

^{43.} See id. at 469.

^{44.} See 28 U.S.C. § 1332(a) (stating federal diversity jurisdiction requires that matter in controversy exceed \$75,000 exclusive of interest and costs and dispute be between "citizens of different states"). A corporation is deemed a citizen of both its state of incorporation and "where it has its principal place of business." See § 1332(c). Absent unusual circumstances, the principal place of business is the company executive headquarters. See Hertz v. Friend, 130 S. Ct. 1181 (2010).

Grove meet the requisite jurisdictional amount. But the putative class was large enough to encompass Illinois citizens, which would destroy the required complete diversity of citizenship between all plaintiffs and all defendants. 45

Because of the Class Action Fairness Act ("CAFA"), 46 passed by Congress as an attempt to respond to the perceived problem of collusive or abusive state court class actions, 47 a class action such as that sought by Shady Grove was permitted even in the absence of complete diversity. This allowed the exercise of federal court jurisdiction pursuant to 28 U.S.C. § 1332(d), so long as the case otherwise qualified as a class action. Although claims such as the Galvez bill were small, when combined with those of other medical providers, the jurisdictional amount was easily met. Shady Grove contended that the damages to the class from Allstate's alleged slow pay subterfuge exceeded \$5 million. 48

But in moving to dismiss, Allstate had two very strong cards to play—(1) New York's class action law (§ 901(b)), which prohibits class actions that seek enforcement of a statutory penalty absent express authorization in the statute, which was lacking in Insurance Law § 5106, and (2) the *Erie* doctrine, which requires that federal courts sitting in diversity apply controlling state substantive law in the case, although they are obligated to apply federal procedural law. ⁴⁹ If, as alleged by

^{45.} See Strawbridge et al. v. Curtiss et al., 7 U.S. 267 (1806) (establishing requirement of complete diversity between all plaintiffs and all defendants); MOORE'S FEDERAL PRACTICE § 102.12[1] (3d ed. 1997 & Supp. 2010) (describing background and operation of complete diversity requirement).

^{46.} Pub. L. No. 109-2, 119 Stat. 4 (2005), codified at 28 U.S.C. § 1332(d) and in other sections of Title 28.

^{47.} See MOORE'S FEDERAL PRACTICE, supra note 45, § 3705 (describing background and contents of CAFA); Stephen B. Burbank, The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View, 156 U. PA. L. REV. 1439 (2008). Describing the Act, Professor Burbank notes the problematic nature of the law and its potential for unintended consequences:

[[]CAFA] resulted from years of intense lobbying (on both sides of the aisle by interest groups associated with both plaintiffs and defendants), partisan wrangling, and, following two successful filibusters, fragile compromises. [CAFA marks] a sharp break from a nearly uniform history of congressional contraction of diversity jurisdiction. The scope of putative class actions that, at the end of the day, the statute brings within the subject matter jurisdiction of the federal courts is very broad. Those facts—coupled with the legislation's place in a trio of "tort reform" measures sought by the Bush administration, and with unrelenting attacks on lawyers in general and plaintiffs' lawyers in particular—help to understand why some critics regard the compromises as insufficient and the ultimate legislation as inimical to the interests of numerous groups of potential litigants.

See id. at 1441 (footnotes omitted).

^{48.} See Shady Grove, 466 F. Supp.2d at 469.

^{49.} See supra note 4 and accompanying text (describing the Erie doctrine).

Allstate, § 901(b) was New York substantive law (despite being encased in a state procedural provision), the *Shady Grove* class action was barred in federal court just as it would be in New York's state courts. Alternatively, if § 901(b) was a state rule of civil procedure, it was overridden or displaced by Federal 23, which contained no restriction on statutory penalty class actions of this type.

If an alien from another planet were to land on Earth and be appraised of the *Erie* doctrine in sound bite fashion (in federal court diversity cases, federal procedure and state substantive law apply), a case like *Shady Grove* might seem deceptively easy. The case was obviously in federal court, which has a comprehensive body of civil rules, including Federal Rule 23, which extensively regulates class actions. The shortest way with the *Erie* question of Federal Rule 23 regardless of the underlying substantive content of any conflicting New York rules of civil procedure. But with the possible exception of *Erie* itself, the *Erie* doctrine has never been simple. Distinguishing between procedure and substance can be difficult, particularly where a court is attempting to achieve the symmetry of state and federal outcomes sought in *Erie* and to avoid the type of unseemly federal-state forum shopping that motivated Justice Brandeis's *Erie* opinion. In addition, there can be difficult questions as to the scope of

^{50.} I use the phrase in homage to Max Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388 (1942), which urged a streamlined approach to statutory construction, albeit one I find incomplete and flawed, realizing that reasonable observers might think the same of the *Shady Grove* plurality opinion and my enthusiasm for it.

^{51.} In *Erie*, a Pennsylvania plaintiff sued a New York-based railroad for injuries he suffered while walking along the footpath adjacent to one of its tracks in Pennsylvania. Under Pennsylvania tort law, plaintiff Tompkins was considered a mere trespasser and owed no duty but the railroad's refraining from inflicting intentional injury. But under the federal common law of tort, which applied in federal diversity cases prior to *Erie*, plaintiff was a licensee permitted to use the footpath by custom and practice and was owed a duty of reasonable car by the defendant. Erie itself thus presented a clear choice of different substantive rules of tort law. No one contended that the trespasser/licensee distinction was procedural. *See* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), *overruling* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

^{52.} See Erie, 304 U.S. at 75 (describing the policy goal of change in Erie from prior rule of Swift v. Tyson was to harmonize applicable law and outcomes in similar cases in federal and state court and to discourage excessive forum shopping). Justice Brandeis was particularly upset with pre-Erie cases such as Black and White Taxicab Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928) in which a Kentucky cab company wished to enter into an exclusive arrangement with the Louisville & Nashville Railroad, also a Kentucky Corporation, giving it a monopoly on taxi service at the Bowling Green, Kentucky train station. The cab company avoided the state's prohibition on such an arrangement by re-incorporating in Tennessee and successfully sued in federal court for a declaratory judgment that the monopoly arrangement was permissible. It succeeded due to the application of federal common law, which differed from Kentucky state law, to the contract. See Erie, 304 U.S. at 73-75.

a procedural rule and the boundaries of its application. Where the reach of a federal procedural rule ends, courts have metaphorically entered the territory of state substantive law.

Beginning largely with Guaranty Trust Co. of New York v. York, 53 the Supreme Court focused on whether application of a federal civil rule or a state law would make a difference in the case outcome, holding in York itself that a state statute of limitations applied to bar a claim that was otherwise timely under federal procedural rules.⁵⁴ Similarly, in *Ragan v. Merchants Transfer & Warehouse Co.*,⁵⁵ the Court applied a Kansas requirement that a defendant be served with process within two years to bar a tort claim even though the action had been commenced in federal court prior to the expiration of the statute pursuant to Federal Rule 3.56 When a similar situation arose fifteen years later, the Court's Hanna v. Plumer opinion surprised some observers and changed the contours of the Erie doctrine by applying Federal Rule 4, which permitted substituted service of process, rather than chapter 197, section 9 of the General Laws of Massachusetts, which required that executors of estates be provided with in-hand personal service within a year in order to be timely, thus permitting in federal court a tort claim against a decedent's estate that would have been barred in Massachusetts state court.57

Hanna's refinement of the Erie doctrine was to specifically establish two tracks of Erie analysis. In one track were cases where there was an applicable Federal Civil Rule. In such cases, the federal rule would govern⁵⁸ unless the Rule exceeded the powers of rulemaking conferred in the Rules Enabling Act, 28 U.S.C. § 2072, ⁵⁹ which

^{53. 326} U.S. 99 (1945).

^{54.} Id. at 111.

^{55.} Categorized Ragan v. Merchants Transfer & Warehouse Co., 337 U.S.530 (1949).

^{56.} Id. at 533-34.

^{57.} See Hanna v. Plumer, 380 U.S. 460, 466-70 (1965).

^{58.} Properly promulgated Federal Rules of Civil Procedure have the force of statute and "laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." See 28 U.S.C. § 2072(b).

^{59.} The Act gives the U.S. Supreme Court "power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals." Rules are promulgated through a process in which an Advisory Committee on the Civil Rules, appointed by the Chief Justice, makes recommendations, which are in turn reviewed and approved by a Standing Committee on Rules of Practice and Procedure and by the Judicial Conference of the United States and ultimately then promulgated by the Court, which submits the proposed Rule or Rules to Congress on or before May 1 of a given year. If Congress does not alter, amend, or block a proposed Rule within 180 days, the Rule takes effect December 1. See generally 28 U.S.C. §§2073, 2074; Steven S. Gensler, Must, Should, Shall, 43 AKRON L. REV. 1139 (2010) (describing process of Rules amendments in the context of changes to FED. R. CIV. P. 56 that took

mandates that federal procedural rules "not abridge, enlarge or modify any substantive right." In the absence of an on-point, valid, civil rule, the Court was left with the "relatively unguided" task of determining whether the state law at issue was sufficiently substantive in that its application was required by constitutionally based principles of federalism and *Erie*'s policy goals of avoiding, where possible, disparate outcomes in state and federal court as well as the discouragement of undue federal-state forum shopping. 61

Although *Hanna* strengthened the role of the Federal Rules, reinvigorating pro-Rules case law that had been somewhat forgotten, *Hanna* was not enough of a game changer to undo the 1949 *Ragan* ruling. In *Walker v. Armco Steel Corp.*, 62 the Court re-affirmed its commitment to *Ragan* and a narrow reading of Federal Rule 3 (as governing primarily issues of intra-federal court timing rather than required notice for purposes of statutes of limitation) and applied an Oklahoma law requiring service of process upon a defendant (rather than filing in court) within the prescribed state limitations period if a tort claim was to be timely and subject to litigation in federal court. 64

Thus, the *Erie* doctrine retained substantial clout that could prevent application of what to the uninitiated might seem like a simply matter of applying federal procedural rules. Particularly strengthening Allstate's case was *Gasperini v. Center for the Humanities, Inc.*, ⁶⁵ which required an application of New York CPLR § 5501 regarding judicial review of verdicts as to alleged excessiveness notwithstanding the presence of Federal Rule 59, which governs motions for new trials. Because Rule 59 does not expressly list the grounds and criteria for the grant of a new trial, the *Gasperini* Court found it not to be in conflict with the New York law in a 5-4 opinion displaying some sharp contrasts between Justice Ginsburg's majority opinion and Justice Scalia's dissent. ⁶⁶

effect Dec. 1, 2010); Steven Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (providing a comprehensive review of the Act).

^{60. 28} U.S.C. § 2072(b).

^{61.} See Hanna, 380 U.S. at 471. See also id. at 466-67 (stating that York's outcome determinative test was "never intended to serve as a talisman.").

^{62.} Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

^{63.} See id. at 749-51 & 742.

^{64.} See id. at 751-53.

^{65.} Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996).

^{66.} Compare id. at 418 (Ginsburg majority opinion) (joined by Justices O'Connor, Kennedy, Souter and Breyer) with id. at 448 (Scalia dissent) (joined by Chief Justice William Rehnquist and Justice Clarence Thomas). See also id. at 439 (Stevens, J., dissenting on different grounds). The distinctions in the Scalia and Stevens analyses presage and are similar to their jurisprudential

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Against this backdrop, the *Shady Grove* trial court found Allstate's argument against class certification persuasive, ⁶⁷ as did the Second Circuit.⁶⁸ But a slim majority of the U.S. Supreme Court disagreed, holding that Federal Rule 23 controlled the issue of class certification in federal court, overriding a contrary state court rule. "Because the New York law attempts to answer the same question, but in a different way, i.e., stating that the suit may not be maintained as a class action because of the relief it seeks, the New York law must give way to the Federal Rule unless the Federal Rule is invalid."69

The Scalia plurality opinion followed Chief Justice Earl Warren's methodology in Hanna and relied heavily on the seventy-year old Sibbach v. Wilson & Co., Inc. decision 70 that predated Guaranty Trust of

conflict in Shady Grove. See infra note 89-94 and accompanying text (describing their respective Shady Grove opinions).

67. See Shady Grove Orthopedic Assoc., P.A. et. al. v. Allstate Ins. Co., 466 F. Supp. 2d 467, 472-73 (E.D.N.Y. 2006).

68. See Shady Grove Orthopedic Assoc., P.A. et al. v. Allstate Ins. Co., 549 F.3d 137 (2d Cir. 2008) (unanimous decision of panel comprised of Judges Rosemary Pooler, opinion author, Jose Cabranes and Robert Katzmann)

69. Allan Ides, Rule 23 Prevails Over New York Law Limiting Class Actions: U.S. Supreme Court Construes The Rules Enabling Act, LEXSEE 2010 EMERGING ISSUES 5075 (May 25, 2010) ("The Court rejected the Second Circuit's argument that Rule 23 and the New York law address different issues and, therefore, do not conflict."). Further summarizing the decision, Professor Ides noted that the Second Circuit had found no conflict by viewing FED. R. CIV. P. 23 as concerning only the criteria for deciding when a class may be certified while § 901(b) focused on the issue of whether the type of claim asserted was eligible for class action treatment.

The Court rejected this distinction between eligibility and certifiability as "entirely artificial," noting that both are preconditions for maintaining a class action. The Court read Rule 23 as empowering a federal court to certify a class in each and every case in which the Rule's criteria are met, so that any purported limitation on that power, such as the New York law's prohibition on class actions seeking statutory penalties, necessarily conflicts with it.

Id.

70. 312 U.S. 1 (1941).

The fundamental difficulty with both [concurrence and dissent] arguments is that the substantive nature of New York's law, or its substantive purpose, makes no difference. A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others - or valid in some cases and invalid in others - depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes). That could not be clearer[than] in Sibbach: [quoting Sibbach at length].

. . . We have held since Sibbach, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure. [citing Sibbach, Hanna v. Plumer, 380 U.S. 460, 466-70 (1965), and Burlington N. R. Co. v. Woods, 480 U.S. 1, 8 (1987)]. If it does, it is authorized by § 2072 and is valid in all jurisdictions, with respect

New York v. York and its outcome determinative test. To the plurality, the finding of an applicable federal rule was nearly the end of the *Erie* inquiry: if the federal rule is on point, it controls unless it violates the Enabling Act. But if the federal rule is genuinely procedural, the safeguards of the Enabling Act process almost guaranty that the resulting rule does not violate the Act.

The framework for our decision is familiar. We must first determine whether Rule 23 answers the question in dispute. If it does, it governs—New York's law notwithstanding—unless it exceeds statutory authorization or Congress's rulemaking power. We do not wade into *Erie*'s murky waters unless the federal rule is inapplicable or invalid.

. . . .

...[Federal Rule 23 by its terms] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action. . . . Thus, Rule 23 provides a one-size-fits-all formula for deciding the class-action question. Because § 901(b) attempts to answer the same question—i.e., it states that Shady Grove's suit "may not be maintained as a class action" because of the relief it seeks—it cannot apply in diversity suits unless Rule 23 is ultra vires.

For the plurality, "the only criterion for validity under the [Rules Enabling Act] is whether the rule really regulates procedure, i.e., the judicial process of enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." For Justice Scalia and the plurality, it was not

to all claims, regardless of its incidental effect upon state-created rights. Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1444 (2010) (emphasis in original) (citations omitted).

^{71.} See Guaranty Trust Co., 326 U.S. 99, 109 (1945) ("The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?"); MOORE'S FEDERAL PRACTICE, supra note 45, § 62 (discussing York's attempt to create consistent results regardless of whether a case arises in state court or federal court, but pointing out that the outcome determinative approach is ineffective because "it is difficult to conceive of any rule of procedure that cannot have a significant effect on the outcome of the case.").

^{72.} Shady Grove, 130 S. Ct. at 1437 (Scalia, J., announcing the judgment of the Court) (emphasis added) (citations omitted).

^{73.} Ides, *supra* note 69 ("If [the federal civil rule] governs only the manner and the means by which a litigant's rights are enforced, it is valid; if it alters the rules of decision by which the court will adjudicate those rights, it is not. Whether the rule will incidentally affect a litigant's substantive rights, which most procedural rules do, is beside the point.").

important whether § 901(b) reflected substantive state law or policy. Its status as a state rule of procedure required that it take a back seat to an applicable federal rule.

The plurality found no question that § 901(b) was procedural rather than substantive. "Unlike a law that sets a ceiling on damages (or puts other remedies out of reach) in properly filed class actions, § 901(b) says nothing about what remedies a court may award; it prevents the class actions it covers from coming into existence at all." Regardless of whether § 901(b) was pursuing state substantive policy rather than merely providing procedural ground rules, § 901(b) and Federal Rule 23 "flatly contradict each other." Regarding Enabling Act precedent about the validity of civil rules, Justice Scalia noted that the Court has "rejected every statutory challenge to a federal Rule that has come before us." Although [e]ach of these rules had some practical effect on the parties' rights," he emphasized that "each undeniably regulated only the process for enforcing those rights; none altered the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either." The substantial process for enforcing those rights; none altered the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either.

In dissent, Justice Ginsburg, in an analysis similar to that of her *Gasperini* majority opinion, argued that § 901(b) was indeed an expression of New York substantive law, enacted to effect an important state policy. Under the dissent's concept of *Erie*, the Court must be sensitive to such important state interests. In reaching the view that § 901(b)'s limitation on statutory penalty class actions was such an important state interest, the dissent relied heavily on its view of the statute's legislative history. As discussed in Part III, below, this view of the prohibition's genesis was incomplete and arguably misleading in that § 901(b) looks at least as much as an ill-examined bit of interest group horse-trading as it does a considered expression of public policy

^{74.} See Shady Grove, 130 S. Ct. at 1439 (footnote omitted).

^{75.} See id. at 1441.

^{76.} See id. at 1442-43 (citations omitted). As the Court has consistently done, Justice Scalia categorized Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) and Walker v. Armco Steel Corp., 446 U.S. 740 (1980) as cases in which the scope of the federal rule (FED. R. CIV. P. 3) was too narrow to conflict with the state rules in question (governing commencement of actions by service of process prior to the expiration of the applicable statutes of limitations).

^{77.} See Shady Grove, 130 S. Ct. at 1460 (Ginsburg, J., dissenting).

^{78.} See id. at 1460-65.

^{79.} See id at 1463-64. See also infra notes 80-81 & 150-52 and accompanying text (addressing completeness and accuracy of the dissent's characterization of § 901(b)'s legislative history).

norms. 80 A similar but less cheerleading view of § 901(b)'s derivation is reflected in the concurrence as well. 81

The Scalia plurality and the Ginsburg dissent each commanded four votes. The Stevens concurrence broke the tie in favor of application of Federal Rule 23 over § 901(b). At the end of this hotly litigated *Erie* question, five jurists sided with Federal Rule 23 (Justices Stevens, Roberts, Thomas, Sotomayor and Stevens) while eight (Justices Ginsburg, Breyer, Kennedy and Alito as well as trial judge Nina Gershon and Second Circuit judges Rosemary Pooler, Jose Cabranes, and Robert Katzmann)⁸² preferred application of § 901(b). Justice Stevens sided with the federal rule through a considerably more functionalist route, more jurisprudentially aligned with the Ginsburg dissent than the Scalia plurality in method if not result.⁸³

Justice Stevens, like the dissenters, was more concerned about being sensitive to state substantive law and policy and openly acknowledged the degree to which that law and policy may be encased in state procedural provisions. Similarly, Justice Stevens acknowledged that the application of particular procedural rules often has substantive consequences and noted that the Court's *Erie* precedents had often applied ostensibly procedural state laws and rules that had clear substantive impact in terms of affecting a litigant's success in federal court litigation. But to a greater degree than Justice Scalia in the plurality opinion, Justice Stevens sought to balance the state and federal interests presented in the case. ⁸⁴

In *Shady Grove*, he found the balance to tip in favor of Federal Rule 23 in that New York had chosen to express its reservations about statutory penalty class actions in a state procedural rule. Federal Rule 23 governs class actions in federal court. Under the Stevens examination of whether conflicting state procedural practice contains important state substantive law, it does not violate the Enabling Act. As such, § 901(b) was New York's statement about how its courts should deal with such matters, but was not enough of an expression by the state as to the absolute scope of state statutory remedies such as Insurance Law § 5106. Further, § 901(b) did not itself define state rights and remedies regarding

^{80.} See infra notes 150-52 and accompanying text.

^{81.} See Shady Grove, 130 S. Ct. at 1458-59.

^{82.} See infra note 41 & 68 and accompanying text (discussing trial and appellate court history of Shady Grove).

^{83.} See Shady Grove, 130 U.S. at 1448 (Steven, J., concurring).

^{84.} See id. at 1448-54.

^{85.} See id. at 1457-59.

the substantive issues presented in the *Shady Grove* litigation. Although § 901(b) has aspects of a cap on damages, which Justice Stevens would have regarded as applicable controlling substantive law under *Erie*, New York did not adopt a cap but instead addressed its policy concerns only through a procedural rule. Under these circumstances, Justices Stevens as the key fifth vote was unwilling to require the ousting of federal procedural law by this type of state provision.

Notwithstanding support from Justice Stevens on the merits and holding of the case, Justice Scalia could not resist severe criticism of the concurrence as an imprudent legal approach. Part II.C. of Justice Scalia's opinion (which Justice Sotomayor did not join, perhaps because it she viewed it as surplusage, perhaps because it seemed an almost ad hominem attack on the reasoning of a colleague providing a crucial vote, or perhaps because her own *Erie* approach is not as formalistically supportive of the Federal Rules of Civil Procedure when in conflict with state law), spends several pages attacking the Stevens approach to assessing the validity of a federal rule under the Enabling Act. 88

To perhaps oversimplify, Justice Scalia's focus is whether an applicable federal rule "really regulates procedure" rather than setting forth substantive law encased in a procedural code. If the rule in question is truly one of procedure (i.e., the methodology by which substantive claims are litigated), it is valid under the Enabling Act and applies notwithstanding contrary state law.

We have long held that [the Enabling Act's limitation that federal procedural rules not abridge, enlarge or modify substantive rights] means that the Rule must "really regulat[e] procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself *regulates*: If it governs only "the manner and the means" by which the litigants' rights are "enforced," it is valid; if it alters "the rules of decision by which the court will adjudicate [those] rights," it is not.

^{86.} See id.

^{87.} See id. at 1458-59.

^{88.} See id. at 1444-48.

^{89.} See id. at 1442 (citations omitted; emphasis in original).

In contrast, Justice Stevens focuses more on the Enabling Act requirement that the federal procedural rule at issue not "abridge, enlarge, or modify any substantive right." If it does, it cannot overcome the state law or rule, no matter how procedural the federal rule's function. In *Shady Grove*, Justice Stevens found Federal Rule 23 not to have changed state substantive law. Notwithstanding plaintiff Shady Grove's success in being allowed to seek class action status in federal court, insurance companies like Allstate and other defendants facing statutory penalties continue to enjoy their immunity from state court class actions.

For Justice Scalia, the Stevens approach was unwise both because it deviated from the precedential simplicity of *Sibbach* and because it required a court to make a more sustained, time consuming, and potentially value-laden assessment of the relative importance of the conflicting state law rather than simply drawing a bright line between the procedural and the substantive. For Justice Stevens, the Scalia approach was an over-reading of *Sibbach v. Wilson* and was unfaithful to the command of the Enabling Act that the Court ensure that the Federal Rules of Civil Procedure not oust or negate state substantive law, which could occur even if the state statute or rule did not alter an otherwise applicable substantive rule or decision.

Despite occasionally snippy rhetoric in the Scalia and Stevens opinions, ⁹³ the practical consequences of their approaches are quite

^{90.} See id. at 1456-60.

^{91.} See id. at 1444-45 ("The concurrence would decide this case on the basis, not that Rule 23 is procedural, but that the state law it displaces is procedural, in the sense that it does not "function as part of the State's definition of substantive rights and remedies." A state procedural rule is not preempted, according to the concurrence, so long as it is "so bound up with," or "sufficiently intertwined with," a substantive state-law right or remedy "that it defines the scope of that substantive right or remedy," This analysis squarely conflicts with Sibbach, which established the rule we apply." (citations omitted)).

^{92.} See id. at 1454-1455 (contending that plurality over-reads or over-extends Sibbach without sufficient sensitivity for Enabling Act requirement that judicially promulgated procedural rules not supplant state substantive law.

^{93.} See, e.g., id. at 1445 (Scalia, J.) ("In reality, the concurrence seeks not to apply Sibbach, but to overrule it (or, what is the same, to rewrite it.")); id. at 1446, n.11 ("The concurrence's approach, however, is itself unfaithful to the statute's terms" and "would allow States to force a wide array of parochial procedures on federal courts so long as they are 'sufficiently intertwined with a state right or remedy"), id. at 1446 ("Why we should cast aside our decades-old decision escapes us, especially since (as the concurrence explains) that would not affect the result"), id. at 1447 ("[T]he concurrence's approach does nothing to diminish the difficulty [of drawing the line between procedure and substance], but rather magnifies it many times over. Instead of a single hard question of whether a Federal Rule regulates substance or procedure, that approach will present hundreds of hard questions, forcing federal courts to assess the substantive or procedural character of countless state rules that may conflict with a single Federal Rule); id. at 1447, n.15 ("[The

similar and compatible. One advantage of the Scalia approach is its simplicity and relative ease of application. Another is that it is less likely to result in the invalidation of federal rules, which result only after a considerable expenditure of effort by the legal community. In the alternative, an advantage of the Stevens approach is that it provides for more problematic cases a means for striking down federal rules that seriously conflict with state substantive law and policy. ⁹⁴

Shady Grove presents interesting and difficult questions about the scope of the Federal Civil Rules, deference to state law and policy, equivalence of federal and state litigation outcomes, forum shopping, and the jurisprudence of federalism as well as revisiting long-running concerns over the costs and benefits of class actions. It also provides an interesting window on the jurisprudential preferences of the Justices. The case has spurred and will continue to spur substantial academic commentary and further litigation regarding the contours of the Erie doctrine.

concurrence's proposed] amorphous inquiry into the 'nature and functions' of a state law will tend to increase, rather than decrease the difficulty of classifying Federal Rules as substantive or procedural. Walking through the concurrence's application of its test to § 901(b) gives little reason to hope that its approach will lighten the burden for lower courts."

See also id. at 1448, 1452-53 (Steven, J., concurring) (Justice Scalia believes that the sole Enabling Act question is whether the federal rule "really regulates procedure [as narrowly and perhaps glibly defined in the plurality opinion]. I respectfully disagree [observing in accompanying footnote 7 that "[t]his understanding of the Enabling Act has been the subject of substantial academic criticism, and rightfully so") (citing sources)]. This interpretation of the Enabling Act is consonant with the Act's first limitation to 'general rules of practice and procedure,' But it ignores the second limitation that such rules also 'not abridge, enlarge or modify any substantive right," and in so doing ignores the balance that Congress struck between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies. It also ignores the separation-of-powers presumption and federalism presumption that counsel against judicially created rules displacing state substantive law." (emphasis in original) (citations omitted)), id. at 1453, n.8 (Justice Scalia's objection [to the concurrence contention that a state procedural code may really express state substantive law and policy] misses the key point."); id. at 1453, n.9 (Justice Scalia's response to concurrence argument "highlights how empty the plurality's test really is" and invites undue "speculation" regarding congressional intent).

- 94. See Ides, supra note 19.
- 95. See, e.g., supra notes 17, 19, 20.
- 96. See, e.g., Holster v. Gatco, Inc., 130 S. Ct. 1575 (2010) (putative Telephone Consumer Protection Act class action with certification initially denied by lower courts on grounds similar to trial court and Second Circuit rational in Shady Grove, remanded for further consideration in light of Supreme Court's Shady Grove decision); Retained Realty, Inc. v. McCabe, 376 Fed. Appx. 52 (2d Cir. 2010) (applying Shady Grove to Erie question in litigation); Pefanis v. Westway Diner, Inc., No. 08 Civ. 002 (DLC), 2010 U.S. Dist. LEXIS 93180 (S.D.N.Y., Sept. 7, 2010) (same); Giovanniello v. ALM Media, No. 3:09cv1409 (JBA), 2010 U.S. Dist. LEXIS 92181 (D. Conn. Sept. 3, 2010) (same); Leyse v. Bank of Am., No. 09 Civ. 7654 (JGK), 2010 U.S. Dist. LEXIS 58461 (S.D.N.Y. June 14, 2010) (same); Leyse v. Clear Channel Broadcasting, Inc., et al., No. 1:09-CV-237, 2010 U.S. Dist., Lexis 54103 (S.D.N.Y. June 2, 2010) (same).

An under-discussed aspect of both the decision and the doctrine, however, is the precise derivation and nature of § 901(b)'s limitation on certain types of class actions, its wisdom and impact, and the degree to which the Court's different *Erie* approaches may encourage or frustrate reflective and transparent state lawmaking. Although formalism has taken its share of blows in the academy and the courts, in the *Erie* context it may encourage sounder, more deliberative state lawmaking by limiting the degree to which relatively unexamined state law favorable to interest groups may be hidden in state procedural codes rather than openly discussed, debated, and decided as a matter of substantive law. *Shady Grove* itself provides an illustration in that the § 901(b) prohibition on statutory penalty class actions proves on closer examination than given by the *Shady Grove* courts (at all levels) to be more problematic and less worthy of judicial deference than first meets the eye.

See also Holster, 130 S. Ct. at 1576 (Ginsburg, J., joined by Breyer, J., dissenting) (arguing that Holster decision below was supported by adequate and independent state law ground not conflicting with FED. R. CIV. P. 23 and that vacating judgment below is error) ("I would spare the Court of Appeals the necessity of revisiting—and, presumably, reinstating—its TCPA-grounded ruling"); Holster v. Gatco, Inc., 618 F.3d 214 (2d Cir. 2010) (on remand, Second Circuit, as predicted by Justice Ginsburg, reaffirmed previous ruling on basis other than § 901(b) ban on statutory penalty class actions).

Regarding *Shady Grove* itself, the case continues after remand. *See* 380 Fed. Appx. 96 (2d Cir. 2010) (remanding case to trial court for further proceedings); No. 06-CV-1842 (NG) (JO), 2010 U.S. Dist. LEXIS 64492 (E.D.N.Y. June 28, 2010) (rejecting Allstate's contention that claim is moot because insurer has paid the medical bill and statutory interest initially sought by Shady Grove, noting that this had occurred prior to U.S. Supreme Court's decision and that Allstate did not at that time think the matter moot). *See id.* at *3 ("[Allstate's motion] plainly raises the question of why, if that payment mooted the case as Allstate now claims, it did not say so earlier but instead pursued complex litigation before the appellate court and then the Supreme Court."). At the risk of sounding cynical, one wonders why the *Shady Grove* dissenters were so interested in expending legal resources in a functional question to help this rather unattractive litigant accused of systematically chiseling auto accident victims and their medical providers. Even if the facts alleged by plaintiff are incorrect, the *Shady Grove* case itself illustrates the arguable futility of individual imposition of statutory penalties to curb bad but profitable behavior by insurers and other economically powerful interests. Simultaneously, *Shady Grove* calls into serious question the wisdom of § 901(b)'s ban on statutory penalty class actions.

III. NEW YORK CLASS ACTION LAW AND ITS RESTRICTIONS ON ACTIONS SEEKING STATUTORY PENALTIES

A. The Impetus for Class Action Reform in New York

The Shady Grove story has roots arguably as old as 184997 and began in earnest in 1966, the year that far-reaching amendments to Federal Rule 23 effect. 98 The 1966 amendments expanded the utility and potential for use of the class action device in federal courts, prompting many states to follow suit in the aftermath of the federal rules change. 99 In what is now seen as perhaps excessive optimism over the potential of the class action to right wrongs, support for class actions by consumers and investors rocketed, leading to a wave of federal court litigation that, although later leading to second thoughts, did not generally inhibit enthusiasm for the class action device. In the aftermath of the 1966 Amendment to Federal Rule 23, a generally pro-claimant law reform mentality held sway, one that included expanded discovery and access to information, a continued liberal attitude toward pleading, and expanding substantive rights for consumers, individuals and minorities. 100 There eventually emerged fierce opposition to this movement as well as backlash against its perceived excesses, forces that during the ensuing 40 years would change the litigation picture dramatically. 101

^{97.} See N.Y. C.P.L.R. § 1005 (predecessor to current state class action law at N.Y, C.P.L.R. § 901 et seq.).

^{98.} See FED. R. CIV. P. 23 & advisory committee Note (1966), reprinted in FEDERAL RULES OF CIVIL PROCEDURE, 2010-2011 EDUCATION EDITION 126-31 (2010).

^{99.} See JAMES, JR. ET AL., supra note 2, § 10.20 (describing history of class action litigation); STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) (detailing development of class action, including importance of 1966 Amendment to Fed. R. CIV. P. 23); Jeffrey W. Stempel, Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes, 83 WASH. U. L. QTRLY 1127, 1133-55 (2005) [hereinafter Stempel, Class Actions and Limited Vision] (reviewing development of modern federal class action).

^{100.} See Arthur R. Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem," 92 HARV. L. REV. 664 (1979) (describing optimism in wake of 1966 amendments displaced to some extent by excessive fear of large class actions, criticizing Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), which required expensive actual mailed notice to class members in Rule 23(b)(3) damages class action).

^{101.} See Stempel, Class Actions and Limited Vision, supra note 99 at 1128-32 (noting mounting criticisms of class actions from 1970s to almost fever pitch during 1990s and early twenty-first century); Charles Silver, "We're Scared to Death": Class Certification and Blackmail, 78 N.Y.U. L. REV. 1357 (2003) (noting opposition to class actions as extortive but assessing such contentions as exaggerated); Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377 (2000) (noting

As the 1970s began, the class action was riding high and enjoyed the esteem of courts, scholars, and public interest groups despite strong opposition from much of the business community. New York was something of a laggard in this trend. Its class action law dated back to 1849 and precluded class action treatment where a defendant's allegedly wrongful conduct was not simultaneously directed at a discrete and relatively confined group. Class actions were impossible under New York law, at least as historically applied by the courts, even where the conduct was uniform (e.g., a standardized insurance policy, form

similar assessment finding great criticism of class actions but deeming much of the criticism overblown or unfounded); John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995) (contending that despite the benefits of class actions in theory they are in practice often abusive).

Regarding the backlash against the rights revolution and access to the courts generally, see Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81TEX. L. REV. 285 (2002); Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Bane or Boon?*, 40 ARIZ. L. REV. 965 (1998); Steven N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155 (1993); Jeffrey W. Stempel, *New Paradigm, Normal Science or Crumbling Construct? Tends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659 (1993); Judith Resnik, *Failing Faith, Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

102. See, e.g., Adolf Homburger, State Class Actions and the Federal Rule, 71 COLUM. L. REV. 609 (1971) (urging that New York adopt class action law similar to FED. R. CIV. P. 23); Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 HARV. L. REV. 356 (1967) (expressing optimism about new FED. R. CIV. P. 23); Jack B. Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 BUFF. L. REV. 433 (1960) (advocating expansion of class actions availability).

103. See N.Y. C.P.L.R. § 1005; Onofrio v. Playboy Club of N.Y., 205 N.E.2d 308 (N.Y. Ct. App. 1965) (holding class certification denied where patrons were each allegedly erroneously charged \$25 fee); Hall v. Coburn Corp., 259 N.E.2d 720, 720-22 (N.Y. 1970) (holding certification denied for putative class alleging illegally small type in credit contracts despite standardized form nature of contracts; interest of class members insufficiently common where they engaged in different transactions involving same form); Soc'y Milion Athena, Inc. v. Nat'l Bank of Greece, 22 N.E.2d 374, 377 (N.Y. 1939) (showing court's refusal to certify a class of depositors seeking return of funds allegedly illegally received by bank on grounds depositors are insufficiently "united in interest: in that "[n]one of them has any lien or interest, legal or equitable against the property transferred or against any other assets of defendants" and thus "have no joint or common interest in any fund."). But see Ray v. Marine Midland Grace Trust Co., 316 N.E.2d 320, 321-23 (N.Y. 1974) (class certification permitted where putative class consisted of owners who were all holders of debentures benefited by the same trust and allegedly injured in the same manner by trustee wrongdoing). See also Alfonso A. Narvaez, Local Veto Voted on OTB Parlors, N.Y. TIMES, Feb. 11, 1975, at 46 [hereinafter Narvaez, Local Veto Voted on OTB Parlors] (subsidiary reporting on "Class-Action Bill") ("While current laws in New York State permit class actions in certain cases, restrictive interpretations of the statutes by the courts made consumer suits virtually impossible to initiate.").

contract, or a nationwide policy) if the proposed plaintiff class was affected by the defendant's conduct at different times and place. ¹⁰⁴

This limitation placed New York class action law in the relative Dark Ages as compared to Federal Rule 23, which in turn created considerable pressure for modernization. Consumer groups and progressives with substantial support in the judiciary argued for a new class action law. Law professor Adolf Homburger, then Chair of the CPLR Committee of the New York State Judicial Conference, published an important article urging that New York amend its class action law to conform to the federal rule. The Administrative Board of the Judicial Conference, chaired by influential and prestigious Court of Appeals Judge Stanley Fuld, endorsed class action reform.

The Court of Appeals went on record in favor of reform, almost engaging in legal blackmail in *Moore v. Metropolitan Life Insurance Co.*¹⁰⁷ Plaintiff challenged the insurer's refusal to pay for treatment by a psychologist under its group major medical insurance policy covering state employees, contending that the policy's limitation to reimbursing

^{104.} See Letter from New York City Mayor Abraham D. Beame (by Legislative Representative Reinard E. Yousiven) to Gov. Hugh L. Carey (June 2, 1975) (praising eventual enactment of class action legislation and criticizing old New York law by noting: "If a thousand consumers are defrauded and all sign the very same piece of paper, one may sue for the benefit of all, but if they sign one thousand identical standard form contracts, they lack the requisite unity of interest. This renders the class action statute illusory for many consumers. The proposed class action bill eliminated the unity of interest requirement and thus provides the consumer with a practical remedy."). See, e.g., Moore v. Metropolitan Life Ins. Co., 307 N.E.2d 554 (N.Y. 1973).

^{105.} See Homburger, supra note 102; Weinstein, supra note 102 (advocating expansion of class actions availability. In addition, Columbia Law Professors Jack Greenberg and Philip Schrag and others had been pushing for class action reform in litigation as well as in articles. See, e.g., Ratner v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972) (attempting large class action for Truth in Lending violations but certification denied on grounds it would create excessively coercive pressure on defendants); see also Schrag & Meltsner, Class Action: A Way to Beat the Bureaucracies Without Increasing Them, THE WASH. MONTHLY, Nov. 1972, at 55; Comment, Translating Sympathy for Deceived Consumers into Effective Programs for Protection, 114 U. PA. L. REV. 395 (1966) (cited in Memorandum of June 10, 1975 from Keneth P. Norwick, Legislative Dir., N.Y. Civil Liberties Union to Judah Gribetz, Governor's Counsel in support of class action legislation after passage while awaiting gubernatorial signature) (at pp. 1-2). Similar articles favoring expanded class action availability were cited in Memorandum of May 29, 1975 from the State Consumer Protection Board to Counsel to the Governor at p. 5, n.18 (citing Resnikoff & Shrag, Pending State Class-Action Legislation, N.Y. L.J., Mar. 14, 1974, p. 1 and Shrag & Ratner, Caveat Emptor—Empty Coffer: The Bankruptcy Law Has Nothing to Offer, 72 COLUM, L. REV. 1147, 1148, 1169-72 (1972).

^{106.} See Sperry v. Crompton Corp., 863 N.E.2d 1012, 1015 (N.Y. 2007) (noting judicial conference support of class action law). Court of Appeals Judge Stanley Fuld was a highly regarded jurist, with a pro-business reputation. See Sidney H. Stein, Stanley H. Fuld: A Life Lived in the Law. 104 COLUM. L. REV. 258 (2004).

^{107. 307} N.E.2d 554 (N.Y. 1973).

services only if provided by medical doctors had been nullified by statute. The court found the imposition of coverage valid, but denied class action treatment pursuant to CPLR § 1005 and applicable precedent despite misgivings about continuing along this course of stare decisis.

The court is also aware that there was pending before the Legislature last year and will be again this year a comprehensive proposal to provide a broadened scope and a more liberal procedure for class actions, an objective shared by members of this court. (See Senate Bill, No, 8544 [1972]; Assembly Bill, No. 10448 [1972].) Because the proposed statute would assure limitations and safeguards which would be highly desirable in broadening the jurisdiction of the courts of this State over class actions, legislation in this area is highly preferable to the alternative of judicial development in the same direction. In our view there is urgency for early legislation to accomplish these purposes, in light of the general and judicial dissatisfaction with the existing restriction on class actions which in many instances may mean a total lack of remedy, as a practical matter, for wrongs demanding correction.

The lone dissenter in *Moore*, Judge Sol Wachtler, a Long Island Republican, then a star on the judicial and political horizon, ¹⁰⁹ argued that the court should forgo waiting for an unpredictable legislature and enter the modern era of class action legislation via common law decision-making:

[T]his class should be certified. As noted by the majority, "the restrictive interpretation in the past of CPLR § 1005 and its predecessor statute no longer has the viability it may once have had." Remembering that those restrictive interpretations were a product of this court, it would seem most appropriate that this court, recognizing the need for a broadened and more liberal procedure for class actions, should take the initiative in that direction.

The early efforts to which the *Moore* Court alluded had foundered due to the resistance of Republicans, who then controlled the State

^{108.} See id. at 558.

^{109.} In an astoundingly ironic and sad story, Judge Wachtler eventually was convicted and incarcerated as a result of harassing a former paramour in a notorious case of obsessive love gone bad. He survived a stabbing in prison and was eventually released but, as might be expected, did not return to public life or legal prominence. *See* Sol Wachtler, After the Madness (1997); Linda Wolfe, Double Life (1994); John M. Caher, King of the Mountain: The Rise, Fall, and Redemption of Chief Judge Sol Wachtler (1998).

^{110.} See Moore, 307 N.E.2d at 558 (Wachtler, J., dissenting).

Assembly and State Senate, as well as due to the shadow of then-governor Malcolm Wilson, a Republican who was likely to veto any class action bill. Republican legislators identified with the concerns of retailers, insurers, and bankers, who dreaded the thought of class action litigation creating significant legal costs and potential liability due to modest overcharges or improprieties. 112

Although the *Moore* opinion's call to action put some additional wind in the sails of reformers and resulted in a significant effort to enact a modern class action law during the 1974 legislative session, the same political factors remained at work. Governor Wilson and the Republican leadership again prevented passage, albeit in part through the procedural gambit of barring a printing of the proposed bill so that it could not be brought before the full Assembly for consideration. Then came the November 1974 elections where, as elsewhere, the Nixon Administration's Watergate scandal, culminating in President Richard Nixon's August 1974 resignation and new President Gerald Ford's unpopular pardon of Nixon, fueled substantial Democratic gains across the country. In New York, this meant a Democratic takeover of the

^{111.} See Linda Greenhouse, Passage Seen for a Class-Action Bill, N.Y. TIMES, Jan. 23, 1975, at 290 [hereinafter Greenhouse, Passage Seen for a Class-Action Bill] ("Last year, a strong classaction bill died in both houses of the Legislature without reaching the floor, after intense lobbying by banking and business groups. [Republican] Governor [Malcom] Wilson made no secret of his dislike for the concept, and [Republican] Senator H. Douglas Barclay, chairman of the Senate Codes Committee, where the strong bill was assigned, countered it with a version of his own that consumer groups denounced as worse than no bill at all. . . . Governor Carey urged the passage of a classaction bill") (noting significant support for bill from some Republican legislators); Linda Greenhouse, Class Action, and How It Came to Nothing in Albany, N.Y. TIMES, May 12, 1974, at 187 [hereinafter Greenhouse, How It Came to Nothing in Albany, N.Y.] (discussing politics of class action legislative proposal, including Democratic support and Republican opposition. "What happened to the bill is 'a classic study of what real lobbying is all about,' in the words of James T. Prendergast, a lawyer who lobbied on the losing side for consumer assembly."); James Klurfeld, Lobbyist Campaign Stalls Consumer Bill in Albany, THE HERALD STATESMAN (Watertown, N.Y.), Apr. 13, 1974, at 1; Linda Greenhouse, Consumers' Class-Action Bill Argued, N.Y. TIMES, Feb. 14, 1974, at 33 [hereinafter Greenhouse, Consumers' Class-Action Bill Argued] (noting academic proponents of class action similar to FED. R. CIV. P. 23 and resistance or opposition by Republican legislators and business groups).

^{112.} See supra note 111.

^{113.} See Greenhouse, Consumers' Class-Action Bill Argued, supra note 111, at 33.

^{114.} See Laura Kalman, Gerald Ford, the Nixon Pardon, and the Rise of the Right, 58 CLEV. St. L. Rev. 349 (2010) (describing Watergate-related upheavals of 1974 politics); Joseph A. McCartin, Unexpected Convergence: Values, Assumptions, and the Right to Strike in Public and Private Sectors, 1945-2005, 57 BUFF. L. Rev. 727 (2009) (describing huge Democratic victory in Watergate-influenced elections of 1974); J. Morgan Kousser, The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007, 86 Tex. L. Rev. 667, 705 (2008) (referring to "Democratic sweep in the 1974 'Watergate election"); David S. Law & Lawrence Solum, Positive Political Theory and the Law: Judicial Selection, Appointments Gridlock, and the Nuclear Option, 15 J.

Assembly and Senate and the replacement of Wilson with liberal Democrat Hugh Carey as governor. 115

B. The Path of Class Action Legislation and the Derivation of CPLR § 901(b)'s Limitation on Penalty Class Actions

Class action reform suddenly had renewed momentum. Proponents reintroduced legislation in the 1975 session, putting forth a bill that would largely adopt the federal model. However, in some ways the proposed New York law was even more plaintiff and class treatment friendly than Federal Rule 23 in that it contained a relaxed provision regarding notice in actions seeking payment of damages to class members Federal Rule 23(b)(3) (class actions in federal jargon), allowing the judge to dispense with the inconvenience and expense of mailing individualized notice to class members. 117 As before, the 1975 proposal had widespread support from the academy, the judiciary, consumer groups, and political liberals. Opposition predictably came from political conservatives and business interests and perhaps surprisingly from some elements of the organized bar who saw the coercive impact of the class device as outweighing its ability to help society's "little guys" from righting little wrongs perpetrated profitably en mass by commercial entities. 118

CONTEMP. LEG. ISSUES 51, 83 (2006) (same); David R. LaGassee, Note, *Undue Influence: Corporate Political Speech, Power and the Initiative Process,* 61 BROOK. L. REV. 1347, 1356 (1995) (noting that the 1974 election big was a win for liberal reformers).

^{115.} See Betsy Buechner, Consumer Groups Seek Big Albany Gains, THE HERALD STATESMAN (Watertown, N.Y.), Jan. 10, 1975, at 23 [hereinafter Buechner, Consumer Groups See Big Albany Gains] (noting shift to Democratic control of legislature and replacement of Republican Wilson with Democrat Carey was seen as positive by consumer groups seeking to enact class action bill and other pro-consumer legislation). See also Alfonso A. Narvaez, Bill to Aid Consumer Suits Passed by the Legislature, N.Y. TIMES, May 29, 1975, at 39 [hereinafter Narvaez, Bill to Aid Consumer Suits Passed by the Legislature] (noting support for bill among consumer, liberal, and Democratic constituencies and opposition in Republican, business, and conservative quarters.

^{116.} See sources cited in supra note 111.

^{117.} See Greenhouse, How It Came to Nothing in Albany, N.Y., supra note 111, at 290 (noting relaxed notice requirements of original bill and revised bill providing for greater notice but court discretion in application); Greenhouse, Consumers' Class-Action Bill Argued, at 33 (noting that conservative alternative to original bill offered by prominent Republican Senator would "for example, require all potential members of the class to be notified of the lawsuit and would require each plaintiff to show that he had suffered damages before he could share in the judgment").

^{118.} See articles cited in supra notes 111-18. There historically has been some division of bar organizations in New York. The Association of the Bar of the City of New York, headquartered in Midtown Manhattan, is heavily comprised, as its name implies, of urban practitioners. In addition, many or most of the members and the bulk of the leadership is comprised of lawyers in prestigious commercial firms or alumni of such firms. It is commonly described as the "Ivy League" bar, the "white shoe" bar or the "liberal establishment" in that it tends to be more politically liberal.

Assembly Speaker Stanley Fink, a Brooklyn Democrat, was lead sponsor of the bill, joined by more than fifty co-sponsors. It passed the Assembly (by a 138 to 5 vote) on February 10, 1975. The Senate returned the bill for reconsideration in May, where the amended legislation was again passed (by a vote of 146 to 0) and processed through the Senate, reaching final enactment on May 28. After transmittal to the governor, the bill was signed into law on June 17, 1975. The resulting product was a state class action provision that looks like Federal Rule 23, but with a limitation on actions seeking penalties. The process by which the final bill and this limitation emerged provides an additional window on the federal-state tussle reflected in *Shady Grove*.

Despite pushback from bill opponents, which resulted in § 901(b)'s limitation on class actions enforcing statutory penalties, the resulting legislation was still arguably more pro-plaintiff, pro-class, and "liberal" than Federal Rule 23. As noted in the Attorney General's Memorandum to Governor Carey regarding the bill,

Section 904 gives the court great discretion in determining the content and method of notice to the class and also permits the court to hold preliminary hearings in order to determine how the costs [of] notice need not be given in class actions brought primarily for injunctive or declaratory relief (where the plaintiff is in essence acting as a "private attorney general"). Section 904 also gives the court discretion to allow the prevailing party the expenses of notice as taxable disbursements under 904 for the discretionary award of attorneys' fees to the people

academic in orientation, and national or international in its focus than the New York State Bar (headquartered in Albany), whose membership and leadership reflect considerably more upstate, small town and suburban roots as well a more conservative, pro-business focus. See JEFFREY B. MORRIS, MAKING SURE WE ARE TRUE TO OUR FOUNDERS: THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1970-95 (1997). For example, the City Bar publically opposed the nomination of conservative D.C. Circuit Judge and former Yale and Chicago law professor Robert Bork. See Jeffrey W. Stempel, Politics and Sociology in Federal Civil Rulemaking: Errors of Scope, 52 ALA. L. REV. 529, 632, n.473 (2001); Linda Greenhouse, The Bork Hearings: Legal Establishment Divided Over Bork Nomination, N.Y. TIMES, Sept. 26, 1987, at 33. See also MICHAEL PERTSCHUK & WENDY SCHAETZEL, THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION (1989).

^{119.} See Assembly Bill 1252-B, addressed in New York Legislative Service, Inc., NYLS LEGISLATIVE HISTORY ch. 207 (1975) [hereinafter NYLS LEGISLATIVE HISTORY] (on file with author) (including Governor's Bill Jacket). Fink continued in the legislature for nearly another twenty years, rising to become speaker and becoming one of New York's most powerful politicians.

^{120.} See id.

^{121.} See id.

^{122.} See id.

^{123.} See id.

with small individual damages and poor financial resources to make greater use of the class action in order to redress common class injuries. 124

Although federal courts have the discretionary power to achieve similar results, both the language of current Federal Rule 23 and long-standing interpretation of the 1966 version of the Rule that inspired the New York law, create a strong presumption that individual notice to class members is required in Federal Rule 23(b)(3) damages class actions, with plaintiff bearing responsibility for the costs of notice, at least in first instance. Governor Carey was made quite aware of this by his Attorney General:

Not only does the bill now make class action procedures in New York similar to the federal procedures, its treatment of the issue of notice avoids the problems that continue to beset federal practice as a result of last year's U.S. Supreme Court decision in <u>Eisen</u> v. <u>Carlisle & Jacquelin</u>, 417 U.S. 156.

I have advocated revision of the class action statute in this fashion for many years, having submitted a brief to the New York State Court of Appeals in 1969 as amicus curiae in the case of <u>Hall v. Coburn</u>, 226 N.Y.2d 396. My amicus curiae brief to the U.S. Supreme Court in the <u>Eisen</u> case supported the same treatment of notice as that provided by this bill.

Nowhere in his memorandum assessing the bill does the Attorney General mention § 901(b)'s prohibition on class actions regarding statutory penalties. Similarly, the Memorandum of the Governor filed with the Assembly makes no mention of the limitation on statutory penalty class actions. Neither does the Lieutenant Governor's Counsel's Memorandum to the Governor's Counsel. In general, the bill was presented upon passage as an unalloyed good but described only in general terms, with little or no discussion of the areas in which the

^{124.} Memorandum for the Governor [Hugh Carey] of Attorney General Louis J. Lefkowitz (June 4, 1975), at 1-2 (on file with author).

^{125.} See FED. R. CIV. P. 23(c)(2); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). See also Miller, supra note 100.

^{126.} See Memorandum for the Governor, supra note 124, at 2 (underlining in original).

^{127.} See Memorandum filed with Assembly Bill Number 1252-B (date not included on memorandum), signed by Governor Hugh Carey, available in "Bill Jacket" for the class action law. See NYLS LEGISLATIVE HISTORY, supra note 119, ch. 207 (page 9 of compilation).

^{128.} See Memorandum from Robert J. Dryfoos, Counsel to the Lieutenant Governor to Judah Gribetz, Counsel to the Governor (June 9, 1975) (on file with author).

original proposal had been cut back to accommodate business interest groups. 129

But, as with all legislation, there was a backstory in which interests opposing the bill pushed back, with mixed success in the matter of class action legislation. During the 1974 legislative session during which the proposal died and the 1975 session leading to passage, debate over the class action bill was confined to the overall merits of aggregation in the abstract, i.e., whether permitting collective claims was in itself a wise idea empowering those suffering little wrongs or a foolish idea enabling voracious plaintiffs' lawyers to extort businesses over minor errors. In addition, there was public discussion of the means of measuring damages in class action matters, in particular whether "fluid" recovery or market share liability concepts could be used to compensate plaintiffs in cases where it was difficult or impossible to determine the identity of those wronged by an improper business practice.

^{129.} See, e.g., Letter from Assemblyman Stanley Fink to Judah Gribetz, Governor's Counsel (June 2, 1975) (on file with author) (making no mention of limitation on class actions for statutory penalties or derivation of the restriction); Memorandum from State Consumer Protection Board to Governor's Counsel (May 29, 1975) (on file with author) (describing new law as "based largely on the procedure used in federal class actions" but an "improve[ment] on the federal procedure": in that it avoids the Eisen v. Carlisle & Jacquelin jurisprudence by authorizing notices by publication and "permits random sampling of the class to determine the need for individual notice, allows the court to require the defendant to pay for part or all of the costs of notice, and permits the court to hold a preliminary hearing on the merits to determine how the costs of notice should be apportioned." (endnote omitted)). The Consumer Protection Board Memorandum, supra, addresses § 901[b] simply by summarizing it and arguably understates its limiting effect, noting that "of course, if the members of a class who would be entitled to a penalty sue only for their actual damages, they may do so in a class action," an observation that tends to overlook the difficulties of proof and possibly low incentive to sue even with the benefit of the class action device.

^{130.} See articles cited in supra notes 111-18.

^{131.} See Linda Greenhouse, State Senate Unit Expected to Recommend New Bill Allowing Class-Action Suits, N.Y. TIMES, Mar. 11, 1974, at 13 [hereinafter Greenhouse, State Senate Unit Expected to Recommend New Bill Allowing Class-Action Suits]. "Fluid recovery" as the term was used in press accounts envisions a situation in which it is clear that consumers were harmed by wrongdoing but under circumstances where there was no paper trail and where it was unlikely or unwieldy for consumers to come forward and demonstrate their participation in the wrongful transactions. The example used was of a cab company with a meter that charged excessive rates. Because most passengers then usually paid cash, identifying and notifying those harmed was difficulty, expensive, or perhaps impossible. The passengers themselves would be unlikely to realize that they had been swindled absent notice. The fluid recovery damages solution would require the taxi company to reduce its charges going forward until the amount of the overcharges had been repaid to the company's patrons. See id. I analogize this form of recovery for the group to market share liability in tort law in which a plaintiff harmed by a product made by several manufactures may obtain proportional repayment according to the defendants' market share when the plaintiff is unable to identify the specific drug or blasting cap that caused injury. See, e.g., Hall v. E.I. Du Pont De Nemours & Co., Inc., 345 F. Supp. 353 (E.D.N.Y. 1972) (Weinstein, J.) (blasting caps); Sindell v. Abbott Labs., Inc., 607 P.2d 924 (Cal. 1980) (DES pharmaceutical product).

One might consider Section § 901(b)'s ban on class actions for statutory penalties to be a subset of the larger debate over aggregation generally. Nonetheless, it appears that there was not a single mention of this limitation, proposed by opponents of the bill seeking to salve the pain of defeat, in any popular press reports—during either 1974 or 1975—regarding class action legislation and the public policy issues surrounding the legislation. In other words, even politically interested laypersons outside the immediate circle of legislating likely had no idea that the original bill contained no such limitation and that the restriction came about silently and without any serious debate over the matter by political elites.

Proposals to carve out statutory penalty litigation from the new class action law began to surface during spring 1975 as various interest groups registered their expected opposition. The New York State Bar Association, in expressing its "disapproval" of the bill, as it had done with similar predecessor legislation, stated that § 901 regarding "prerequisites to a class action" should "contain a separate subdivision (b)" that would read:

132. See, e.g., Greenhouse, Consumers' Class-Action Bill Argued, supra note 111, at 33; Consumers' Groups Attack Barclay 'Class-Action' Bill, WATERTOWN DAILY TIMES, Mar. 11, 1974, at 9; Linda Greenhouse, State Senate Unit Expected to Recommend New Bill Allowing Class-Action Suits, supra note 131; Barclay Commends Public Service Department at Recognition Dinner, THE TRIBUNE-PRESS (Gouverneur, N.Y.), Apr. 10, 1974, at 1; Klurfeld, supra note 111, at 1; Class Action Law Unlikely This Year, WATERTOWN DAILY TIMES, Apr. 30, 1974, at 16; Class Action Law Dies in Albany, ADIRONDACK DAILY ENTERPRISE (Saranac Lake, N.Y.), May 1, 1974, at 5; Greenhouse, Class Action, and How It Came to Nothing in Albany, supra note 111, at 187; Candidates Heat Up Campaigning, The Daily Press, Oct. 26, 1974, at 17; Betsy Buechner, Albany Warming to Consumer Activists, THE OBSERVER-DISPATCH (Utica, N.Y.), Jan. 9, 1975, at 23; Buechner, Consumer Groups Seek Big Albany Gains, supra note 115, at 17; Senator Reintroduces Class Action Measure, WATERTOWN DAILY TIMES, Jan. 21, 1975, at 11; Greenhouse, Passage Seen for a Class-Action Bill, supra note 111, at 29; Narvaez, Local Veto Voted on OTB Parlors, supra note 103, at 46; Class-Action Suit Bill Gets Assembly OK, PRESS-REPUBLICAN, Feb. 11, 1975, at 25; Assembly Approves New Consumer Aid, THE HERALD STATESMAN (Yonkers, N.Y.), Feb. 11, 1975, at 2; Assembly Passes Consumer-Protection Bill, Utica NY DAILY PRESS, Feb. 11, 1975; David Shaffer, Assembly Passes by 140-5 Vote Key Consumer-Protection Bill, SCHENECTADY GAZETTE, Feb. 11, 1975, at 44; Paul Harenberg, Hometown Report, SUFFOLK COUNTY NEWS, Feb. 27, 1975, at 13; Narvaez, Bill to Aid Consumer Suits Passed by the Legislature, supra note 115, at 39; Paul J. Browne, Class Action Bill Passed by Senate, WATERTOWN DAILY TIMES, May 29, 1975, at 11; Christine McKnight, Consumer Legislation an Exception in Divided House, UTICA NY DAILY PRESS, 1975; Carey Okay Predicted for 'Class Action Bill', THE CITIZEN-ADVERTISER (Auburn, N.Y.), May 29, 1975, at 2; Legislature Passes 'Class Action' Bill, ADIRONDACK DAILY ENTERPRISE (Saranac Lake, N.Y.), June 2, 1975, at 2; Paul Harenberg, Hometown Report, SUFFOLK COUNTY NEWS, June 5, 1975, at 17; Milton Hoffman, Albany Legislation: Lot Getting Done, THE HERALD STATESMAN (Yonkers, N.Y.), June 25, 1975; State Legislature Leaves 'Slim' Legacy, THE OBSERVER-DISPATCH (Utica, N.Y.), July 13, 1975, at 2A; Benjamin P. Roosa Jr., Assembly Report, THE HARLEM VALLEY TIMES, Sept. 4, 1975, at 4.

Unless a statute creating or imposing a penalty, forfeiture or minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, forfeiture or minimum measure of recovery created or imposed by statue may not be maintained as a class action. ¹³³

The rationale for the Bar's position was that New York law

Contains many "penalty" and similar provisions establishing arbitrary measures of liability for noncompliance which, although appropriate for individual actions, would lead to excessively harsh results in large class actions. The amounts of those penalties were established at levels sufficient to provide incentives for individual suits and it would be a gross distortion of their purpose to permit their recovery in class suits. The sufficient to provide incentives for individual suits and it would be a gross distortion of their purpose to permit their recovery in class suits.

Other business-affiliated interest groups also supported the statutory penalty carve out as a means of making the class action more palatable, although none offered to support the legislation in return for the limit on statutory penalty class actions. Simultaneously, groups

133. See N. Y. State Bar Assoc. Comm. on Banking Law, Business Law and Civil Practice Law and Rules, Legislative Report No. 15 (1975) (on file with author) (regarding S.1309 (proposed by Barclay), A. 1252 (proposed by Fink), A1417 (proposed by Jonas); S. 1360 (proposed by Dunne), A. 1330 (proposed by Fink), S. 1251 (proposed by Dunne) (undated), at 2) (all various forms of the essentially similar class action bill favored by consumer groups)). Accord N.Y. State Bar Association Committees on Banking Law, Business Law Legislative Report No. 4 (Apr. 7, 1975) (on file with author); N.Y. State Bar Association Committees on Banking Law, Legislative Report No. 1 (undated) (on file with author).

134. N. Y. State Bar Assoc. Legislative Report No. 15 (1975) (on file with author) (regarding S.1309 (proposed by Barclay), A. 1252 (proposed by Fink), A1417 (proposed by Jonas), S. 1360 (proposed by Dunne), A. 1330 (proposed by Fink), S. 1251 (proposed by Dunne), at 2 (all various forms of the essentially similar class action bill favored by consumer groups)) (transmitted via Letter of June 5, 1975 from John I. Vanderploog, Legislative Representative, N.Y. State Bar Ass'n to Judah Gribetz). *See also* materials adjacent to Letter from Donald A. Walsh, Counsel, N.Y. Conference of Mayors and Municipal Officials to Judah Gribetz (June 16, 1975) (on file with author) in legislative history, stating:

Penalties make it worthwhile for people to pursue their rights in court, and costly for defendants to violate the law. Class actions do the same thing. When lumped together, penalties and class actions produce overkill by magnifying potential liability wildly out of proportion to any possible wrong. In one case a defendant was asked to pay \$130 million dollars for a violation which the judge called debatable and which caused no actual damages to anybody.

Id.

135. See, e.g., Letter from Sanford H. Bolz, General Counsel, Empire State Chamber of Commerce, to Judah Gribetz, Governor's Counsel (June 4, 1975) and accompanying Memorandum in Opposition to A. 1252 (proposed by Fink) and S. 1309 (proposed by Barclay), at 3 [hereinafter Bolz Letter of June 4, 1975] (on file with author) (contending that "Recovery of Penalties Should Be Prohibited"). See also Letter from Donald A. Walsh, Counsel, N.Y. Conference of Mayors and Mun. Officials to Judah Gribetz (June 16, 1975) (on file with author) (criticizing "vague" language

supporting the bill registered their approval of the legislation but did not comment on the issue of limits on statutory penalty class actions. ¹³⁶ In

and "wide-open approach" of bill and expressing fear of "rash of suits" interfering with municipal actions but making no specific mention of statutory penalties); Letter from Welles A. Gray, Legislative Representative, Associated Credit Bureaus of N.Y. State and N.Y. Unit, American Collectors Assoc., to Judah Gribetz, Governor's Counsel (June 9 1975) (on file with author) (attacking several aspects of bill but making no mention of statutory penalties); Letter from Clarence E. Galston, Exec. Vice President, Assoc. of N.Y. State Life Ins. Co., to Judah Gribetz, Governor's Counsel (June 5, 1975), at 1 (on file with author) (opposing bill because of failure to limit recovery to "actual damages sustained by identifiable people" but failing to address issues of penalty class actions); Letter from Gary J. Perkinson, Executive Dir., N.Y. State Council of Retail Merch., Inc. to Judah Gribetz (June 4, 1975) (on file with author); Letter from Joseph R. Shaw, President, Associated Indust. of N.Y. State, Inc., to Judah Gribetz, Governor's Counsel (June 3, 1975) (on file with author) (expressing general opposition to class action law without specific discussion of § 901[b]); Memorandum to the Legislature, N.Y. Chamber of Commerce & Indust. (Feb. 3, 1975) (on file with author) (opposing bill in general as permitting "legalized blackmail" but making no specific mention of statutory penalties).

In his letter, Chamber of Commerce Counsel Bolz made clear that the Chamber opposed the class action bill even with the inclusion of the penalty limitation:

Of the six reasonable amendments which we, along with the New York State Council of Retail Merchants and a combination of three committees of the New York State Bar Association, suggested that would make the bill acceptable, four were ignored. Only (1) a ban on recovery of statutory penalties was adopted—and only a feeble pass was made at (2) an essential limitation on attorneys' fees—by limiting them to the "reasonable value of the legal services rendered" instead of, as we urged to "the number of hours reasonably expended . . . at a fair hourly rate." Beyond that, there was no concession made to our further requests for (3) individual notice to reasonably identifiable members of the class in damage cases, (4) notice expenses to be borne by plaintiffs except in extraordinary circumstances, (5) limitation of recoveries to actual damages sustained by identifiable people and not "fluid recoveries," and (6) discretion to the judge to determine whether class members should be required to assent to be included ("opt-in") or be included unless they signify dissent ("opt-out").

See Bolz Letter of June 4, 1975, supra, at 1.

136. See, e.g., Memorandum from Keneth P. Norwick, Legislative Dir., N.Y. Civil Liberties Union to Judah Gribetz (June 19, 1975) (on file with author); Letter from Joseph T. Weingold, Exec. Dir., N. Y. State Assoc. for Retarded Children, to Judah Gribetz, Governor's Counsel (June 9, 1975) (on file with author); Telegram from Abraham Fuchsberg, Chair, Legislative Comm., N.Y. State Trial Lawyers Assoc. (June 6, 1975) (on file with author); Letter from Stephen Shestakofsky, Legislative Representative, Citizens Union of the City of N. Y., to Judah Gribetz, Governor's Counsel (June 6, 1975) (on file with author) (making no specific mention of statutory penalty class actions but noting that "[i]ndividual actions are often too costly for a single consumer to bring. The final award is usually more than offset by the cost of the litigation itself."); Letter from Luther Gatling, Comty Service Soc'y, to Judah Gribetz, Governor's Counsel (June 3, 1975) (on file with author); Recommendation of Citizens Union of the City of N. Y. (week of May 27, 1975) (on file with author); Legislative Memorandum from Robert T. Cobb, Assoc. Exec. Dir., N. Y. State Council of Churches (Feb. 11, 1975) (on file with author). See also Letter from George L. Graff, Chair, Comm. on State Legislation, and Rhoda Karpatkin, Chair, Special Comm. on Consumer Affairs, Assoc. of the Bar of the City of N. Y., to Judah Gribetz, Governor's Counsel (June 11, 1975), at 1 (on file with author) (apparently accepting limitation on statutory penalty class actions as part of final legislation). The Association's Committee on Civil Practice Laws and Rules had in

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general, proponents of the reform stressed the impracticality of vindicating rights for small wrongs, even systematic small wrongs, in the absence of a modern class action device akin to Federal Rule 23 rather than the old New York CPLR § 1005, which drastically limited the availability of the class action. 137 Passage and enactment of the new law was portrayed in the popular press as a great victory for consumers with relatively little discussion of the arguments of the law's opponents and no discussion of the separate status of statutory penalties.¹³

The Almost Invisible Debased Non-Debate Over CPLR § 901(b)¹³⁹ *C*.

Throughout the legislative history of the class action law, there appears to have been little serious and sustained discussion of the issue of statutory penalty class actions. In particular, there appears to have been little serious examination of, or debate over, the rationale put forth in support of the limitation. 140 In addition to New York Bar Legislative

1972 issued a Committee Report critical of class actions but did not specifically address statutory

The Reports of the Administrative Boards of the Judicial Conference for the relevant time periods discuss the basic arguments for or against class actions but contain no express examination of the issue of statutory penalty class actions and appears not to have considered this cutback as a possible modification of the class action reform generally supported by the Conference.

137. See, e.g., Special Comm. on Consumer Affairs, Assoc. of the Bar of the City of N.Y., Proposed Class Action Legislation in N.Y. (on file with author) (reviewing history of class actions generally and in New York, California experience with liberalized class actions, rationale for and criticisms of class actions, strongly concluding that state law should follow approach of FED. R. CIV. P. 23 making class actions more available; no mention of statutory penalty issue in majority Report, dissenting statements, or supplementary views).

138. See, e.g., Narvaez, Bill to Aid Consumer Suits Passed by the Legislature, supra note 115, at 39. See also supra note 132.

139. With apologies to Marc Galanter, although I find the analogy to § 901(b) and Professor Galanter's phraseology too apt to forgo. See Marc Galanter, News From Nowhere: The Debased Debate Over Civil Justice, 71 DENV. U. L. REV. 77 (1993).

140. But see Letter from Adolf Homburger, Chair, Comm. to Advise and Consult with the Judicial Conference of the State of New York on Civil Practice Law and Rules, to Judah Gribetz, Governor's Counsel (June 6, 1975) (on file with author). Professor Homburger notes that the final legislation differs from the initial bill recommended by the Judicial Conference in that it contains the § 901[b] statutory penalty prohibition and in § 902 "requires that the plaintiff within a specified time after joinder of issue move for permission to maintain the action as a class action" while the original bill required the defendant to move for dismissal of a putative class action. In addition, § 904 of the final bill "contains a far more elaborate notification scheme than the original bill" but one regarded as "in harmony with the general intent of the bill as originally drafted." Id.

According to Homburger, "none [of these] changes affect the main thrust of the bill. They were carefully considered and approved by the Advisory Committee to the Judicial Conference.' Id. at 1. However, no written record of any Advisory Committee deliberations is found in the official legislative history or appears to have been independently published. A contemporaneous letter states that the Judicial Conference found amendments to the original bill, implicitly including the statutory penalty prohibition, "unobjectionable" except for concern over the clarity of language

Report 15 cited above, the most extensive discussion of the matter by the legislation's opponents is found in the Chamber of Commerce Memorandum to the Governor's Counsel:

A class action statute should limit any monetary recovery sought to the actual damages sustained.

The purpose of penalty provisions <u>in individual actions</u> envisioned in State and Federal law is to encourage wronged individuals and their attorneys to pursue their claims by creating a sufficient amount in controversy to ensure economic incentive. Statutory penalties and minimum recoveries which are necessary in <u>individual</u> actions are <u>not necessary in class actions</u>, where the aggregate damage claims are large and sufficient, in and of themselves, to support litigation.

Penalties and class actions simply do not mix. This was proved in Ratner v. Chemical Bank, a case under the Federal Rules where the combination caused a potential liability of \$130,000,000 although the actual damages to individual plaintiffs were zero!

This injustice could be remedied by adding subsection B to Section 901, to provide that unless a statute creating or imposing a penalty or other minimum recovery specifically authorizes the recovery thereof in a class action, an action to recovery such a penalty or minimum recovery created or imposed by such statute may not be maintained as a class action. ¹⁴¹

In response to the lobbying of the bill's opponents arguing for the statutory penalty ban as a means of making the legislation less onerous, the bill's proponents seemed to have accepted the anti-penalty arguments with surprisingly little resistance. For example,

regarding class action motion practice but provides no discussion of the penalty issue. See Letter from Richard A. Bartlett to Judah Gribetz 1 (June 3, 1975). The Judicial Conference Memorandum regarding the original bill does not discuss statutory penalties. See also Letter from Jay Cox O'Brien, Assistant Dir., N.Y. State Law Revision Commission, to Judah Gribetz and accompanying memorandum (June 2, 1975) (noting changes from initial bill that "now appears to meet most of the objections to class action bills filed by bar associations over the past several years" but providing no specific discussion of statutory penalties or other areas of conflict or amendment).

Notwithstanding the Judicial Conference's seeming tacit support for the statutory penalty prohibition, it appears that class action proponents neither seriously assessed nor publically debated the wisdom of adding this limitation to the final bill. *See infra* note 146-52 and accompanying text.

141. Empire State Chamber of Commerce, Memorandum in Opposition to A. 1252 (proposed by Fink) and S. 1309 (proposed by Barclay), at 3 (underlining in original) (on file with author) (contending that "Recovery of Penalties Should Be Prohibited").

Assemblyman Stanley Fink, a liberal Democratic activist who would eventually become Speaker, stated:

[The final legislation] [p]recludes a class action based on a statute creating or imposing a penalty or minimum measure of recovery unless the specific statute allows for a class action. These penalties or "minimum damages" are provided as a means of encouraging suits where the amounts involved might otherwise be too small. Where a class action is brought, this additional encouragement is not necessary. A statutory class action for actual damages would still be permissible.

Floor debates on the new law were no more probing on the issue of whether statutory penalties were so different from ordinary class action cases to merit prohibition. In floor debate just prior to passage in the Senate, sponsor Senator Barclay (R-Pulaski) noted:

[The final bill] has been amended from its original version to exclude statutory penalties and minimum measures of recovery from class actions unless the statue creating a penalty or minimum measure of recovery specifically authorized the remedy thereof. Spokesmen for many groups at the public hearing acknowledged that the imposition of penalties which would be appropriate when applied in an individual action would produce excessively harsh results when you magnify the impact in a class suit.

Nevertheless, this amended bill recognizes the power of the Legislature to exact penalty provision which are appropriate in class action context and leaves the door open for the recovery of such penalties in class actions if the Legislature specifically so provides.

There appears to have been no other significant discussion of the matter during floor debate, although Senator Barclay alluded to commentary at a public hearing on the bill for which there appears to exist no available transcribed record or docket. As previously noted, popular press reports regarding the class action law did not address the issue of statutory penalties. The one excerpt of floor debate that made the news would likely be interpreted by reasonable readers as suggesting that the new law did indeed encompass statutory penalties as well as other forms of damages:

^{142.} See Memorandum by Stanley Fink regarding A. 1252 and S. 1309 (final class action legislation), at 2 (on file with author).

^{143.} See Transcript of Proceedings, N.Y. State Senate (May 28, 1975), at S946-S947 (remarks of Senator Barclay).

^{144.} See supra note 132.

Only Senator Richard E. Schemerhorn, Republican of Cornwallon-Hudson, spoke out against the bill. He asked if one consumer who was defrauded by a store was victorious in a lawsuit and was awarded damages, would all other customers who had purchased the item be entitled to similar awards.

When he was told that they would be so entitled, he said "I'm against class action." He voted against the bill.

The New York Consumer Assembly called passage of the measure "one of the greatest steps for consumer justice ever taken by this Legislature."

The Practice Commentary to the Act, upon which the *Shady Grove* dissent heavily (and perhaps excessively) relied in assessing the legislative history of § 901(b)¹⁴⁶ notes:

[The] Judicial Conference proposal for the adoption of Article 9 did not contain subdivision (b) of CPLR § 901. The Legislature added the provision, apparently fearing that class judgments awarding statutory penalty-type damages to each member of the class would result in "annihilating punishment" of the defendant. See Ratner v. Chemical Bank of New York, S.D.N.Y. 1972, 54 F.R.D. 412, 416. Thus, CPLR § 901(b) generally prohibits class certification of claims that seek recovery of a "penalty or minimum measure of recovery created or imposed by statute. On the other hand, certification is allowed if the statute creating the penalty or minimum recovery specifically allows for class recovery. For example, N.Y. Pub. Health Law § 2801-d authorizes both a minimum monetary recovery and punitive damages in private litigation against nursing homes for inadequate provision of services, explicitly stating that a class action is permitted. Id. §2801-d(4).

The Practice Commentary, with its quotation from *Ratner v. Chemical Bank*, clearly served as a core component of Justice Ginsburg's *Shady Grove* dissent, which cited the "annihilating punishment" phrase and accepted as accurate the Commentary's summary of the genesis of § 901(b)'s limitation on class actions. But

^{145.} See Narvaez, Bill to Aid Consumer Suits Passed by the Legislature, supra note 115 (noting favorable comments about new law suggesting no subject matter or substantive restrictions on use of class actions).

^{146.} See infra note 148 and accompanying text, (discussing the Shady Grove Court's oversimplified and arguably misleading version of § 901(b)'s legislative history).

^{147.} See Vincent Alexander, Practice Commentary to N.Y. C.P.L.R. § 901.

^{148.} See Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1464 (2010) (Ginsburg, J., dissenting) ("Aiming to avoid 'annihilating punishment of the defendant," the New York Legislature amended the proposed statute to bar the recovery of statutory damages in

the phrase appears nowhere in the official bill jacket for the law or in the

class actions." (citing Vincent Alexander, *Practice Commentaries*, C901:11, *reprinted in* 7B McKinney's Consolidated Laws of New York, Ann. 104 (2006)). A review of the Bill Jacket for the new class action law, however, nowhere reflects the legislature using these particularly loaded words. The closest the official legislative history gets is in the two references in interest group submissions to Ratner v. Chemical Bank of New York, 54 F.R.D. 412, 412 (S.D.N.Y. 1972), where the trial court uses this phrase in refusing to certify a TILA class action notwithstanding the absence of an express prohibition on class treatment of such claims in FED. R. CIV. P. 23.

And, notwithstanding the adage that those in glass houses should not throw stones, I find the *Shady Grove* dissent's slavish reliance on the Practice Commentaries (following the New York Court of Appeals similar deference in Sperry v. Crompton Corp., 863 N.E. 2d 1012, 1015 (N.Y. 2007) puzzling and unjustified. Although Practice Commentaries and similar glosses included in statutory compilations and annotations can be important helpful materials for attorneys conducting research they are, to perhaps state the obvious, not the actual statute or legislative history. The Practice Commentary to § 901(b), in particular, seems essentially to rely only upon *Sperry v. Crompton*. There is no indication that the Practice Commentary examined the full legislative history materials or bill jacket. The *Sperry* opinion itself does not reflect any particularly comprehensive review or critical assessment of the genesis of § 901(b).

Vincent C. Alexander, the author of the Practice Commentary to N.Y. C.P.L.R. § 901(b), is a long-time professor at St. John's Law School in New York, whose principal writings are the Practice Commentaries to various sections of the New York laws, an Evidence treatise, and a well-cited law review article. See Vincent C. Alexander, The Corporate Attorney-Client Privilege: A Study of the Participants, 63 St. John's L. Rev. 191 (1989) (cited in more than eighty law review articles and in Swidler & Berlin v. U.S., 524 U.S. 339 (1998) (holding that attorney-client privilege survives death of client, in that case former Clinton Justice Department official Vincent Foster, who had committed suicide and who had come within the scope of the Whitewater investigation).

Professor Alexander was born in 1949 and became a lawyer in 1975, the year of the enactment of New York class action legislation that had been developing over the prior three years. There is no indication that he worked for the legislature or otherwise participated in the process. His ability to characterize the legislative history of the bill thus would seem no better than mine or that of other observers distant in space and time, who must depend on the Bill Jacket, news accounts of the era, and perhaps interviews (although there is no indication that this was done as part of the Practice Commentaries). In all likelihood, he relied exclusively on the description of § 901(b)'s background contained in *Sperry v. Crompton*, which appeared not to have delved much into the almost casual manner in which the sections limitations were grafted onto the bill. Although not exactly a house of cards, neither is this much foundation for maintaining that § 901(b) is central to New York's substantive law.

As noted above, an examination of the Bill Jacket and newspaper reports of the period hardly suggests the uniform swell of policymaker opinion as fearful of large statutory penalty class actions reflected in *Ratner v. Chemical Bank, Sperry v. Crompton*, or the *Shady Grove* dissent. The actual legislative history should a much stealthier, unexplored amendment weakening the class action bill well out of sight of the general public which, as far as I can determine, never even had a chance to read about the interest group lobbying for § 901(b) until it was a fait accompli. Without doubt, there was no meaningful public debate on the wisdom of § 901(b).

Under these circumstances, the Practice Commentary is certainly incomplete and arguably misleading, as is the *Sperry v. Crompton* description of § 901(b)'s genesis. It is troubling that the highest court in the nation's fourth largest state and four Justices of the nation's highest court were so quick to embrace what appears to be a superficial assessment of the section as the definitive word on § 901(b)'s legislative history. A more accurate and nuanced "telling" of the § 901(b) story (see *Shady Grove* dissent, 130 S. Ct. at 1464) ("the story behind § 901(b)'s enactment deserves telling") reveals substantial problems with the *Sperry v. Crompton* and Practice Commentary account.

Legislative Service's formal compilation of legislative history, although *Ratner* is noted by proponents of § 901(b) as an example of the in terrorem effect of statutory penalty class actions.

Reading only the Shady Grove dissent, one could get the misleading impression that § 901(b) emerged from a civics textbook example of deliberative democracy in action. The dissent's argument that "[t]he story behind § 901(b)'s enactment deserves telling" is correct. Unfortunately, however, the dissent misleadingly portrayed this gritty exercise of legislative sausage-making in fairy tale fashion. The dissent begins innocently (but incompletely) enough, noting that in 1975, the Judicial Conference of the State of New York proposed a new class-action statute designed to "set up a flexible, functional scheme" that would provide "an effective, but controlled group remedy." The statement is true but incomplete in that it omits any discussion of the years of effort preceding the 1975 legislative success and the steady rear guard actions against the law waged by vested special interests that feared the empowerment of consumers. 151 It also bears noting that the Judicial Conference, hardly a radical group of Marxists intent on pillaging legitimate businesses, thought the original bill was "controlled" enough in its remedy without any limitation on statutory penalty class actions. 152 Indeed, the model for the original New York class action proposal was Federal Rule 23, a rule that is considered sufficiently "controlled" by most of the legal world, notwithstanding criticisms of class action abuses.

The dissent's oversimplified view becomes more apparent in the next paragraph as it accepts as Gospel what might be termed the "Cliff Notes" history of the law contained in a single Court of Appeals decision and the McKinney's Practice Commentary to the resulting statute.

While the Judicial Conference proposal was in the New York Legislature's hopper, "various groups advocated for the addition of a provision that would prohibit class action plaintiffs from being awarded a statutorily-created penalty . . . except when expressly authorized in the pertinent statute." [citing *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 211 (2007).] These constituents "feared that recoveries beyond actual damages could lead to excessively harsh results." "They

^{149.} See Shady Grove, 130 S. Ct. at 1464.

^{150.} See id. at 1464.

^{151.} See supra text and accompanying notes Section III.A.

^{152.} See supra notes 131-33 and accompanying text (originally proposed class action bill, through several legislative sessions, contained no statutory penalty limitation, suggesting that legal experts crafting the bill saw no basis for such a restriction).

also argued that there was no need to permit class actions . . . [because] statutory penalties . . . provided an aggrieved party with a sufficient economic incentive to pursue a claim." Such penalties, constituents observed, often far exceed a plaintiff's actual damages. "When lumped together," they argued, "penalties and class actions produce overkill." [citing to letter from Retail Merchants, Inc. to Governor's Counsel, *supra*].

Aiming to avoid "annihilating punishment of the defendant," the New York Legislature amended the proposed statute to bar the recovery of statutory damages in class actions. Vincent Alexander, *Practice Commentaries*, C901:11, *reprinted in 7B MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, ANN. 104 (2006) (internal quotation marks omitted). In his signing statement, Governor Hugh Carey stated that the new statute "empowers the court to prevent abuse of the class action device and provides <i>a controlled remedy.*" Memorandum on Approving L. 1975, Ch. 207, *reprinted in 1975 N.Y. Laws at 1748 (emphasis added).*

"[T]he final bill . . . was the result of a compromise among competing interests." [citing *Sperry*]. 153

As noted above and discussed further below, this portrayal of the emergence of § 901(b) is ironic in that in cases like *Ratner v. Chemical Bank*, Federal Rule 23 proved to be a sufficiently controlled remedy in that class certification of a penalty action was denied where the court found it to be too potentially coercive in light of the lack of willful statutory violation or actual harm to the named plaintiff. But a political actor (or anyone else) reading the reference to *Ratner* made by groups opposing the new law would be mislead to believe that *Ratner* and Federal Rule 23 had indeed permitted a problematic, no-actual-damages class action seeking \$130 million. Further, the "constituents" of which the dissent speaks were not rank-and-file voters (and certainly not consumers) and prevailed without ever having their arguments tested in legislative or public debate. The retail merchants, insurers, banks, and others concerned about greater leverage (represented largely through their official lobbying organizations rather than expressions of the members individually) obtained a concession in the final weeks of the

^{153.} See Shady Grove, 130 S. Ct. at 1464 (citations omitted except as indicated in text) (emphasis in original).

^{154.} See supra note 141 accompanying text.

^{155.} Depending on the legislation and its circumstances, this can be important. For example, a lobbying organization's position may be considerably more left or right than the views of many of its members. For example, the U.S. Chamber of Commerce appears to have become steadily more conservative on public policy issues during the past two decades, so much so that some prominent

legislative session with essentially no public knowledge of or discussion of their proposal. In particular, there is no basis upon review of the law's Bill Jacket for concluding that when Governor Carey referred to a "controlled" remedy (language the dissent sought so important it was italicized), he was referring to § 901(b).

The dissent's discussion of legislative history also suggests that it is overly credulous of the complaint that class actions are unduly coercive, a form of legal blackmail posing company killing risk:

"Even in the mine-run case, a class action can result in "potentially ruinous liability." Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C. App. P. 143. A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims. See, e.g., Coopers & Lybrand v. Livesay, 437 U.S. 463, 476, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978). When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury. See, e.g., Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 416 (S.DNY 1972) (exercising "considerable discretion of a pragmatic nature" to refuse to certify a class because the plaintiffs suffered negligible actual damages but sought statutory damages of \$13,000,000).

companies have dropped membership or publically disagreed with Chamber positions. Susie Shutts, Companies Abandon Chamber of Commerce Over Climate Change Stance, YES! MAGAZINE, Oct. 8, 2009, available at http://www.yesmagazine.org/planet/companies-abandon-chamber-of-commerce-over-climate-change-stance. (Apple, Pacific Gas & Electric, PNM, and Exelon withdraw from organization; Nike withdraws from board by retains membership; General Electric and Johnson & Johnson publicly criticize Chamber position on climate change).

156. See Shady Grove, 130 S. Ct. at 1465. The dissent was aware that in Ratner, the trial court denied certification due to in terrorem concerns. But, as noted above, there is nothing to indicate that the state legislature or Governor Carey was aware of the correct Ratner holding as the case is misleadingly invoked by interest groups lobbying against the state class action law. See supra note 174 and accompanying text.. It is worth re-quoting the Empire State Chamber of Commerce, Memorandum in Opposition to A. 1252 and S. 1309 (to establish new rules for "class actions"), at 3 (underlining in original) (see supra note 141 and accompanying text), which was the primary invocation of Ratner as part of the business opposition to the proposed law:

Penalties and class actions simply do not mix. This was proved in <u>Ratner v. Chemical Bank</u>, a case under the Federal Rules where the combination caused a potential liability of \$130,000,000 although the actual damages to individual plaintiffs were zero!

This injustice could be remedies by adding subsection B to Section 901, to provide that unless a statue creating or imposing a penalty or other minimum recovery specifically authorized the recovery ther3of in a class action, an action to recover such a penalty or minimum recovery created or imposed by such statute may not be maintained as a class action.

Although the "class action as unfair legal blackmail" notion is widespread, a closer look at class actions in operation and their actual impact on business tends to debunk this mythology. Consequently, it is a little disheartening for the dissent to seem to so readily accept this argument against the class action and the underlying erroneous argument that even in the absence of class certification consumers have adequate incentives to pursue claims vindicating their statutory rights. Undoubtedly, the dissenters' response would be that regardless of the errors of the anti-class action arguments, they were persuasive to New York lawmakers. But, as a fuller legislative history of § 901(b) shows, the anti-penalty provision became part of the resulting law with almost no scrutiny or analysis. This should give courts pause before privileging this type of "law" over validly promulgated Federal Rules of Civil Procedure.

Justice Stevens in concurrence was less of a cheerleader for the § 901(b) legislation than were the Ginsburg dissenters but was still unduly deferential to the law and unduly credulous of the drive-by legislative history incorporated into the Practice Commentaries to McKinney's

Id. A reasonable reader could view the Chamber of Commerce memorandum as describing a case in which uninjured plaintiffs were permitted to recover \$130 million when the exact opposite occurred in *Ratner*, notwithstanding the FED. R. CIV. P. 23 has no limitation on statutory penalty class actions.

Ratner was in another instance cited as an example of "uneven" application of FED. R. CIV. P. 23 due to the large discretion possessed by federal judges. See Report No. 405, State Bar of New York re Proposed Class Action Legislation, at 2 (on file with author). Although the State Bar clearly opposed the class action law and favored Ratner's restrictive view of Federal Rule 23, the case is not used in this instance to make the "annihilating punishment" argument. The reader of this report would gain little actual knowledge of the Ratner case itself or Federal Rule 23's treatment of statutory penalty class actions.

The *Shady Grove* dissent to a degree recognized that § 901(b) is special interest legislation that is not particularly logical in that "suits seeking statutory damages are arguably *best* suited to the class device because individual proof of actual damages is unnecessary." *Shady Grove*, 130 S. Ct. at 1465 (italics in original). But instead of considering whether this sort of illogical provision favoring vested interests should trigger *Erie*'s ejection of an otherwise applicable Federal Rule, the dissent concluded that this flaw in § 901(b) emphasized the substantive nature of the provision. "New York's decision instead to block class-action proceedings for statutory damages therefore makes scant sense, except as a means to a manifestly substantive end." *Id*.

157. See, e.g., Stempel, Class Actions and Limited Vision, supra note 99, at 1127, 1133-55 (arguing that criticisms of coercive force of class certification is overstated); Silver, supra note 101 (comprehensive debunking of the exaggerated blackmail critique of class actions); Hay & Rosenberg, supra note 101 (characterizing class device more as an equalizer than as means by which plaintiffs for counsel gain excessive leverage over business defendants).

158. See infra notes 185-86 and accompanying text, (statutory penalties, even with possible attorney fee shifting to victorious consumers, are insufficient incentives for bringing individual suits against defendants violating statute).

159. See supra text and accompanying note Section III.C.

Annotated New York Statutes. Like the dissent, he accepted the legislation as a considered judgment of New York but saw it as sufficiently procedural that it was required to yield to Federal Rule 23 160

As previously discussed, the actual legislative history of § 901(b) is one of interest group advocacy and unduly easy acceptance in order to defuse remaining opposition to the pending law, with no serious examination of the merits of the question of whether statutory penalty class actions are excessively confiscatory or business-killing. Further, the Shady Grove dissent and concurrence as well as the New York Court of Appeals and the McKinney's Practice Commentaries all appear to share the same cardboard characterization of § 901(b)'s legislative history. When the entire Bill Jacket and surrounding materials are reviewed, it is clear that cases like Ratner v. Chemical Bank were an important illustration of the potential evils of penalty class actions. But nowhere in the legislative history do any official actors embrace the "annihilating punishment" rhetoric of Ratner. But somehow, through the magic of translation and the social construction of history, the almost afterthought-like attachment of § 901(b) to the new class action law has become enshrined as a palpable fear of class actions destroying businesses widely held by the New York citizenry. The actual legislative history is hardly as phobic about class actions as the sketch of it contained in the McKinney's Practice Commentaries, the Sperry v. Crompton Corp. Court of Appeals decision, and the Shady Grove dissent.

^{160.} See Shady Grove, 130 S. Ct. at 1448, 1458 ("The legislative history, moreover, does not clearly describe a judgment that § 901(b) would operate as a limitation on New York's statutory damages. In evaluating that legislative history, it is necessary to distinguish between procedural rules adopted for some policy reason and seemingly procedural rules that are intimately bound up in the scope of a substantive right or remedy. Although almost every rule is adopted for some reason and has some effect on the outcome of litigation, not every state rule "defines the dimensions of [a] claim itself." New York clearly crafted § 901(b) with the intent that only certain lawsuits—those for which there were not statutory penalties—could be joined in class actions in New York courts. That decision reflects a policy judgment about which lawsuits should proceed in New York courts in a class form and which should not. As Justice Ginsburg carefully outlines, § 901(b) was 'apparently' adopted in response to fears that the class-action procedure applied to statutory penalties would lead to 'annihilating punishment of the defendant.' Vincent Alexander, Practice Commentaries, C901:11, reprinted in 7B McKinney's Consolidated Laws of New York Ann. 104 (2006) (internal quotation marks omitted). See also Sperry v. Crompton Cor., 863 N.E.2d 1012, 1015. But statements such as these are not particularly strong evidence that § 901(b) serves to define who can obtain a statutory penalty or that certifying such a class would enlarge New York's remedy. Any device that makes litigation easier makes it easier for plaintiffs to recover damages.").

One might ask how it came to pass that the *Shady Grove* dissent (and to a lesser extent the *Shady Grove* concurrence) came to provide such a straw man picture of the class action law. One suspects that rather than focusing on the Bill Jacket itself or the larger contemporary context of the legislation, which would have lead the courts to appreciate the astounding lack of substantive discussion and public input surrounding § 901(b), both the New York Court of Appeals in *Sperry v. Crompton* and the *Shady Grove* dissent and concurrence took a shortcut that oversimplified and idealized the statutory penalty ban on class actions.

In Sperry v. Crompton, the Court of Appeals relied excessively on a McKinney's Practice Commentary that was at best oversimplified and arguably misleading. The Shady Grove dissent in turn relied excessively on Sperry and the Court of Appeals oversimplification rather than looking closely at the full legislative history and the political realities of § 901(b)'s non-examination by both political elites and the public. The vision of legislative history set forth in Sperry and the Shady Grove dissent is incomplete and misleading in elevating an expedient last minute concession to self-serving private interest groups to the status of momentous expression of state substantive law. By contrast, the Shady Grove plurality's preference for avoiding this political thicket looks positively enlightened as well as more expeditious, simpler, and subject to more consistent application.

Unlike Rule 23, designed to further procedural fairness and efficiency, § 901(b) (we are told [by the dissenters]), "responds to an entirely different concern": the fear that allowing statutory damages to be awarded on a class-wide basis would "produce overkill." The dissent reaches this conclusion on the basis of (1) constituent concern recorded

^{161.} See supra note 148 (describing limitations of Practice Commentary as authoritative legislative history).

^{162.} Sperry also illustrates the degree to which § 901(b) is based on the faulty premise that the existence of statutory penalties eliminates the rationale for class actions. Sperry involved an antitrust claim under New York General Business Law § 340, which provides for treble damages in the event of a violation. See Sperry, 863 N.E.2d at 1012-15. Although trebling may be a powerful remedy and significant penalty where the antitrust injury is large, it hardly does much to make individual litigation of small claims feasible. For example, a consumer may pay a few cents more for a household product due to the anti-competitive conduct by the manufacturer or retailer. Even if the consumer is regularly buying the product in Costco or Sam's Club sized portions for many years, the amount of injury to the individual consumer will never prompt a rational litigant (save perhaps the independently wealthy, unemployed crusader or perhaps an advocacy group) to incur the time, effort, and aggravation of litigation, even if recovery of out-of-pocket counsel fees is possible. Without class treatment, this type of antitrust violation is essentially immunized in New York courts.

in the law's bill jacket; (2) a commentary suggesting that the Legislature "apparently fear[ed]" that combining class actions and statutory penalties "could result in annihilating punishment of the defendant,"; (3) a remark by the Governor in his signing statement that § 901(b) "provides a controlled remedy,", and (4) a state court's statement that the final text of § 901(b) "was the result of a compromise among competing interests.""

This evidence of the New York Legislature's purpose is pretty sparse. But even accepting the dissent's account of the Legislature's objective at face value, it cannot override the statute's clear text. Even if its aim is to restrict the remedy a plaintiff can obtain, § 901(b) achieves that end by limiting a plaintiff's power to maintain a class action [which directly conflicts with Federal Rule 23].

As the foregoing, more comprehensive, review of the legislative history, politics, and journalistic coverage of the law shows (but still one "pretty sparse" owing to the lack of sustained examination of § 901(b)), the story of the inclusion of the penalty limitation is something other than a pure civics textbook example of the rational, public-regarding legislature in action. The bill as a whole reflected sound public policy and widely shared sentiment accumulated over years of analysis and experience. But the engrafting of the statutory penalty limitation came on with all the fanfare of an earmark to an appropriations bill. Although not descending entirely to the level of the lobbyist's side deal in a side corridor, neither does the story of § 901(b) inspire much confidence that the penalty limitation reflects the considered judgment of the New York electorate or their chosen representatives regarding this constriction of the class action device.

D. The Case Misleadingly Used to Illustrate Allegedly Abusive Class Action

A look at *Ratner v. Chemical Bank*, ¹⁶⁴ which served as something of a poster child example of an oppressive class action ¹⁶⁵ serves as an

^{163.} See Shady Grove, 130 S. Ct. at 1440 (citations omitted) ("The manner in which the law 'could have been written,' has no bearing; what matters is the law the Legislature did enact. We cannot rewrite that to reflect our perception of legislative purpose. The dissent's concern for state prerogatives is frustrated rather than furthered by revising state laws when a potential conflict with a Federal Rule arises; the state-friendly approach would be to accept the law as written and test the validity of the Federal Rule." (internal citations omitted) (emphasis in original)).

^{164.} Ratner v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972)

^{165.} In addition to being referenced in the Practice Commentaries to § 901(b), *Ratner* was frequently cited by opponents of class actions as an example of a situation in which aggregation of trivial claims could create excessive liability for inadvertent violations of the law. Lost in most of

instructive beginning to debunking some of the mythology surrounding § 901(b) and appreciating the absence of any real reflection regarding this carve-back of the original class action bill supported by New York's judiciary and consumer groups. Plaintiff, "holder of a Master Charge credit card . . . sued to redress an asserted violation of the Act by defendant—namely the failure to show a 'nominal annual percentage rate' on a periodic statement reporting an outstanding principal balance but no interest charge yet accrued" and "undertook to sue for himself and as representative of other debtors similarly situated." The Truth in Lending Act ("TILA") provides for minimum liability of \$100 plus costs and reasonable counsel fees for each violation, regardless of whether plaintiff has suffered actual damages. Plaintiff Ratner sought certification for a class estimated to include as many as 130,000 card holders. "At a minimum rate of \$100 apiece, this class would be entitled to a sum in the neighborhood of \$130,000,000."

But the federal trial judge, former Columbia Law School Dean Marvin Frankel, would have none of what he perceived to be a pretextual claim. He questioned plaintiff's theory of the case almost to the point of making a summary judgment decision adverse to plaintiff

Plaintiff's theory, it may be recalled, is that the "nominal annual percentage rate" should have been shown so that plaintiff (and others like him) could compare competing interest rates and make an informed choice. Assuming the rate (18%) had been shown, and assuming plaintiff had elected to borrow elsewhere, and assuming he could have borrowed at 6%, the difference in annual percentage rate would have been 12%, or, for the one month affected by the omission, 1%. The principal amount affected by the rate was a new indebtedness of \$191.58. . . . The difference in interest, even on these excessively favorable assumptions, would have been less than \$2. More realistically, of course, consumer credit of the kind in question comes generally at a rate very like 18% per annum.

the discussion is that in *Ratner* itself, this theoretically unfair and business-destroying class action was not permitted even under Federal Rule 23, which had no prohibition on penalty class actions.

^{166.} Id. at 412.

^{167.} See 15 U.S.C. § 16540(e).

^{168.} Ratner, 54 F.R.D. at 414.

^{169.} I borrow the term from Professor Sebok, who has deemed certain classes of purported technical legal violations that cause little or no harm but create the prospect of generating counsel fees, extorting settlements, or gaining business or publicity leverage as "pretextual torts" in that the plaintiffs are not seeking significant corrective justice. *See* Anthony Sebok, Remarks, Symposium, *Asbestos Litigation*, 12 CONN, INS. L.J. 281 (2006) (panel discussion).

^{170.} Ratner, 54 F.R.D. at 413, n.2 (citation omitted).

Clearly, Judge Frankel saw plaintiff and counsel crying crocodile tears in order to gain leverage over the bank for purposes of extorting a settlement in a case without genuine victims, noting that "[n]o other member of the proposed class has evinced an interest in the lawsuit or brought a similar suit elsewhere, and the one-year limitation period" for TILA suits "has long since expired." But it was the sheer magnitude of the case and the bank's potential exposure rather than the merits of the claim that appeared to offend the court and led to a denial of class certification.

[A]llowance of thousands of minimum recoveries like plaintiff's would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement. 172

Students of [Federal Rule 23] have been lead generally to recognize that its broad and open-ended terms call for the exercise of some considerable discretion of a pragmatic nature. Appealing to that kind of judgment, defendant points out that (1) the incentive of class-action benefits is unnecessary in view of the Act's provisions for a \$100 minimum recovery and payment of costs and a reasonable fee for counsel; and (2) the proposed recovery of \$100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act. These points are cogent and They are summarized compendiously in the overall conclusion stated earlier: the allowance of this as a class action is essentially inconsistent with the specific remedy supplied by Congress and employed by plaintiff in this case. It is not fairly possible in the circumstances of this case to find the [Federal Rule23](b)(3) form of [damages] class action "superior to" this specifically "available [method] for the fair and efficient adjudication of the controversy." ¹⁷

The *Ratner* court's rationale became the playbook for elements of the New York bar and business interest groups attempting to prohibit penalty class actions as a means of weakening proposed legislation that they disfavored overall. To a degree, this is understandable in that the *Ratner* arguments are not bad, particularly on the facts of that case, and

^{171.} *Id.* at 414. *See also id.* at 415 (attacking other aspects of substance of plaintiff's theory of the case and claimed injury).

^{172.} Id. at 414.

^{173.} Id. at 416.

^{174.} See supra note 164-71 and accompanying text.

the opinion was authored by one of the country's most prestigious jurists. But the *Ratner* rationale is hardly unassailable and was in any event not seriously examined during the legislative process that led to the almost sub silentio pruning of the new progressive state class action law by cutting out statutory penalty class actions.

One can take serious issue with the *Ratner* Court's rationale that annual percentage rate disclosure would have done little good to the plaintiff (and proposed class) because it was only one month of information omission, which amounts to little accrued interest for the time and principal at issue. To be sure, when the matter is sliced so thinly, the damages appear trivial. But if the full disclosure demanded by TILA was not present at the outset of a patron's decision to acquire or use a credit card, it could have considerable consequence. The cardholder might use the card for major purchases that would otherwise have been forgone or alternatively financed. Perhaps even disclosure a month later will do little to help the cardholder already committed to a high interest path that might have otherwise been avoided. To be sure, a month's negligent omission of disclosure hardly seems like a capital offense. But given the avowed deterrent purpose of TILA, *Ratner* is a bit too glib in rejecting the notion of real injury to the plaintiff(s).

In addition, it simply appears not to be correct to suggest that a \$130 million judgment would comprise an "annihilating punishment" of Chemical Bank. In 1972, Chemical Bank was the fourth largest bank in the United States, with assets of \$15 billion. The award sought by *Ratner* would surely sting and appears grossly disproportionate to any harm done, but it likely would not have led to the Bank's demise. Although class certification would have given Mr. Ratner and his counsel considerable leverage over the bank, the bank had not only the option of attempting to settle the claim relatively cheaply (arguably reducing any blackmail from the certification to a mere graymail cost of doing business that would likely be passed on to customers and the

^{175.} In addition to his stature as Columbia Law Dean, Judge Frankel was a noted jurist prominent in public debates over judicial administration and the legal function, perhaps most prominently during his ongoing debate with Hofstra Law Dean Monroe Freedman over the lawyer's role when confronting issues of client perjury. *Compare* MONROE H. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM (1975) (taking strong view of lawyer as partisan advocate with view constraints), *with* MARVIN E. FRANKEL, PARTISAN JUSTICE (1980) (criticizing Freedman's view and emphasizing lawyer's duties to as officer of the court). After leaving the bench, Judge Frankel enjoyed a distinguished (although occasionally controversial) career as a name partner in a prominent New York law firm.

^{176.} FUNDING UNIVERSE, http://www.fundinguniverse.com/company-histories/Chemical-Banking-Corporation-Company-History.html (last visited Mar. 27, 2011).

public)¹⁷⁷ but also the prospect of convincing the court that such an award was unwarranted and unconscionable and rendered an absurd result at odds with TILA's legislative intent and statutory purpose.¹⁷⁸ Although such a finding might have been controversial and on the edge of judicial activism, it is arguably no more of a reach than what the court actually did – refusing even to certify a class in which the Federal Rule 23(a) prerequisites for class certification appeared certainly to have been met.¹⁷⁹ If the matter was to be adjudicated at all a Federal Rule 23(b)(3) class action would have been "superior" to 130,000 individual suits.¹⁸⁰

- 177. I realize such a passing on of litigation expenses has costs of its own. But if the net effect of such settlements is to make the lenders more careful about observing statutory commands regarding disclosure to costumers, net social welfare may be increased by more than the additional costs imposed on customers to pay for the settlement.
- 178. TILA, Pub. L. No. 90-321, 82 Stat. 146 (1968), codified at 15 U.S.C. §§ 1601-1693, was designed to require that lenders make adequate disclosures regarding interest rates and other terms and conditions of their loans in order to "facilitate comparison shopping for credit." In particular, disclosure of finance charges and the effective annual percentages charged for the use of money are to be disclosed. *See* Robert A. Schwartz, Note, *Can Arbitration Do More for Consumers? The TILA Class Action Reconsidered*, 78 N.Y.U. L. REV. 809, 811, n.19 (2003).
- 179. FED. R. CIV. P. 23(a) provides that a class may be maintained if the following minimum prerequisites are satisfied:
 - (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defense of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.
- Id. In addition, a claim must also qualify for class action treatment pursuant to FED. R. CIV. P. 23(b). See TEPLY & WHITTEN, supra note 2, at 788-95; JAMES, JR. ET AL, supra note 2, § 10.23; WRIGHT, supra note 2, § 72. The FED. R. CIV. P. 23(a) requirements were clearly satisfied in Ratner as the putative class was huge, the TILA claims of the group were essentially the same, and Plaintiff Ratner had competent legal counsel that could adequately represent the class if it were certified
- 180. FED. R. CIV. P. 23(b) provides for three possible types of class action: one seeking to avoid inconsistent adjudications or where an initial adjudication would prejudice the rights of other class members (a FED. R. CIV. P. 23(b)(1) class action); one seeking to order particular defendant conduct via an injunction or other apt relief (a FED. R. CIV. P. 23(b)(2) class action); or one seeking damages on behalf of the class (a FED. R. CIV. P. 23(b)(3) class action). In order to qualify as a damages class action, FED. R. CIV. P. 23(b)(3) requires that the court find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." In making this determination, the trial court may consider:
 - (A) The class members interests in individually controlling the prosecution or defense of separate actions;
 - (B) The extent and nature of any litigation concerning the controversy already begun by or against class members;
 - (C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
 - (D) The likely difficulties in managing a class action.

See FED. R. CIV. P. 23(b)(3); TEPLY & WHITTEN, supra note 2, at 788-95; JAMES, JR. ET AL., supra note 2, § 10.23; WRIGHT, supra note 2, § 72.

In addition, *Ratner* can be criticized for its implicit view that large class actions seeking large total awards are by their very nature disfavored. Such an attitude tends to undermine the very rationale of the class action. The 1966 Amendments to Federal Rule 23 were not designed to accord class action treatment to only modest or medium sized aggregations of claims involving common issues of law and fact. There is no size limitation in Federal Rule 23. Judicial imposition of an implicit size limitation is judicial activism that functions to reduce the articulated scope of a legislative enactment. In this regard, a judge arguably even more prominent and respected than *Ratner* trial judge Frankel has characterized this aspect of the opinion as "one of those rare instances where a judicial Homer nodded."

E. The Flawed Rationale At the Core of CPLR § 901(b) as a Cautionary Tale Regarding Excessive Deference to State Lawmaking

In the main, however, one can take greatest issue with the *Ratner* Court's view that TILA already provides copious remedy for the

As noted above, Judge Frankel concluded that a class action was not a superior means of adjudicating such a gigantic dispute with the aroma of a pretextual tort and that concentration of so many claims in one case was undesirably. But because the class members had not interest in individual adjudication and the failure to certify a class effectively precluded enforcement of a federal statute, other reasonable jurists might disagree, notwithstanding the practical impact of class certification in terms of giving Ratner significant settlement leverage over the Bank.

- 181. See FED. R. CIV. P. 23 & advisory committee note to 1966 Amendment to Rule 23.
- 182. Although the Federal Rules are not enacted through the normal legislative process, they carry the force of statute. After a Federal Civil Rule is promulgated through the normal rulemaking process, which includes congressional "approval" through failing to intervene after Supreme Court promulgation of the Rule, "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." *See* 28 U.S.C. § 2072(b). *See* JAMES, JR. ET. AL., *supra* note 2, § 2.36; WRIGHT, *supra* note 2, §§ 54-55; Burbank, *supra* note 59.
- 183. See Parker v. Time Warner Ent't Co., 331 F.3d 13, 23, 27, n.4 (2d Cir. 2003) (Newman, J., concurring) (characterizing Judge Frankel's undue resistance to large class actions in *Ratner* was an uncharacteristic mistake and that "[a]lthough Ratner has been cited favorably by many courts, I believe this is one of those rare instances where a judicial Homer nodded" (citations omitted)). Judge Jon Newman has been a highly regarded federal district and Second Circuit judge for nearly forty years and was prominently mentioned as being on President Clinton's "short list" of possible nominees to the U.S. Supreme Court. See Peter K. Yu, The Copyright Divide, 25 CARDOZO L. REV. 331, 395 (2003) (referring to Newman as well-respected judge); Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, 152 U. PA. L. REV. 33, 94 (2003) (same).

The allusion to Homer nodding comes from AUGUSTUS S. WILKINS, THE ARS POETICA OF HORACE 402 (1964) ("Homer himself hath been observ'd to nod.") (quoted in BARTLETT'S FAMILIAR QUOTATIONS (13th ed. 1951) and refers the inevitability of human error, inattention, or insufficient reflection even among highly talented humans). See Parker, 331 F 3d at 27

wronged financial consumer. In addition to the \$100 statutory penalty, the Court notes that counsel fees are available to the prevailing plaintiff and that they would be approximately \$20,000. But even this sort of recovery (possible only because the matter became a test case for high-powered lawyers)¹⁸⁴ hardly makes the plaintiff whole. Plaintiff remains uncompensated for the time, effort, and inconvenience of being a major case litigant. A victory on the TILA claim in *Ratner* will never compensate Plaintiff Ratner for these losses. The award of counsel fees merely prevents Ratner's claim from being a huge drain on his personal finances. ¹⁸⁵

This is hardly the sort of incentive that prompts otherwise sane citizens to tilt at judicial windmills by picking a fight with one of the nation's largest financial institutions and its high-powered counsel. Even if one accepts that the "real" plaintiff in the case is plaintiff's law firm, the incentive structure and potential rewards are hardly as munificent as the *Ratner* court suggests. Twenty thousand dollars is a nice chunk of change, but it is hardly free money. It represents the law firm's opportunity costs in bringing the case and is to some degree contingent.

In addition, there is always a contingency that may be adverse to plaintiffs like *Ratner*. Even what appears to be a strong TILA case may not be a sure winner. Even a sure winner may run up against a judge who dislikes the Act and rules adversely, requiring at minimum a trip to the Court of Appeals for compensation. At the end of even a successful litigation "day," the lawyers may find that they could have earned far more than \$20,000 had they invested similar time, effort and skill in pursuing other class actions, basic tort claims such as automobile accidents or slip-and-fall incidents, or even through the grind of insurance defense tort work. Without TILA's minimum statutory damages and fee-shifting, no sane person would litigate a minor TILA

^{184.} The *Ratner* plaintiffs were aided by Professors Jack Greenberg, Eric Schapper, and Philip Schrag. Chemical Bank was represented by Cravath, Swaine & Moore, a top national law firm. *See* Ratner v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972) (listing counsel).

^{185.} Settlement of class actions must be approved by the court. *See* FED. R. CIV. P. 23(e). At the time *Ratner* was decided, it was permissible in settling a class action for the named class representatives to receive a settlement amount greater than that of other class members and larger than the actual losses incurred by the named representatives in order to compensate the representative for the burdens of carrying the litigation forward on behalf of the class. Subsequent legislation forbids such enhanced settlement payments to class members in securities class action. *See* 15 U.S.C. § 77a et seq. (codifying Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995)). *See also* TEPLY & WHITTEN, CIVIL PROCEDURE 788-95, *supra* note 2; JAMES, JR., HAZARD, JR. & LEUBSDORF, *supra* note 2, §10.23; WRIGHT, *supra* note 2, § 72.

violation. But even with these plaintiff-strengthening tools, there are many factors counseling the sane against litigation, at least when it must be pursued on an individual, case-by-case basis.

Put another way, the mere presence of a statutory penalty, even one high in relation to actual injury, often does not create much incentive for pursuing individual litigation. One need only ask the rhetorical question: Would a consumer like Ratner aggrieved by a technical TILA violation who had lost little in actual damages seek out counsel and prosecute an individual claim just to have a shot at \$100 in statutory damages and reimbursement of counsel fees? Would such a cranky dogooder consumer even be able to find a competent lawyer willing to take the case?

In my view, the answer to both questions is a resounding "no." Only the possibility of class action treatment spurred Ratner and counsel to action. Without class certification, the case died (there was never any appellate consideration of the trial court's refusal to accord class treatment), as have other TILA claims denied class certification. Undoubtedly, there are untold numbers of TILA claims that were never brought because of these practical financial and logistical barriers. The *Ratner* Court's own opinion suggests this by noting that other than Plaintiff Ratner no other putative class members had come forward to litigate with the bank over these issues despite the supposedly enticing allure of the possibility of \$100 statutory damages and repayment of counsel fees.

In this sense, the *Ratner* rationale—and that of those who lobbied for § 901(b) in the New York law—is seriously flawed and, at least in my view, outright wrong. In many, perhaps even most cases where statutory penalties are established, they are nonetheless usually insufficient to make individual pursuit of modest claims realistic. Even a statute with a strong penalty provision such as Insurance Law § 5106, the statute at issue in the underlying dispute in *Shady Grove*, a substantive law that provides for two percent (2%) interest per month regarding unpaid medical services to no-fault insurance claimants, does not do enough to make individual litigation very attractive.

As all Justices observed in *Shady Grove*, the statutory penalty as applied to the past due medical bill for insured Sonia Galvez was only approximately \$500. Justice Ginsburg's dissent is heated in its condemnation of the unwisdom of allowing this \$500 claim to become a \$5 million claim. My question is why Justice Ginsburg is not similarly concerned that even with the statutory penalties provided by New York Insurance Law § 5106, there exists a situation where insurance

companies, which by definition make money by "playing the float" and holding funds as long as possible before paying even valid claims. ¹⁸⁶

186. See Warren E. Buffett, Letter to Shareholders of Berkshire Hathaway, Inc. 2, 7-10 (Feb. 21, 2003) (sections in letter on "The Economics of Property/Casualty Insurance" and "Insurance Operations") (on file with author) (recapping 2002 year; emphasizing importance of "float"—premium dollars and investment funds held by the insurer prior to being needed to pay claims—to profitability of insurance companies. Berkshire Hathaway, Buffet's celebrated entity, is a holding company consisting of, among other things, several large insurers or reinsurers. Regarding the company and insurance, Buffett observed:

Our core business—though we have others of great importance—is insurance. To understand Berkshire, therefore, it is necessary that you understand how to evaluate an insurance company. The key determinants are: (1) the amount of float that the business generates; (2) its cost; and (e) most critical of all, the long-term outlook for both of these factors.

To being with, float is money we hold but don't own. In an insurance operation, float arises because premiums are received before losses are paid, an interval that sometimes extends over many years. During that time, the insurer invests the money. This pleasant activity typically carries with it a downside: The premiums that an insurer takes in usually do not cover the losses and expenses it eventually must pay. That leaves it running an "underwriting loss," which is the cost of float. An insurance business has value if its cost of float over time is less than the cost the company would otherwise incur to obtain funds. But the business is a lemon if its cost of float is higher than market rates for money.

. . .

If our insurance operations are to generate low-cost float over time, they must: underwrite with unwavering discipline; (b) reserve conservatively; and (c) avoid an aggregation of exposures that would allow a supposedly "impossible" incident to threaten their solvency.

See id. at 7, 8. See generally MARK S. DORFMAN, INTRODUCTION TO RISK MANAGEMENT AND INSURANCE ch. 1 (8th ed. 2005) (discussing risk and insurance generally).

What Buffett fails to mention (perhaps because he enjoys an apparently well-deserved reputation as an ethical capitalist) is that an insurer can attempt to improve its cost of float and income by delaying the payment of claims—by paying later than due the losses that must "it eventually must pay." This can take the form of a merely lackadaisical attitude toward paying claims. Everyone at an insurance company, from top to bottom knows that if claims are paid slower rather than faster, the insurer makes at least a modest amount of additional interest, knowledge that can sap an insurer's will to pay claims with alacrity. Among unscrupulous insurers, there can develop a culture or even a business model of purposefully delaying claims, perhaps by making pretextual requests for additional information, pretending to mislay files, quibbling about a policyholder's documentation and verification of a claim, or simply waiting to pay the claim for several weeks simply to enjoy greater investment income. New York Insurance Law § 5106 and its implementing regulations, like most state unfair claims practices laws, attempts to counter this insurer incentive by subjecting unpaid claims to a high interest rate or fine.

Although the *Shady Grove* allegations against Allstate alleging conscious policy of deliberately pretending not to receive claims and documentation and then purposefully delaying payment even after all the paperwork has concededly been received (see *supra* note 42-44 and accompanying text, summarizing allegations) may sound excessively paranoid, substantial evidence exists to suggest that notwithstanding laws like § 5106, insurers engage in such misbehavior, something I have labeled "institutionalized bad faith" because it occurs as a consequence of deliberate company policy rather than mistakes by agents in the field. *See* David Evans, *Insurers Hold Billions in Federal Death Benefits in Unprotected Accounts*, BLOOMBERG NEWS, Aug. 1,

available at http://www.washingtonpost.com/wpdyn/content/article/2010/07/31/AR2010073100035.html (describing as "institutionalized bad faith" life insurer practice of inducing beneficiaries to leave death benefit funds in a "retained asset account" with the insurer rather than demanding immediate payment, a ploy that permits insurer to continue to benefit from float on premium and investment dollars). See also David Evans, Fallen Soldiers Families Denied Cash as Insurers Profit, BLOOMBERG NEWS, July 28, 2010, available at http://www.bloomberg.com/news/2010-07-28/fallen-soldiers-families-denied-cash-payout-as-lifeinsurers-boost-profit.html (using "institutionalized bad faith" term to describe automobile insurer practice of uniformly making non-negotiable "lowball" settlement offers regardless of individual facts, in so-called "Minor Injury, Soft Tissue" injury cases); David Zax, When The Brain Breaks, YALE ALUMNI MAGAZINE, Nov./Dec. 2010 at 20 (describing Ph.D. economist suffering soft tissue injury to brain from low-impact, low-speed, rear-end collision, causing serious injury that dramatically damaged much of her cognitive ability: after the accident, "I couldn't add up my time sheet."). Describing the accident, one that should surely be disparaged by defense counsel arguing before a jury, victim Anne Forrest stated that she "was hit from behind. I was looking left in order to merge into traffic, and my head swung from side to side and backwards and forwards. It was a slow-speed accident, a seemingly insignificant accident. There was some damage to my bumper."

Regarding insurers succumbing to the temptation to purposely delay payment to profit from investment float, I have seen an affidavit from a former AIG employee alleging that company policy was for local representatives to hold checks from the home office for days or even weeks before delivering them to claims. (I, of course, am not in a position to assess the truth of the affidavit, but even if the product of a disgruntled former employee, it surely suggests the potential for problems in this regard.) In addition, evidence presented at trial has suggested that major insurers have substantial incentives to quibble about the amount of payment due on injury claims. See JEFFREY W. STEMPEL, LITIGATION ROAD: THE STORY OF CAMPBELL V. STATE FARM chs. 16, 17 (2008) (discussing evidence of bad faith presented at trial against major insurer).

In short, N.Y. Ins. Law § 5106 addresses a major problem that is hard to police, even with statutory penalties. Arguably, this reflects the substantive policy of New York at least as much as N.Y. C.P.L.R. § 901(b). Interestingly, one of the implementing regulations to § 5106 appears to envision that aggrieved policyholders would indeed be bringing class actions against insurers.

If any applicant [for payment of a claim] is a member of a class in a class action brought for payment of benefits, but is not a named party, interest shall not accumulate on the disputed claim or element of a claim until a class which includes such applicant is certified by court order, or such benefits are authorized in that action by Appellate Court decision, whichever is earlier.

See 11 N.Y. C.R.R. § 65-3.9(c).

This regulation was originally promulgated in 1973 but extensive changes were made when New York's no-fault statute, N.Y. Ins. Law. Article 51, was substantially revised in 1977. Additional revisions took place in 1999, but were required to be re-promulgated in 2001 due to procedural discrepancies resulting in the invalidation of the 1999 promulgation. *See* Medical Soc'y of the State of N.Y. v. Levin, 712 N.Y. S.2d 745 (Sup. Ct., N. Y. Co., 2000) (invalidating regulations on grounds of non-compliance with state Administrative Procedure Act); Medical Soc'y of the State of N.Y. v. Serio, 749 N.Y.S.2d 227, 228 (App. Div. 2002) (noting repromulgation of regulations to correct earlier infirmity).

If one is to make the functional assessment of state law urged by the *Shady Grove* dissent, it certainly would appear colorable to conclude that this regulation effectively authorizes a penalty class action regarding interest on past due payments, or at least reflects New York public policy favoring such actions—a policy post-dating the 1975 enactment of § 901(b). Although the face of § 5106 may not so provide, insurance is historically heavily regulated and legislators enact insurance statutes with an expectation that their meaning and enforcement will be developed through administrative regulation. Although one of the virtues of the Scalia plurality is that courts are

Insurers have little incentive to behave well because victimized medical vendors have little incentive to sue slow-paying insurers in the absence of the availability of a class action. Contrary to the arguments raised by those lobbying for the prohibition on statutory class actions, it appears simply untrue that the presence of a statutory penalty, even one providing for recovery of counsel fees, guarantees that there exists sufficient incentive to bring meritorious suits for small injuries. If this argument of the lobbyists is wrong, the premise underlying § 901(b)—that it is overkill—is also incorrect.

Of course, my analysis could be "wrong" in the sense that after sustained examination it would be rejected by reasonable legislators in favor of the Ratner view. It would not be the first time that reasonable observers preferred the insights of a Marvin Frankel or Ruth Bader Ginsburg to my differing analyses. But regardless of who is correct, the inarguable point is that § 901(b) arrived on the scene and became part of state law with almost no serious reflection. It was added, however, to thoughtful class action law years in the making that was modeled on a successful and tested federal procedural rule. Neither the legislature nor the executive appears to have seriously examined or debated the arguments in favor of the penalty limitation. The general public was never even informed of the matter or given a chance to assess the arguments for, or against, a penalty limitation. This aspect of the legislation appears to have been solely the province of political insiders engaged in some last-minute tinkering designed to secure smooth enactment.

Under these circumstances, courts would do well to hesitate before embracing the view that § 901(b) represents some considered

spared this difficult inquiry, one can certainly argue that courts applying New York law have erred in too quickly concluding that § 901(b) barred class action enforcement of the applicable insurance law. Certainly, as discussed herein (text and accompanying notes *supra*), the mere existence of the two percent per month interest charges was not in many cases enough incentive to prompt victims of slow insurance company payment to vindicate their rights in court.

187. Although a medical provider such as Shady Grove may achieve some economy of scale in routinizing a system of suing medical insurers for delayed payment violating N.Y. Ins. Law § 5106, many of its patients no doubt generate relatively modest bills that, standing alone, are not sufficiently large to justify the time, expense, aggravation, and opportunity cost of litigation. Depending upon state law and the nature of any agreements with insurers, a medical provider or other vendor in this position may be able to style its claims as bringing an action for anticipatory breach of contract. But in addition to the obvious problem of § 5106 being a statutory duty rather than a contractual one, a significant body of state law treats insurance claims as inapt for acceleration and consolidation on a theory of anticipatory breach. See Hazel Beh & Jeffrey W. Stempel, Misclassifying the Insurance Policy: The Unforced Errors of Unilateral Contract Characterization, 32 CARDOZO L. REV. 85, 150-55 (2010).

determination of the State of New York and its citizens. While legislation has been likened, to paraphrase Bismarck, to sausage-making where too close a view of the process can be distasteful, ¹⁸⁸ the resulting legislative product is positive law entitled to legal force, at least within its sphere of operation. But this hardly requires that an on-point Federal Rule of Civil Procedure yield to a "law fragment" that was never well vetted by political elites nor vetted at all by the electorate. The Shady Grove dissent's attempt to privilege suspicious § 901(b) over Federal Rule 23 is all the more ironic when one considers that the primary thrust of the 1975 New York legislation was to bring state class action practice into harmony with federal practice. Certainly, this is what any reasonable member of the electorate reading news accounts of the legislation would believe (and presumably support). Limitations on penalty class actions were simply not under public scrutiny.

Indeed, because § 901(b) was not under much scrutiny from New York's elite policy makers, it is not clear whether support for the penalty limitation was viewed as merely an express means of harmonizing the new state law with Federal Rule 23 or was instead a considered attempt to make New York class action law narrower than the federal counterpart on which it was modeled. This is the other great irony of having *Ratner v. Chemical Bank* serve as a rallying point for § 901(b). In *Ratner*, the court denied class action treatment of a TILA penalty action based on the language of Federal Rule 23. The *Ratner* Court did not need the express language of § 901(b) in order to avoid the perceived harm of the potentially "annihilating" class action feared by the bill's opponents. Federal Rule 23 was sufficient. Although federal courts differ over the issue, *Ratner* suggests that § 901(b) was unnecessary or

^{188.} Otto von Bismarck, the master politician and founder of modern Germany in the late Nineteenth Century, allegedly opined that "[i]f you like law and sausages, you should never watch either one being made." See Robert Pear, If Only Laws Were Like Sausages, N.Y. TIMES, Dec. 5, 2010, at 3, col. 1 ("Week in Review" section). However, one reporter familiar with the legislative process found that "a visit to a sausage factory [near Washington, D.C.] suggests that Bismarck and today's politicians [who often quote Bismarck] are mistaken. In many ways, that quotation is offensive to sausage makers; their process is better controlled and more predictable." Id.

[&]quot;In a real sausage plant," [Rutgers public policy] Professor [Alan] Rosenthal said, "everybody is on the same team, trying to produce bratwurst or knockwurst. In the legislative sausage factory, at least half the people don't want to make sausage. Or they want to make a different kind. . . .

Big bills often include special-interest provisions whose origin is a mystery. By contrast, [a sausage master] knows exactly where his ingredients come from.

Id. at 3, cols. 3-4. As previously discussed (text and accompanying supra note 156, § 901(b) has many traits of special-interest legislation even if Bismarck and others may be misinformed in likening it to sausage-making.

that some support for the state limitation may have stemmed from a mistaken view that federal courts always frowned upon class actions in statutory penalty cases.

Most likely, however, the legislative history of § 901(b) suggests simply that the legislature did not give the matter much thought and simply rushed to judgment on the basis of glib pronouncements about the efficacy of penalties to spur individual actions for redress and the inordinate dangers of aggregating statutory penalty claims. In any event, the *Shady Grove* dissent's lionization of § 901(b) as a statement of public-regarding compromise and widespread consensus seems demonstrably incorrect when the legislative background of the law receives closer examination.

IV THE UNEXPECTED VIRTUES OF FORMALISM IN SHADY GROVE AND BEYOND

Although some legislative decisions are, like some sports victories, "ugly" rather than artistic, all state laws require judicial deference absent unconstitutionality or fatal defects in their formation (defects sufficiently large that the provisions do not qualify as duly enacted "laws"). Under the *Erie* doctrine, in the absence of applicable federal law, such state laws provide controlling rules of decision on substantive points no matter how much wiser elements of the legal profession might disagree with that substance.

Erie itself provides a good illustration of both the concept and its privileging of state prerogatives and federal-state consistency over aspirations to more frequently apply "better" rules of law. Recall than in Erie, the applicable state law (Pennsylvania) in a case brought by a plaintiff injured due to alleged railroad negligence in maintaining its vehicles, tracks, or footpaths treated the plaintiff using the footpath as a mere "trespasser" to whom the railroad owed little obligation, notwithstanding that the path was widely used by area pedestrians. In contrast, the federal common law rule applicable under Swift v. Tyson, treated such plaintiffs as invitees to whom a duty of reasonable care was owed. If, as Plaintiff Tompkins alleged, he was hit by an unsecured train

^{189.} See Erie R. Co. v. Tompkins, 304 U.S. 64, 70 (1938) ("[U]nder the law of Pennsylvania, as declared by its highest court, persons who use pathways along the railroad right of way—that is a longitudinal pathway as distinguished from a crossing—are to be deemed trespassers; and that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or wilful [sic].").

door, grappling hook or the like, ¹⁹⁰ most would agree that the federal common law at the time made more sense as a matter of substantive tort law and public policy ¹⁹¹ but under *Erie* this less hospitable judicial treatment of such victims was required because federal deference to the state law was required. Tompkins had to "die" in order that federalism might "live," at least live better than had been the case under *Swift v. Tyson*. ¹⁹²

Although, as *Erie* itself shows, 180-degree judicial turns can occur even after a century of seemingly settled law, but that is hardly the norm. Although *Erie*—both the decision and the doctrine—can be criticized, ¹⁹³ it appears to be overwhelmingly accepted as an improvement on *Swift* and is, as a practical matter, probably here to stay in American law. ¹⁹⁴

^{190.} See id. at 69 ("[Tompkins] claimed that the accident occurred through negligence in the operation, or maintenance, of the train; that he was rightfully on the premises as licensee because on a commonly used beaten footpath which ran for a short distance alongside the tracks; and that he was struck by something which looked like a door projecting from one of the moving cars.").

^{191.} See id. at 70 (quoting Tompkins v. Erie R. Co., 90 F.2d 601, 604 (2d Cir. 1937) (under federal common law, "it is well settled that the question of the responsibility of railroad for injuries caused by its servants is one of general law [and the rule is that where] the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes a duty of care in the operation of its trains. . . . It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting from the side of the train.")).

^{192.} Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

^{193.} For example, the *Erie* Court could have, in my view, announced the overruling of *Swift v*. Tyson and nonetheless given Tompkins the benefit of the more enlightened federal tort rule on the ground that there was sufficient federal interest in uniformity due to the massively interstate presence of railroad right of ways, their danger, and the need for uniformity regarding permissive users of railroad pathways across the country that was comparable in importance to the goal of uniformity of outcomes in federal and state courts. Although there is no "general federal common law" after Erie, there continues to exist federal common law in areas of sufficient federal interest and importance. See City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (federal common law applies to interstate pollution dispute). But see WRIGHT, supra note 2, § 60 (stating that the Illinois v. Milwaukee case "seemed to some to go very far" in using expansive concept of proper use of federal common law). Almost certainly, Professor Wright and mainstream federal courts and procedure scholars would reject my imagined different result in Erie on similar grounds. After seventy years of *Erie*, it is simply too difficult for mainstream lawyers to imagine a different result in the case once Swift v. Tyson was displaced. But this alternative Erie holding hardly seems more strained than judicial efforts to convert state procedural rules to substantive law as did the Gasperini majority and the Shady Grove dissent. Ironically, another case of federal common law cited by Professor Wright involved railroad liability and the Court's invocation of federal common law to apply a substantive rule more protective of the railroad. See Francis v. S. Pac. Co., 333 U.S. 445 (1948) (holding that application of pre-Erie federal common law cases providing that passengers riding free on railroad are entitled to recover for injury only in cases of gross negligence, overriding Utah state law providing for liability in event of ordinary negligence for injuries to such passengers). Francis is discussed in WRIGHT, supra note 2, § 60.

^{194.} See, e.g., TEPLY & WHITTEN, supra note 2, at ch. 5 (presenting positive or at least non-critical view of Erie concept even if noting problems or criticisms of Erie doctrine in operation);

Consequently, federal courts are likely to remain in the business of occasionally applying some wrong-headed state substantive laws in diversity jurisdiction cases. Despite the arguable net resulting increase in application of disfavored law, *Erie* greatly reduces instances of disparate federal-state outcomes. Although Plaintiff Tompkins was stripped of a \$30,000 jury verdict, he was accorded the substantive "protection" of Pennsylvania state law, such as it was. Arguably this was all to which he was entitled once one disregards the accident of diversity jurisdiction. 196

Despite the seeming command of *Erie*, one can make a strong argument that deference to state substantive law need not mean servility or overly expansive application. Where a state law is unwise, federal courts would do well to be sure that it is truly sufficiently substantive for its application to be commanded by *Erie*. Where legislation is the product of haste, misinformation, or unduly narrow interest group power, or where there is little evidence of public support or strong public benefit, courts can legitimately take a restrained view in applying the problematic law unless the law clearly qualifies as substantive for purposes of *Erie*. Where aggressive application of the state law is in tension with applicable federal law or policy, this logically counsels for some restraint in the use of functionalism to deem state procedural rules substantive rules of decision in disguise.

Shady Grove presented this type of situation. Consequently, the dissent's great deference to § 901(b) and hailing of it as an example of public-regarding compromise and consensus seems in error. Unlike the standard for testing the excessiveness of jury awards at issue in Gasperini, the penalty limitation does not appear to meet mainstream

JAMES, JR. ET AL., *supra* note 2, §§ 2.36-2.39 (same, although displaying more sympathy for *Swift v. Tyson* and its rationale); WRIGHT, *supra* note 2, §§ 54-60 (same).

^{195.} See Erie, 304 U.S. at 70. According to the popular online service, The Inflation Calculator, \$30,000 in 1938 dollars would be \$452,096.25 in 2009 dollars. Although this is a substantial amount, it may have actually undervalued the seriousness of his injury and disability. See infra note 196.

^{196.} Tompkins may also have been something less than blameless in the matter. He was walking along the railroad footpath during the wee hours after a night of apparently extensive drinking, raising the prospect that he wandered upon or too close to the railroad track. *See* Irving Younger, *Observation: What Happened in Erie*, 56 Tex. L. Rev. 1011 (1978). A jury faced with the prevailing contributory negligence doctrine of the time (in both federal and state courts) had to choose between giving Tompkins nothing or an award consistent with the degree of his injuries rather than apportioning the award to account for any comparative negligence. In the aftermath of the U.S. Supreme Court's decision, Tompkins "died severely disabled and destitute." *See* SUBRIN ET AL., *supra* note 2, at 827 (citing Bob Rizzi, *Erie Memoirs Reveal Drama, Tragedy*, 63 HARV. L. RECORD, Sept. 24, 1976, at 2).

law reform concerns that animated CPLR § 5501. Faced with the *Shady Grove* situation and the legal, but arguably tarnished status of § 901(b), one might engage in a more realistic and critical analysis of § 901(b)'s birth and legitimacy and conclude that § 901(b) is simply too ill-thought and insufficiently examined to count as important state law and policy entitled to deference sufficient to displace otherwise applicable federal law in the form of Federal Rule 23. Or one might engage in a different, less politically cynical analysis of § 901(b) such as that found in Justice Stevens's *Shady Grove* concurrence and conclude that without regard to the quality of § 901(b)'s underlying analysis, it is too insufficient an expression of state substantive legal policy to displace an otherwise clearly applicable federal procedural rule.

Both of these approaches incur the cost of committing the evaluator to substantial examination of state lawmaking and public policy and carry the risk of inconsistent or inaccurate assessments shaped by the values of the assessor, who may like or dislike the legislation and, through the magic of functionalism, now is given greater opportunity to apply personal preferences to the assessment of case situations. Even if the process costs of extensive judicial assessment of state law are manageable, there exist significant deliberation costs as jurists will undoubtedly differ as to the wisdom of state legislation and the deference to which it is entitled once one looks behind text. I find § 901(b) an appallingly bad provision enacted hastily on the basis of shallow, unsubstantiated, and incorrect contentions by vested interests. Others may deem it a wise response to the potential evils of class certification and its potential for litigation blackmail.

Under these circumstances, the formalist route of Justice Scalia's *Shady Grove* plurality has much to recommend it as a means of avoiding judicial debate over the background and merits of state legislation as well as a means of lowering adjudication costs and conserving judicial resources. Although formalism also provides plenty of opportunity for judges to silently inject personal preferences into the analysis, it can, when applied fairly, have a simplifying and discretion-suppressing effect. And in *Erie* matters, somewhat less judicial opportunity for discretion may be a fair price to pay for greater efficiency, predictability, certainty, and avoidance of evaluation of the nature of litigation than obtains when justices look behind state procedural rules to locate and evaluate their substantive content.

Shady Grove provides a good illustration of the benefits of such reasonable formalism for *Erie* questions. By looking almost solely at the applicable scope of a Federal Rule of Procedure, the Scalia plurality

avoids both the logistical costs of sustained examination of § 901(b), its derivation, its place in the constellation of New York substantive law, and its relative importance to the state body politic. Although this can perhaps permit decisions that ride roughshod over strong state interests embedded within a procedural rule or code, this almost certainly was not the case in *Shady Grove*. The New York legislature wanted New York law to largely mirror Federal Rule 23. Widely followed federal case law applying Federal Rule 23 resisted class action treatment of statutory penalty claims. The application of Federal Rule 23 to a case validly in federal court rather than use of § 901(b) does little or no violence to New York public policy and is hardly unfair to defendant Allstate, particularly if there is any truth to plaintiff's allegations of intentional foot-dragging in paying for medical services to insured accident victims.

Unexpectedly but importantly, the formalism of the *Shady Grove* plurality also would logically have the beneficial effect of prompting states to more often engage in greater scrutiny of procedural rules and the policies imbedded in them. It may also prompt states to more often determine for themselves whether the policies are of such importance that they merit codification in the state's obviously substantive statutes in order to avoid the reach of the Federal Rules envisioned by Justice Scalia and his allies on the Court.

A state law capping damages appears to be state substantive law that must apply under the *Erie* doctrine. But where a limitation upon recovery is not set forth in a substantive statute but is instead bound with the state's procedural rules, there is not only greater *Erie* conflict but also greater difficulty ascertaining the degree to which the limitation is substantive or procedural and whether it implicates the important state policies to which Justices Harlan and Stevens sought to be sensitive. But if the *Shady Grove* plurality approach becomes the Court's established approach to *Erie* problems, state political actors going forward will be required to establish their substantive legal regime with greater clarity. ¹⁹⁷

Consider the issue of limitations on penalty class actions. If New York had introduced this as a stand-alone piece of legislation to accompany the 1975 class action bill or as a revision or corrective of the

^{197.} See Hendricks, supra note 17, at 58 ("[U]niform federal procedure will allow states to formulate substantive policy with knowledge of the procedures through which they will be enforced and will encourage state lawmakers to act openly through the substantive law rather than manipulated outcomes with special procedures."). See generally Symposium, Democracy and the Courts: Judicial Selection, Legal Literacy, and the Role of Public Opinion, 61 HASTINGS L. J. 1333-1501 (2010).

law, this hypothetical legislation would have likely enjoyed separate reporting by the press and at least some consideration by the public at large. The bill would have likely required separate hearings and invited more reflective and substantive debate by the various interests comprising the body politic. There would have been at least a chance at some reasoned debate over the efficacy of penalties as enforcement tools in the absence of class treatment and the actual degree to which aggregation of penalty claims posed fair or unfair risks of large judgments and defendant ability to pay them. The issue of class action coercion would also perhaps have gotten a more serious examination than it has traditionally enjoyed.

In the post-Shady Grove real world, the plurality's approach arguably has already opened this possibility. New York political actors reading Shady Grove now have a roadmap should they wish to make a limitation on statutory penalty class actions impregnable against Federal Rule 23 attack in cases that reach federal court through the accidents of CAFA and diversity jurisdiction. They can re-enact § 901(b) as a substantive law. Although the technical details of such a response to Shady Grove are of course more complex than I am making them sound (or have time to discuss in this article), this type of state "overruling" of an adverse Erie decision with which the state disagrees is eminently possible. But to date, there appears to have been no effort in New York to overcome Shady Grove and ensure that Insurance Law § 5106 or other state penalty statutes never again gain class action treatment in federal court.

This may simply reflect legislative inertia and the timing, as New York has not yet had its first post-*Shady Grove* legislative session. Or it might reflect acquiescence or lack of concern, either of which would vindicate the *Shady Grove* plurality and concurrence while undermining the dissent's argument that application of Federal Rule 23 has done some sort of real violence to the concept of federalism embodied in *Erie* jurisprudence.

Additionally, the plurality's formalism and occasional forcing of legislatures to re-examine state policy woven into state procedural provisions can also have the beneficial effect of forcing state legislatures to review and perhaps update these types of laws. The 1975 New York legislation was by all accounts a positive and important law notwithstanding what I regard as the wrong turn taken (with minimal transparency) in § 901(b). But much has happened during the past thirty-five years regarding attitudes toward the class action and consumer protection generally. Today's New York legislature might opt

for something quite different than Federal Rule 23, perhaps constraining class actions beyond the limitations of federal law or § 901(b). A return to pre-1975 state law is not beyond question.

Although I would disagree with any of these class-limiting laws as a matter of my own substantive preferences, these decisions are of course for New York to make—so long as it makes these decisions as part of its substantive rules of decision for adjudicated cases and as part of the state's articulation of the substantive rights and duties of its citizenry, rather than encasing such choices in state procedural codes that conflict with the Federal Civil Rules. By forcing substantive bars to litigation into a state's substantive law, the approach of the *Shady Grove* plurality can serve as a de facto spur for government "in the sunshine" with more open focus on the merits of public policy issues and less low visibility legislation "hidden" in the state's procedural laws.

To the extent states continue to put arguably substantive law into procedural codes, these provisions "deserve" to be displaced by on-point federal rules in cases properly in federal court. At some point, the Sibbach-Byrd-Hanna-Shady Grove line of cases must stand for the proposition that the tail of odd state procedural provisions or practices cannot wag the federal litigation dog and that federal judges are not mere "ventriloquist's dummies" forced to mouth state law despite having a thick batch of applicable federal rules.

The Sibbach-Hanna-Shady Grove analysis is particularly apt where problematic state law is embedded in procedural rule covering the same territory as does a federal civil rule. These cases truly do not present the relatively unguided Erie choice of York or similar cases. When a rule of federal procedure is enacted, the federal judiciary and its constituents (lawyers, scholars, government agencies, litigants, public policy interest groups) have spoken, as has the Supreme Court, with Congress giving at least tacit support or at the very least not disagreeing sufficiently to interfere. At this point, great deference should be given to applying the federal rule in federal court actions. This deference can logically be overcome by a clear showing that state controlling substantive law is to the contrary.

Further, *Shady Grove* involved CAFA jurisdiction, an area where Congress spoke strongly regarding its desire to provide a federal forum for certain types of class actions. Although many CAFA proponents would undoubtedly be unpleasantly surprised at the pro-plaintiff outcome in *Shady Grove*, which permitted doctors to sue an insurer via

the class device, ¹⁹⁸ this arguably only underscores the benefits of formalist adherence to validly promulgated federal rules and statutes. Result orientation is forced to take a back seat to playing by the federal procedural rules in the federal litigation arena. For that reason, the concern for vindicating federal policy in *Byrd* is also enhanced by the *Shady Grove* approach and outcome. ¹⁹⁹ At some point, the deference to state legislation reflected in the *Shady Grove* dissent is likely to have negative implications for the ability of federal courts to run themselves. When in doubt as to the degree the scope of federal procedural rules and the degree of federal-state rules conflict, the federal rule should govern.

In addition to working well in *Shady Grove* and forcing greater democratic deliberation in the states—at least if they want their substantive policies to resist displacement by federal rules in federal courts - the plurality's approach appears reasonable for use in future *Erie* cases. It is sufficiently consistent with key Erie precedents, other than perhaps Gasperini, although it too, can be reconciled with Shady Grove in light of the lack of codified federal standards governing the vacating of excessive jury awards. Applying Shady Grove rather than Gasperini going forward would require minimal federalism costs in return for gains in protection of federal procedural prerogatives, predictability, and efficiency. Gasperini, it should be recalled, displaced Federal Rule 59 with CPLR § 5501 through a bit of straw man sleight of hand in that the Gasperini majority described the federal standard for assessing the excessiveness of jury verdicts as whether the verdict "shocks the conscience" of the court. This unguided homage to judicial gut feeling was contrasted with the seemingly more rational New York

^{198.} See Burbank, supra note 47 (CAFA "resulted from years of intense lobbying" by various interest groups and was part of "a trio of 'tort reform' measures sought by the Bush administration," although the resulting statute may be "inimical to the interests" of many tort reform advocates); Stempel, Class Actions and Limited Vision, supra note 99, at 1142-48 (discussing background of CAFA and legislative intend to tame perceived abusive class actions, particularly those brought in state courts). Shady Grove suggests more than a little prescience in Professor Burbank's observation.

^{199.} See Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958) (determining that where suit is in federal court on basis of diversity jurisdiction, issue of whether injured lineman was independent contractor (rather than employee) and thus outside scope of South Carolina workers compensation law and its limitations on damage awards subject to jury determination notwithstanding state practice because of strong federal policy favoring jury determination of disputed facts). Byrd, of course, is correctly decided, but would have been simpler, more direct, and more satisfying if the Court had simply stated that in federal court, the Seventh Amendment governs the availability of the jury, period. The Seventh Amendment in my view operates as something of a "super" Federal Civil Rule and where on point displaces contrary state practice regarding the allocation of the factfinding function at trial.

law, that allowed setting aside of a jury verdict where the verdict "materially deviates" from reasonable precedent. ²⁰⁰

Although the federal reporters are strewn with plenty of precedent using the "shocks the conscience" language, ²⁰¹ anyone who has ever practiced in federal court knows that a jury verdict is in great danger of being set aside as against the weight of the evidence if the presiding federal trial judge views the amount awarded as unreasonable. Federal district judges do not need to be "shocked" to intervene in such situations. Their desire to prevent unreasonable compensation is reflected in numerous decisions. ²⁰²

By any reasonable understanding of language, an "against the weight of the evidence" standard presents a lower bar to ordering a new trial than a "shocks the conscience" test. By suggesting that only where the trial judge was aghast or amazed by the size of the verdict could there be a new trial, the *Gasperini* majority presented a misleading

202. See, e.g., MOORE'S FEDERAL PRACTICE, supra note 45, § 59.13[2][f] & [g] (stating courts routinely order new trials where verdict is against the clear weight of the evidence or is "entirely disproportionate" to plaintiff's injury); TEPLY & WHITTEN, supra note 2, at 963 (stating courts commonly order new trials where a jury verdict is "excessive"); JAMES, JR., HAZARD, JR. & LEUBSDORF, supra note 2, § 7.29; 11 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2806 (2d ed. 1995) (stating federal courts routinely order new trials when verdict is against the weight of the evidence).

In a case Professors James, Hazard and Leubsdorf describe as summarizing "well" the prevailing federal test, the court stated that when facing a Federal Rule 59 new trial motion "it is the duty of the trial judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence . . . even though there may be substantial evidence which would prevent the direction of a verdict." Aetna Cas. & Surety Co. v. Yeatts, 122 F.2d 350, 352-53 (4th Cir. 1941), and quoted in JAMES, JR., HAZARD, JR. & LEUBSDORF, *supra* note 2, at 474.

Although the *Yeatts* test is typically associated with ordering a new trial because the judge thought that the prevailing party should not have obtained a favorable verdict, its logic applies to review of verdict size as well as verdict direction and suggests that federal courts prior to *Gasperini* were not waiting for jaw-droppingly absurd jury verdicts as a prerequisite to granting a new trail.

^{200.} See Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 425 (1996).

^{201.} See, e.g., Eich v. Board of Regents, Central Mo. State Univ., 350 F.3d 752, 763-64 (8th Cir. 2003) (holding that for new trial, the verdict must shock the conscience of court; a new trial requires a "monstrous" or "shocking" result). See JAMES, JR., HAZARD, JR. & LEUBSDORF, supra note 2, § 7.29 (noting existence of shock-the-conscience review of verdict size, but also noting modern trend toward greater supervision of jury verdicts); MOORE'S FEDERAL PRACTICE, supra note 45, § 59.13[2][g][B] (stating that "[i]n a federal question case, a district court will ordinarily deem an award excessive it if 'shocks the judicial conscience.'" (footnoted omitted)). However, an examination of the footnote's supporting cases suggests that something far less than shock is sufficient for at least some federal courts to deem a verdict excessive and to order a new trial. See, e.g., BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (establishing that punitive damages are subject to review pursuant to Due Process Clause and finding \$4 million punitive damages award remitted to \$2 million for misrepresentation about touched up paint job on car "grossly excessive," but eschewing shock-the-conscience rhetoric); McCoy v. Goldberg, 810 F. Supp. 539, 542 (S.D.N.Y. 1993) (holding a court may overturn verdict that is "grossly excessive").

picture of actual federal court practice and modest or nonexistent degree to which it differed from New York's articulated new trial standard. Consequently, had *Gasperini* been decided the other way, applying Federal Rule 59 rather than CPLR § 5501 to a photographer's suit for lost photographs, his initial jury verdict of \$450,000 would almost certainly have been set aside for a new trial. The \$100,000 remittitur imposed under the New York new trial standard also sounds very much within the range of likely federal outcomes for new trial motions in cases of this type.

In addition to perhaps reflecting the dearth of trial court experience on the *Gasperini* Court (where not a single Justice had served as a trial judge and few had been federal trial attorneys), an unfortunate demographic continued with the current Court (where only Justice Sotomayor has served as a trial judge)²⁰³ *Gasperini*, like the *Shady Grove* dissent, arguably reflects excessive concern with attempting to achieve maximum congruence in federal and state trial outcomes. The concern is misplaced for two reasons.

First, modest differences between federal and state courts are a necessary cost of federalism. *Erie* "hawks" – those who give the most limited reach to federal procedural rules – wrongly see federalism in this context as unvarying equivalence. But federalism also entails accepting some degree of difference between the two systems, just as state-to-state differences are accepted as a cost of doing business in American government and law.

Second, and perhaps more important and certainly more inarguable, a quest for intra-court symmetry is doomed to failure and inconsistent with the inevitable differences in case outcomes that the legal system is forced to embrace as a concession to reality. The differences between state and federal law in *Erie* questions, although sometimes large, are often relatively modest when compared to the inevitable differences that result when the system allows adjudication by different lay jurors presided over by different judges with litigants of different attractiveness

^{203.} See, e.g., DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT (5th ed. 2010) (providing biographies of all justices that indicate lack of trial court experience for all members of Shady Grove Court except Justice Sotomayor); ROGER K. NEWMAN, THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW (2009) (providing short biographies of Justices Breyer, Ginsburg, Scalia, Kennedy, Stevens, and Thomas that reflect lack of trial court experience); BIOGRAPHICAL ENCYCLOPEDIA OF THE SUPREME COURT: THE LIVES AND LEGAL PHILOSOPHIES OF THE JUSTICES (Melvin I. Urofsky ed., 2006) (same regarding all members of Shady Grove Court except Justice Sotomayor); THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (Kermit L. Hall, James W. Ely, Jr. & Joel B. Grossman eds., 2005) (same).

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and resources (but essentially the same type of legal claims and injuries) represented by different attorneys of varying skills and support.

As noted above, Mr. Gasperini's initially large jury verdict was imperiled under either federal or New York new trial standards. As also illustrated by cases such as *Ratner v. Chemical Bank*, federal trial courts possess sufficient power to prevent unduly unwieldy or coercive class actions sufficient to harmonize outcomes in these cases with the prohibition of § 901(b). Compare this to everyday events in litigation for which there is no *Erie* intervention: One plaintiff is awarded \$1 million for accident-related pain and suffering while a similarly situated plaintiff in another court receives nothing or a much lower award. One defendant wins via summary judgment during the early stages of litigation while a second's motion is narrowly denied, leading to a trial and imposition of multi-million dollar liability.

In a nation as large and diverse as the United States, much variegation in litigation outcomes is unavoidable, a reality that counsels against federal courts being too skittish about applying federal procedure merely because of its potential for differences with state court outcomes. To be sure, straight up or hard core differences in substantive law, as existed in *Erie* itself, require deference to the state substantive law. But such deference is hardly so essential in the murkier realm of the questions posed in *Hanna*, *Gasperini*, and *Shady Grove*. Arguably *Ragan* and *Walker* fall into this category as well even though the Court in both cases was solidly behind deference to the state rule in question. In cases like *Byrd*, which implicate the federal constitution (specifically the Seventh Amendment), there should be even less concern that application of federal practice runs afoul of the *Erie* concept merely because there may be a different outcome had the matter been in state court.

The waters of *Erie* will never be crystal clear in this regard. But navigating them can be far simpler and more expeditious under the *Shady Grove* plurality approach, needing only some occasional leavening from the Harlan/Stevens functionalist search for important state interests in the closer cases. If nothing else, however, the *Shady Grove* saga suggests that there is an additional benefit to the plurality's more formalist, *Sibbach* and aggressive *Hanna* approach in that it can force state lawmaking more into the open, encouraging greater and more reflective debate about and scrutiny of policy decisions.

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V. CONCLUSION

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A narrow, brittle formalism usually makes for unsatisfactory jurisprudence. When coupled with primitive, hyperliteral textualism or reductionist presentations of a complex world, it can lead to bizarre results at odds with legislative intent, contracting intent, citizen understanding, and common sense. But formalism has its place in the law's analytic arsenal. If not excessively narrow and fundamentalist, adherence to a formalist approach, like Ulysses now famous decision to have himself lashed to the mast to avoid responding to the Sirens' Song, 204 may save the courts not only from greater investment of adjudication resources but also may act as a modest impetus for government "in the sunshine" by forcing more public and separate consideration of serious policy issues that might otherwise get short shrift when appended to, or interwoven with, procedural legislation. To the extent that a state proceeds to cloth substantive legal entitlements or immunities in procedural garb, it is far less likely to avoid federal procedural pre-emption in federal court litigation if the Shady Grove plurality approach holds in future cases. Notwithstanding the academy's general preference for functionalism and the jurisprudence of Justices Ginsburg, Stevens, and Harlan over formalism and the jurisprudence of Justice Scalia, Shady Grove shows the occasional virtues of formalism properly applied.

^{204.} See Jon Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality (1984) (providing a prominent recounting of the Ulysses story by a philosopher to illustrate potential benefits of establishing pre-existing constraints on decisionmaking). As of December 2010, Elster's use of the Ulysses analogy had been cited more than 300 times in the law review literature while the Ulysses and the Sirens episode has been cited more than 400 times.