The Anatomy of a Class Action

February 13, 2019

6:30 p.m. – 8:30 p.m.

Quinnipiack Club

New Haven, CT

CT Bar Institute Inc.

CT: 2.0 CLE Credits (General)
NY: 2.0 CLE Credits (AOP/Skills)

Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging I acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

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Wednesday, February 13, 2019
6:30 p.m. – 8:30 p.m.
Quinnipiack Club, New Haven, CT

Speakers:
Hon. Warren W. Eginton, United States District Court, Bridgeport
Hon. Thomas Moukawsher, Connecticut Superior Court, Hartford
Hon. Michael P. Shea, United States District Court, Hartford
Robert A. Izard, Izard Kindall & Raabe LLP, West Hartford
Kim E. Rinehart, Wiggin and Dana LLP, New Haven

Moderator:
James T. (Tim) Shearin, Pullman & Comley LLC, Bridgeport

Agenda

1. General discussion of class action rules under Fed. R. Civ. P 23(a) and 23(b)(3) and Conn. Prac. Book § 9-7.
2. How do you certify a class, or defeat certification, in light of the requirements imposed by the governing rules?
3. When and how is class certification decided?
4. What happens after the case is certified from the view of the plaintiff, defendant, and court?
5. Unique issues relating to class settlement (amended Rule 23) or judgment taking into consideration notice (social media), opt-outs, objectors and resolution of attorney's fees.
6. Questions

Faculty Biographies

Warren W. Eginton was appointed United States District Judge for the District of Connecticut on August 1, 1979. He is a graduate of Princeton University, receiving a B.A. degree in 1948, and of Yale Law School, receiving a J.D. degree in 1951.

Judge Eginton, prior to his appointment, was a member of the firm Cummings & Lockwood of Stamford, Connecticut, where he specialized in products liability litigation. From 1988-1993 he was Editor-in-Chief of the Products Liability Law Journal published by Butterworth l
Legal Publishers, and authored several papers dealing with aspects of products liability. Before becoming a judge, he was a founding member of the Product Safety and Liability Prevention Technical Committee of the American Society for Quality Control and a member of the Products Liability Committee of the Defense Research Institute.

Judge Eginton is a member of the American Bar Foundation, the American Bar Association, the American Judicature Society, the Federal Bar Council, the Federal Bar Association, the Connecticut Bar Association, the Judiciary Leadership Development Council, and the Institute of Judicial Administration. He was a founding member and the first president of the Raymond E. Baldwin American Inn of Court in Stamford.

The Honorable **Thomas G. Moukawsher** is a judge of the Connecticut Superior Court. He is currently serving his fourth year on the Complex Litigation docket in Hartford. There he has presided over complex business disputes involving construction contracts and trade secrets as well as consumer and mass tort class actions. Prior to becoming a judge he was co-chair of the American Bar Association Committee on Employee Benefits. While he had a wide range of experience in civil matters, the chief focus of his legal career was in representing defrauded pension plans and plan participants in individual and class action lawsuits. Judge Moukawsher also spent seventeen sessions at the Connecticut General Assembly, mostly representing private clients but also serving as a legislative legal counsel and serving a term as a state representative. He currently serves on the advisory council of the Library of Congress.

Michael P. Shea was sworn in as a United States District Judge on December 31, 2012. He was born in Hartford, Connecticut, on April 7, 1967. Judge Shea graduated from Amherst College in Amherst, Massachusetts, summa cum laude, with a Bachelor of Arts degree in 1989. He graduated from Yale Law School, where he served as a Senior Editor of the Yale Law Journal, in 1993.

After graduating from law school, Judge Shea clerked for Judge James L. Buckley of the U.S. Court of Appeals for the District of Columbia Circuit. Thereafter, he joined Cleary Gottlieb Steen & Hamilton LLP as an associate, resident first in the firm's Washington, D.C. office and then in its Brussels, Belgium office. His practice at Cleary Gottlieb focused on U.S. and European antitrust matters.

In 1998, Judge Shea returned to Hartford, Connecticut, and joined Day Berry & Howard LLP, now known as Day Pitney LLP, as an associate. He became a partner of the firm in 2003. At Day Pitney, Judge Shea focused on commercial litigation, mass torts, First Amendment matters, and white collar criminal defense. He also chaired the firm's appellate practice group. Throughout his career in private practice, Judge Shea maintained an active pro bono practice, receiving awards from both the Hartford County and Connecticut Bar Associations for his work on behalf of Indigent persons in criminal and civil cases.

Judge Shea is a Bencher of the Oliver Ellsworth Inn of Court. He previously served on the Board of Directors of Nutmeg Big Brothers Big Sisters, as the Treasurer of the Connecticut Supreme Court Historical Society, and as Chair of the Antitrust Section of the Connecticut Bar Association.

Robert A. Izard heads the firm's ERISA team and is lead or co-lead counsel in many of the nation's most significant ERISA class actions, including cases against Merck, Cigna, United Healthcare, Tyco International, Time Warner, AT&T, and Sprint among others. Mr. Izard has substantial experience in other types of complex class action and commercial litigation matters. For example, he represented a class of milk purchasers in a price fixing case. He also represented a large gasoline terminal in a gasoline distribution monopolization lawsuit.

As part of his twenty plus years litigating complex commercial cases, Mr. Izard has substantial jury and nonjury trial experience, including a seven-month jury trial in federal district court. He is also experienced in various forms of alternative dispute resolution, including mediation and arbitration, and is a Distinguished Neutral for the CPR Institute for Dispute Resolution.

Mr. Izard is the author of Lawyers and Lawsuits: A Guide to Litigation published by Simon and Schuster and a contributing author to the Mediation Practice Guide. He is the former chair of the Commercial and Business Litigation Committee of the Litigation Section of the American Bar Association.

Kim Rinehart is a litigation partner at the law firm of Wiggin and Dana LLP. Chair of the firm's Class Action Defense Practice Group, Kim has substantial experience defending class action lawsuits involving a broad range of industries. Kim also handles legal malpractice matters, appeals, and other complex civil cases. Kim is dedicated to learning the business objectives of her clients. She aims to bring a creative and efficient approach tailored to the unique needs of each case.

Kim joined Wiggin and Dana following a clerkship with the Honorable Stephen V. Wilson, U.S. District Judge for the Central District of California. She received her J.D. from the Yale Law School and her B.A. with highest distinction in economics and English literature from the University of Michigan.

James T. (Tim) Shearin is chairman of Pullman & Comley LLC and former chair of the firm's Litigation Department. He has wide-ranging experience in federal and state courts, at both the trial and appellate levels, and before arbitration and mediation panels. He represents clients in the areas of commercial and business, intellectual property, Internet piracy and computer crimes, banking, securities, antitrust, products liability and general civil litigation.

Prior to joining Pullman & Comley LLC he was a law clerk for U.S. District Court Judge Peter C. Dorsey from 1986 to 1988.

He graduated from the University of Connecticut School of Law, J.D. with high honors in 1986 and from the University of Connecticut, B.A., summa cum laude, in 1983 as an Honors Scholar.

finding, and thereupon, unless some special reason is shown for further delay, the cause may be brought to trial. (See General Statutes § 52-88 and annotations.)
(P.B. 1978-1997, Sec. 81.)

Sec. 9-3. Joinder of Parties and Actions; Interested Persons as Plaintiffs

All persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, except as otherwise expressly provided; and, if one who ought to be joined as plaintiff declines to join, such person may be made a defendant, the reason therefor being stated in the complaint. (See General Statutes § 52-101 and annotations.)
(P.B. 1978-1997, Sec. 83.)

Sec. 9-4. —Joinder of Plaintiffs in One Action

All persons may be joined in one action as plaintiffs in whom any right of relief in respect to or arising out of the same transaction or series of transactions is alleged to exist either jointly or severally when, if such persons brought separate actions, any common question of law or fact would arise; provided, if, upon the motion of any party, it would appear that such joinder might embarrass or delay the trial of the action, the judicial authority may order separate trials, or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he, she or they may be entitled; and there shall be but one entry fee, one jury fee, if claimed for jury trial, and such other costs as may by rule be prescribed.
(P.B. 1978-1997, Sec. 84.)

Sec. 9-5. —Consolidation of Actions

(a) Whenever there are two or more separate actions which should be tried together, the judicial authority may, upon the motion of any party or upon its own motion, order that the actions be consolidated for trial.

(b) If a party seeks consolidation, the motion to consolidate shall be filed in all of the court files proposed to be consolidated, shall include the docket number and judicial district of each of the cases, and shall contain a certification specifically stating that the motion was served in accordance with Sections 10-12 through 10-17 on all parties to such actions. The certification shall specifically recite the name and address of each counsel and self-represented party served, the date of such service and the name and docket number of the case in which that person has appeared. The moving party shall give reasonable notice to all such parties of the date on which the motion will be heard on short calendar. The judicial authority shall not consider the motion unless it is satisfied that such notice was given.

(c) The court files in any actions consolidated pursuant to this section shall be maintained as separate files and all documents submitted by counsel or the parties shall bear only the docket number and case title of the file in which it is to be filed.
(P.B. 1978-1997, Sec. 84A.) (Amended June 29, 1998, to take effect Jan. 1, 1999.)

Sec. 9-6. —Interested Persons as Defendants

Any person may be made a defendant who has or claims an interest in the controversy, or any part thereof, adverse to the plaintiff, or whom it is necessary, for a complete determination or settlement of any question involved therein, to make a party. (See General Statutes § 52-102 and annotations.)
(P.B. 1978-1997, Sec. 85.)

Sec. 9-7. Class Actions; Prerequisites to Class Actions

One or more members of a class may sue or be sued as representative parties on behalf of all only if (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 defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
(P.B. 1978-1997, Sec. 87.)

Sec. 9-8. —Class Actions Maintainable

An action may be maintained as a class action if the prerequisites of Section 9-7 are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of: (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members who are not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of class action.

(P.B. 1978-1997, Sec. 88.) (Amended June 22, 2009, to take effect Jan. 1, 2010.)

Sec. 9-9. —Procedure for Class Certification and Management of Class

(Amended June 22, 2009, to take effect Jan. 1, 2010.)

(a) (1) (A) When a person sues or is sued as a representative of a class, the court must, at an early practicable time, determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues or defenses, and must appoint class counsel.

(C) An order under Section 9-9 (a) (1) (A) may be altered or amended before final judgment.

(2) (A) For any class certified under Section 9-8 (1) or (2), the court must direct notice to the class.

(B) For any class certified under Section 9-8 (3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues or defenses;

(iv) that a class member may enter an appearance through counsel if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and

(vi) the binding effect of a class judgment on class members under Section 9-8 (3).

(3) The judgment in an action maintained as a class action under Section 9-8 (1) or (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under Section 9-8 (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Section 9-9 (a) (2) (B) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate, (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of Sections 9-7 and 9-8 shall then be construed and applied accordingly.

(b) In the conduct of actions to which Section 9-7 et seq. apply, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of:

(A) any step in the action;

(B) the proposed extent of the judgment; or

(C) the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and to present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) dealing with similar procedural matters.

The orders may be altered or amended as may be desirable from time to time.

(c) (1) (A) The court must approve any settlement, withdrawal, or compromise of the claims, issues, or defense of a certified class. Court approval is not required for settlement, withdrawal or compromise of a claim in which a class has been alleged but no class has been certified.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, withdrawal or compromise.

(C) The court may approve a settlement, withdrawal, or compromise that would bind class members only after a hearing and on finding that the settlement, withdrawal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, withdrawal, or compromise of an action in

which a class has been certified must file a statement identifying any agreement made in connection with the proposed settlement, withdrawal or compromise.

(3) In an action previously certified as a class action under Section 9-8 (3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4) (A) Any class member may object to a proposed settlement, withdrawal or compromise that requires court approval under (c) (1) (A).

(B) An objection made under (c) (4) (A) may be withdrawn only with the court's approval.

(d) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(1) In appointing class counsel, the court must consider:

(A) the work counsel has done in identifying or investigating potential claims in the action;

(B) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action;

(C) counsel's knowledge of the applicable law; and

(D) the resources counsel will commit to representing the class.

(2) The court may:

(A) consider any other matter pertinent to counsel's ability to represent the interests of the class fairly and adequately;

(B) direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs; and

(C) make further orders in connection with the appointment.

(e) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action. When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under subsection (d). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class. The order appointing class counsel may include provisions about the award of attorney's fees or nontaxable costs under subsection (f).

(f) In an action certified as a class action, the court may award reasonable attorney's fees and nontaxable costs authorized by law or by consent of the parties as follows:

(1) a request for an award of attorney's fees and nontaxable costs must be made by motion subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its conclusions of law on such motion.

(g) (1) "Residual funds" are funds that remain after the payment of approved class member claims, expenses, litigation costs, attorney's fees, and other court-approved disbursements made to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from recommending, or the trial court from approving, a settlement that does not create residual funds.

(2) Any order, judgment or approved settlement in a class action that establishes a process for identifying and compensating members of the class may designate the recipient or recipients of any such residual funds that may remain after the claims payment process has been completed. In the absence of such designation, the residual funds shall be disbursed to the organization administering the program for the use of interest on lawyers' client funds pursuant to General Statutes § 51-81c for the purpose of funding those organizations that provide legal services for the poor in Connecticut.

(P.B. 1978-1997, Sec. 89.) (Amended June 22, 2009, to take effect Jan. 1, 2010; amended June 13, 2014, to take effect Jan. 1, 2015.)

TECHNICAL CHANGE: Subparagraphs in subsections (b) (2), (d) (1) and (d) (2) are now designated with capital letters.

Sec. 9-10. —Orders To Ensure Adequate Representation

The judicial authority at any stage of an action under this section may require such security and impose such terms as shall fairly and adequately protect the interests of the class in whose behalf the action is brought or defended. It may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment, or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. Whenever the representation appears to the judicial authority inadequate fairly to protect the interests of absent parties who may be bound by the judgment, it

may at any time prior to judgment order an amendment of the pleadings, eliminating therefrom all reference to representation of absent persons, and it shall order entry of judgment in such form as to affect only the parties to the action and those adequately represented.
(P.B. 1978-1997, Sec. 90.)

Sec. 9-11. Executor, Administrator or Trustee of Express Trust

An executor, administrator, or trustee of an express trust may sue or be sued without joining the persons represented by him or her and beneficially interested in the suit. The term "trustee of an express trust" shall be construed to include any person with whom, or in whose name, a contract is made for the benefit of another. (See General Statutes § 52-106 and annotations.)
(P.B. 1978-1997, Sec. 91.)

Sec. 9-12. Personal Representatives of Cocontractor

In suits on a joint contract, whether partnership or otherwise, the personal representatives of a deceased cocontractor may join, as plaintiffs, and be joined, as defendants, with the survivor; provided, where the estate of the decedent is in settlement in this state as an insolvent estate, his or her personal representatives cannot be joined as defendants. (See General Statutes § 52-78.)
(P.B. 1978-1997, Sec. 92.)

Sec. 9-13. Persons Liable on Same Instrument

Persons severally and immediately liable on the same obligation or instrument, including parties to bills of exchange and promissory notes, and endorsers, guarantors, and sureties, whether on the same or by separate instruments, may all, or any of them, be joined as defendants, and a joint judgment may be rendered against those so joined.
(P.B. 1978-1997, Sec. 93.)

Sec. 9-14. Defendants Alternately Liable

Persons may be joined as defendants against whom the right to relief is alleged to exist in the alternative, although a right to relief against one may be inconsistent with a right to relief against the other.
(P.B. 1978-1997, Sec. 94.)

Sec. 9-15. Assignee of Part Interest

If a part interest in a contract obligation be assigned, the assignor retaining the remaining interest and the assignee may join as plaintiffs.
(P.B. 1978-1997, Sec. 95.)

Sec. 9-16. Assignment Pending Suit

If, pending the action, the plaintiff assigns the cause of action, the assignee, upon written motion, may either be joined as a coplaintiff or be substituted as a sole plaintiff, as the judicial authority may order; provided that it shall in no manner prejudice the defense of the action as it stood before such change of parties.
(P.B. 1978-1997, Sec. 96.)

Sec. 9-17. Unsatisfied Judgment against One Defendant

Where the plaintiff may at his or her option join several persons as defendants, or sue them separately, judgment without satisfaction against one shall not bar a suit against another.
(P.B. 1978-1997, Sec. 97.)

Sec. 9-18. Addition or Substitution of Parties; Additional Parties Summoned in by Court

The judicial authority may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the judicial authority may direct that they be brought in. If a person not a party has an interest or title which the judgment will affect, the judicial authority, on its motion, shall direct that person to be made a party. (See General Statutes § 52-107 and annotations.)
(P.B. 1978-1997, Sec. 99.)

Sec. 9-19. —Nonjoinder and Misjoinder of Parties

Except as provided in Sections 10-44 and 11-3 no action shall be defeated by the nonjoinder or misjoinder of parties. New parties may be added and summoned in, and parties misjoined may be dropped, by order of the judicial authority, at any stage of the cause, as it deems the interests of justice require. (See General Statutes § 52-108 and annotations.)
(P.B. 1978-1997, Sec. 100.)

Sec. 9-20. —Substituted Plaintiff

When any action has been commenced in the name of the wrong person as plaintiff, the judicial authority may, if satisfied that it was so commenced through mistake and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff. (See General Statutes § 52-109 and annotations.)
(P.B. 1978-1997, Sec. 101.)

Sec. 9-21. —Counterclaim; Third Parties

When a counterclaim raises questions affecting the interests of third parties, the defendant may,

Federal Rules of Civil Procedure

2019 Edition

Rule 23 – Class Actions

(a) **Prerequisites**. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(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 defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Types of Class Actions**. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the 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. The matters pertinent to these findings include:

(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.

(c) **Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.**

(1) *Certification Order.*

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3)—or upon ordering notice

under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues*. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses*. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) **Conducting the Action**.

(1) *In General*. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class.*

(A) Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal.* If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to Be Excluded.* If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections.*

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) **Appeals**. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) **Class Counsel**.

(1) *Appointing Class Counsel*. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks

appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) **Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52 (a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Beaton v. SpeedyPC Software, 7th Cir.(Ill.), October 31, 2018

137 S.Ct. 1773
Supreme Court of the United States

BRISTOL–MYERS SQUIBB COMPANY, Petitioner
v.
SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY, et al.

No. 16–466.
|
Argued April 25, 2017.
|
Decided June 19, 2017.

Synopsis

Background: Consumers brought products liability action against prescription drug manufacturer in California state court. The Superior Court, City and County of San Francisco, JCCP. No. 4748, John E. Munter, J., entered an order denying manufacturer's motion to quash service of summons on nonresident consumers' claims. Manufacturer petitioned for a writ of mandate, which the Court of Appeal summarily denied. Manufacturer petitioned for review, which the Supreme Court of California granted, transferring matter back to the Court of Appeal. The Court of Appeal denied petition, and manufacturer petitioned for review. The Supreme Court of California granted review, superseding the opinion of the Court of Appeal. The Supreme Court of California, Cantil-Sakauye, C.J., 1 Cal.5th 783, 206 Cal.Rptr.3d 636, 377 P.3d 874, affirmed. Certiorari was granted.

[Holding:] The Supreme Court, Justice Alito, held that due process did not permit exercise of specific personal jurisdiction in California over nonresident consumers' claims.

Reversed and remanded.

Justice Sotomayor filed a dissenting opinion.

West Headnotes (21)

[1] Constitutional Law
Personal jurisdiction in general

The Fourteenth Amendment's due process clause limits the personal jurisdiction of state courts. U.S.C.A. Const.Amend. 14.

19 Cases that cite this headnote

[2] Constitutional Law
Non-residents in general

Because a state court's assertion of jurisdiction exposes defendants to the state's coercive power, it is subject to review for compatibility with the Fourteenth Amendment's due process clause, which limits the power of a state court to render a valid personal judgment against a nonresident defendant. U.S.C.A. Const.Amend. 14.

4 Cases that cite this headnote

[3] Courts
Factors Considered in General

The primary focus of the personal jurisdiction inquiry is the defendant's relationship to the forum state.

62 Cases that cite this headnote

[4] Courts
Unrelated contacts and activities;general jurisdiction

Courts
Related contacts and activities;specific jurisdiction

Two types of personal jurisdiction are recognized: general, sometimes called all-purpose, jurisdiction, and specific, sometimes called case-linked, jurisdiction.

34 Cases that cite this headnote

[5] Courts

Unrelated contacts and activities;general jurisdiction

Courts

Corporations and business organizations

For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.

26 Cases that cite this headnote

[6] Courts

Unrelated contacts and activities;general jurisdiction

A court with general jurisdiction may hear any claim against the defendant, even if all the incidents underlying the claim occurred in a different state.

42 Cases that cite this headnote

[7] Courts

Unrelated contacts and activities;general jurisdiction

Only a limited set of affiliations with a forum will render a defendant amenable to general jurisdiction in a state.

26 Cases that cite this headnote

[8] Courts

Related contacts and activities;specific jurisdiction

In order for a state court to exercise specific jurisdiction, the suit must arise out of or relate to the defendant's contacts with the forum.

144 Cases that cite this headnote

[9] Courts

Related contacts and activities;specific jurisdiction

For a state court to exercise specific jurisdiction, there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum state and is therefore subject to the state's regulation.

192 Cases that cite this headnote

[10] Courts

Related contacts and activities;specific jurisdiction

Specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.

45 Cases that cite this headnote

[11] Courts

Actions by or Against Nonresidents, Personal Jurisdiction In;"Long-Arm" Jurisdiction

In determining whether personal jurisdiction is present, a court must consider a variety of interests, including the interests of the forum state and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice.

21 Cases that cite this headnote

[12] Courts

Factors Considered in General

The primary concern in determining whether personal jurisdiction is present is the burden on the defendant, the assessment of which requires a court to consider the practical problems resulting from litigating in the forum, and also encompasses the more abstract matter of submitting to the coercive power of a state that may have little legitimate interest in the claims in question.

24 Cases that cite this headnote

[13] Courts

Actions by or Against Nonresidents, Personal Jurisdiction In;"Long-Arm" Jurisdiction

Courts

Exercise of jurisdiction beyond territorial limits

Restrictions on personal jurisdiction are more than a guarantee of immunity from inconvenient or distant litigation; they are a consequence of territorial limitations on the power of the respective states.

8 Cases that cite this headnote

[14] **States**

Nature, status, and sovereignty in general

The states retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts; however, the sovereignty of each state implies a limitation on the sovereignty of all its sister states.

Cases that cite this headnote

[15] **Constitutional Law**

Non-residents in general

Even if a defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another state, even if the forum state has a strong interest in applying its law to the controversy, and even if the forum state is the most convenient location for litigation, the Fourteenth Amendment's due process clause, acting as an instrument of interstate federalism, may sometimes act to divest a state of its power to render a valid judgment. U.S.C.A. Const.Amend. 14.

11 Cases that cite this headnote

[16] **Constitutional Law**

Manufacture, distribution, and sale

Courts

Defective, dangerous, or injurious products;products liability

Nonresident consumers' products liability claims against nonresident prescription drug manufacturer were not connected to California, and, thus, due process did not permit exercise of specific personal jurisdiction over claims there; nonresident consumers were not prescribed drug in California and did not purchase, ingest, or become injured by drug there, mere fact that resident consumers were prescribed, obtained, and ingested drug in California and sustained same alleged injuries as nonresident consumers was an insufficient basis to exercise specific jurisdiction, and neither manufacturer's actions in conducting research unrelated to drug in California nor its decision to contract with a California company to distribute drug nationally were enough to exercise specific jurisdiction. U.S.C.A. Const.Amend. 14.

51 Cases that cite this headnote

[17] **Courts**

Related contacts and activities;specific jurisdiction

Where there is not an affiliation between the forum and the underlying controversy, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the state.

127 Cases that cite this headnote

[18] **Courts**

Related contacts and activities;specific jurisdiction

For specific jurisdiction, a defendant's general connections with the forum are not enough.

171 Cases that cite this headnote

[19] **Courts**

Corporations and business organizations

A corporation's continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.

5 Cases that cite this headnote

[20] **Courts**

Factors Considered in General

A defendant's relationship with a third party, standing alone, is an insufficient basis for jurisdiction, even when the third party can bring claims similar to those brought by the nonresident.

12 Cases that cite this headnote

|21| **Courts**
Actions by or Against Nonresidents, Personal Jurisdiction In;"Long-Arm" Jurisdiction

The requirements for personal jurisdiction must be met as to each defendant over whom a state court exercises jurisdiction.

76 Cases that cite this headnote

***1775** *Syllabus* *

A group of plaintiffs, most of whom are not California residents, sued Bristol–Myers Squibb Company (BMS) in California state court, alleging that the pharmaceutical company's drug Plavix had damaged their health. BMS is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. Although it engages in business activities in California and sells Plavix there, BMS did not develop, create a marketing strategy for, manufacture, label, package, or work on the regulatory approval for Plavix in the State. And the nonresident plaintiffs did not allege that they obtained Plavix from a California source, that they were injured by Plavix in California, or that they were treated for their injuries in California.

The California Superior Court denied BMS's motion to quash service of summons on the nonresidents' claims for lack of personal jurisdiction, concluding that BMS's extensive activities in the State gave the California courts general jurisdiction. Following this Court's decision in *Daimler AG v. Bauman*, 571 U.S. ——, 134 S.Ct. 746, 187 L.Ed.2d 624 the State Court of Appeal found that the California courts lacked general jurisdiction. But the Court of Appeal went on to find that the California courts had specific jurisdiction over the claims brought by the nonresident plaintiffs. Affirming, the State Supreme Court applied a "sliding scale approach" to ***1776** specific jurisdiction, concluding that BMS's "wide ranging" contacts with the State were enough to support a finding of specific jurisdiction over the claims brought by the nonresident plaintiffs. That attenuated connection was met, the court held, in part because the nonresidents' claims were similar in many ways to the California residents' claims and because BMS engaged in other activities in the State.

Held : California courts lack specific jurisdiction to entertain the nonresidents' claims. Pp. 1779 – 1784.

(a) The personal jurisdiction of state courts is "subject to review for compatibility with the Fourteenth Amendment's Due Process Clause." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918, 131 S.Ct. 2846, 180 L.Ed.2d 796. This Court's decisions have recognized two types of personal jurisdiction: general and specific. For general jurisdiction, the "paradigm forum" is an "individual's domicile," or, for corporations, "an equivalent place, one in which the corporation is fairly regarded as at home." *Id.*, at 924, 131 S.Ct. 2846. Specific jurisdiction, however, requires "the suit" to "aris[e] out of or relat[e] to the defendant's contacts with the forum." *Daimler, supra*, at ——, 134 S.Ct., at 754 (internal quotation marks omitted).

The "primary concern" in assessing personal jurisdiction is "the burden on the defendant." *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 62 L.Ed.2d 490. Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. At times, "the Due Process Clause, acting as an instrument of interstate federalism, may ... divest the State of its power to render a valid judgment." *Id.*, at 294, 100 S.Ct. 559. Pp. 1779 – 1781.

(b) Settled principles of specific jurisdiction control this case. For a court to exercise specific jurisdiction over a claim there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Goodyear, supra*, at 919, 131 S.Ct. 2846 (internal quotation marks and brackets omitted). When no such

connection exists, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. The California Supreme Court's "sliding scale approach"—which resembles a loose and spurious form of general jurisdiction—is thus difficult to square with this Court's precedents. That court found specific jurisdiction without identifying any adequate link between the State and the nonresidents' claims. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California does not allow the State to assert specific jurisdiction over the nonresidents' claims. Nor is it sufficient (or relevant) that BMS conducted research in California on matters unrelated to Plavix. What is needed is a connection between the forum and the specific claims at issue. Cf. *Walden v. Fiore,* 571 U.S. ——, 134 S.Ct. 1115, 188 L.Ed.2d 12. Pp. 1780 – 1782.

(c) The nonresident plaintiffs' reliance on *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790, and *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628, is misplaced. *Keeton* concerned jurisdiction to determine *the scope of a claim* involving in-state injury and injury to residents of the State, not, as here, jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum *1777 State. And *Shutts,* which concerned the due process rights of *plaintiffs,* has no bearing on the question presented here. Pp. 1782 – 1783.

(d) BMS's decision to contract with McKesson, a California company, to distribute Plavix nationally does not provide a sufficient basis for personal jurisdiction. It is not alleged that BMS engaged in relevant acts together with McKesson in California or that BMS is derivatively liable for McKesson's conduct in California. The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State. Pp. 1783 – 1784.

(e) The Court's decision will not result in the parade of horribles that respondents conjure up. It does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. Alternatively, the nonresident plaintiffs could probably sue together in their respective home States. In addition, since this decision concerns the due process limits on the exercise of specific jurisdiction by a State, the question remains open whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court. Pp. 1783 – 1784.

1 Cal.5th 783, 206 Cal.Rptr.3d 636, 377 P.3d 874, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, GINSBURG, BREYER, KAGAN, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion.

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Opinion

Justice ALITO delivered the opinion of the Court.

More than 600 plaintiffs, most of whom are not California residents, filed this civil action in a California state court against Bristol–Myers Squibb Company (BMS), asserting a variety of state-law claims based on injuries allegedly caused by a BMS drug called Plavix. The California Supreme Court held that the California courts have specific jurisdiction to entertain the nonresidents' claims. We now reverse.

I

A

BMS, a large pharmaceutical company, is incorporated in Delaware and headquartered in New York, and it maintains substantial ***1778** operations in both New York and New Jersey. 1 Cal.5th 783, 790, 206 Cal.Rptr.3d 636, 377 P.3d 874, 879 (2016). Over 50 percent of BMS's work force in the United States is employed in those two States. *Ibid.*

BMS also engages in business activities in other jurisdictions, including California. Five of the company's research and laboratory facilities, which employ a total of around 160 employees, are located there. *Ibid.* BMS also employs about 250 sales representatives in California and maintains a small state-government advocacy office in Sacramento. *Ibid.*

One of the pharmaceuticals that BMS manufactures and sells is Plavix, a prescription drug that thins the blood and inhibits blood clotting. BMS did not develop Plavix in California, did not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California. *Ibid.* BMS instead engaged in all of these activities in either New York or New Jersey. *Ibid.* But BMS does sell Plavix in California. Between 2006 and 2012, it sold almost 187 million Plavix pills in the State and took in more than $900 million from those sales. 1 Cal.5th, at 790–791, 206 Cal.Rptr.3d 636, 377 P.3d, at 879. This amounts to a little over one percent of the company's nationwide sales revenue. *Id.*, at 790, 206 Cal.Rptr.3d 636, 377 P.3d, at 879.

B

A group of plaintiffs—consisting of 86 California residents and 592 residents from 33 other States—filed eight separate complaints in California Superior Court, alleging that Plavix had damaged their health. *Id.*, at 789, 206 Cal.Rptr.3d 636, 377 P.3d, at 878. All the complaints asserted 13 claims under California law, including products liability, negligent misrepresentation, and misleading advertising claims. *Ibid.* The nonresident plaintiffs did not allege that they obtained Plavix through California physicians or from any other California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California.

Asserting lack of personal jurisdiction, BMS moved to quash service of summons on the nonresidents' claims, but the California Superior Court denied this motion, finding that the California courts had general jurisdiction over BMS "[b]ecause [it] engages in extensive activities in California." App. to Pet. for Cert. 150. BMS unsuccessfully petitioned the State Court of Appeal for a writ of mandate, but after our decision on general jurisdiction in *Daimler AG v. Bauman*, 571 U.S. ——, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014), the California Supreme Court instructed the Court of Appeal "to vacate its order denying mandate and to issue an order to show cause why relief sought in the petition should not be granted." App. 9–10.

The Court of Appeal then changed its decision on the question of general jurisdiction. 228 Cal.App.4th 605, 175 Cal.Rptr.3d 412 (2014). Under *Daimler*, it held, general jurisdiction was clearly lacking, but it went on to find that the California courts had specific jurisdiction over the nonresidents' claims against BMS. 228 Cal.App.4th 605, 175 Cal.Rptr.3d, at 425–439.

The California Supreme Court affirmed. The court unanimously agreed with the Court of Appeal on the issue of general jurisdiction, but the court was divided on the question of specific jurisdiction. The majority applied a "sliding scale approach to specific jurisdiction." 1 Cal.5th, at 806, 206 Cal.Rptr.3d 636, 377 P.3d, at 889. Under this approach, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." *Ibid.* (internal ***1779** quotation marks omitted). Applying this test, the majority concluded that "BMS's extensive contacts with California" permitted the exercise of specific jurisdiction "based on a less direct connection between BMS's forum activities and plaintiffs' claims than might otherwise be required." *Ibid.* This attenuated requirement was met, the majority found, because the claims of the nonresidents were similar in several ways to the claims of the California residents (as to which specific jurisdiction was uncontested). *Id.*, at 803–806, 206 Cal.Rptr.3d 636, 377 P.3d, at 887–889. The court noted that "[b]oth the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assertedly misleading marketing and promotion of that product."

Id., at 804, 206 Cal.Rptr.3d 636, 377 P.3d, at 888. And while acknowledging that "there is no claim that Plavix itself was designed and developed in [BMS's California research facilities]," the court thought it significant that other research was done in the State. *Ibid.*

Three justices dissented. "The claims of ... nonresidents injured by their use of Plavix they purchased and used in other states," they wrote, "in no sense arise from BMS's marketing and sales of Plavix in California," and they found that the "mere similarity" of the residents' and nonresidents' claims was not enough. *Id.*, at 819, 206 Cal.Rptr.3d 636, 377 P.3d, at 898 (opinion of Werdegar, J.). The dissent accused the majority of "expand[ing] specific jurisdiction to the point that, for a large category of defendants, it becomes indistinguishable from general jurisdiction." *Id.*, at 816, 206 Cal.Rptr.3d 636, 377 P.3d, at 896.

We granted certiorari to decide whether the California courts' exercise of jurisdiction in this case violates the Due Process Clause of the Fourteenth Amendment. 580 U.S. ——, 137 S.Ct. 827, 196 L.Ed.2d 610 (2017). [1]

II

A

[1] [2] [3] It has long been established that the Fourteenth Amendment limits the personal jurisdiction of state courts. See, *e.g.*, *Daimler, supra*, at —— – ——, 134 S.Ct., at 753–757; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310, 316–317, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L.Ed. 565 (1878). Because "[a] state court's assertion of jurisdiction exposes defendants to the State's coercive power," it is "subject to review for compatibility with the Fourteenth Amendment's Due Process Clause," *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011), which "limits the power of a state court to render a valid personal judgment against a nonresident defendant," *World-Wide Volkswagen, supra*, at 291, 100 S.Ct. 559. The primary focus of our personal jurisdiction inquiry is the defendant's relationship to the forum State. See *Walden v. Fiore*, 571 U.S. ——, —— – ——, 134 S.Ct. 1115, 1121–1123, 188 L.Ed.2d 12 (2014); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 806–807, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985).

[4] [5] [6] [7] Since our seminal decision in *International Shoe*, our decisions have recognized ***1780** two types of personal jurisdiction: "general" (sometimes called "all-purpose") jurisdiction and "specific" (sometimes called "case-linked") jurisdiction. *Goodyear*, 564 U.S., at 919, 131 S.Ct. 2846. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." *Id.*, at 924, 131 S.Ct. 2846. A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State. *Id.*, at 919, 131 S.Ct. 2846. But "only a limited set of affiliations with a forum will render a defendant amenable to" general jurisdiction in that State. *Daimler*, 571 U.S., at ——, 134 S.Ct., at 760.

[8] [9] [10] Specific jurisdiction is very different. In order for a state court to exercise specific jurisdiction, "the *suit* " must "aris[e] out of or relat[e] to the defendant's contacts with the *forum*." *Id.*, at ——, 134 S.Ct., at 754 (internal quotation marks omitted; emphasis added); see *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–473, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). In other words, there must be "an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*, 564 U.S., at 919, 131 S.Ct. 2846 (internal quotation marks and brackets omitted). For this reason, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Ibid.* (internal quotation marks omitted).

B

[11] [12] [13] [14] [15] In determining whether personal jurisdiction is present, a court must consider a variety of interests. These include "the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice." *Kulko v. Superior*

Court of Cal., City and County of San Francisco, 436 U.S. 84, 92, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978); see *Daimler, supra,* at ——— ——, n. 20, 134 S.Ct., at 762, n. 20; *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.,* 480 U.S. 102, 113, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987); *World-Wide Volkswagen,* 444 U.S., at 292, 100 S.Ct. 559. But the "primary concern" is "the burden on the defendant." *Id.,* at 292, 100 S.Ct. 559. Assessing this burden obviously requires a court to consider the practical problems resulting from litigating in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question. As we have put it, restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla,* 357 U.S. 235, 251, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). "[T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State ... implie[s] a limitation on the sovereignty of all its sister States." *World-Wide Volkswagen,* 444 U.S., at 293, 100 S.Ct. 559. And at times, this federalism interest may be decisive. As we explained in *World-Wide Volkswagen,* "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying ***1781** its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *Id.,* at 294, 100 S.Ct. 559.

III

A

[16] **[17]** Our settled principles regarding specific jurisdiction control this case. In order for a court to exercise specific jurisdiction over a claim, there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Goodyear,* 564 U.S., at 919, 131 S.Ct. 2846 (internal quotation marks and brackets in original omitted). When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. See *id.,* at 931, n. 6, 131 S.Ct. 2846 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales").

[18] **[19]** For this reason, the California Supreme Court's "sliding scale approach" is difficult to square with our precedents. Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction. For specific jurisdiction, a defendant's general connections with the forum are not enough. As we have said, "[a] corporation's 'continuous activity of some sorts within a state ... is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.' " *Id.,* at 927, 131 S.Ct. 2846 (quoting *International Shoe,* 326 U.S., at 318, 66 S.Ct. 154).

[20] The present case illustrates the danger of the California approach. The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents' claims. As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, "a defendant's relationship with a ... third party, standing alone, is an insufficient basis for jurisdiction." *Walden,* 571 U.S., at ——, 134 S.Ct., at 1123. This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient —or even relevant—that BMS conducted research in California on matters unrelated to Plavix. What is needed —and what is missing here—is a connection between the forum and the specific claims at issue.

Our decision in *Walden, supra,* illustrates this requirement. In that case, Nevada plaintiffs sued an out-of-state defendant for conducting an allegedly unlawful search

of the plaintiffs while they were in Georgia preparing to board a plane bound for Nevada. We held that the Nevada courts lacked specific jurisdiction even though the plaintiffs were Nevada residents and "suffered foreseeable harm in Nevada." *Id.*, at ——, 134 S.Ct., at 1124. Because the "*relevant* conduct occurred ***1782** entirely in Georgi[a] ... the mere fact that [this] conduct affected plaintiffs with connections to the forum State d [id] not suffice to authorize jurisdiction." *Id.*, at ——, 134 S.Ct., at 1126 (emphasis added).

In today's case, the connection between the nonresidents' claims and the forum is even weaker. The relevant plaintiffs are not California residents and do not claim to have suffered harm in that State. In addition, as in *Walden*, all the conduct giving rise to the nonresidents' claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction. See *World-Wide Volkswagen, supra*, at 295, 100 S.Ct. 559 (finding no personal jurisdiction in Oklahoma because the defendant "carr[ied] on no activity whatsoever in Oklahoma" and dismissing "the fortuitous circumstance that a single Audi automobile, sold [by defendants] in New York to New York residents, happened to suffer an accident while passing through Oklahoma" as an "isolated occurrence").

B

The nonresidents maintain that two of our cases support the decision below, but they misinterpret those precedents.

In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), a New York resident sued Hustler in New Hampshire, claiming that she had been libeled in five issues of the magazine, which was distributed throughout the country, including in New Hampshire, where it sold 10,000 to 15,000 copies per month. Concluding that specific jurisdiction was present, we relied principally on the connection between the circulation of the magazine in New Hampshire and damage allegedly caused within the State. We noted that "[f]alse statements of fact harm both the subject of the falsehood and the readers of the statement." *Id.*, at 776, 104 S.Ct. 1473 (emphasis deleted). This factor amply distinguishes *Keeton* from the present case, for here the nonresidents' claims involve no harm in California and no harm to California residents.

The nonresident plaintiffs in this case point to our holding in *Keeton* that there was jurisdiction in New Hampshire to entertain the plaintiff's request for damages suffered outside the State, *id.*, at 774, 104 S.Ct. 1473 but that holding concerned jurisdiction to determine *the scope of a claim* involving in-state injury and injury to residents of the State, not, as in this case, jurisdiction to entertain claims involving no in-state injury and no injury to residents of the forum State. *Keeton* held that there was jurisdiction in New Hampshire to consider the full measure of the plaintiff's claim, but whether she could actually recover out-of-state damages was a merits question governed by New Hampshire libel law. *Id.*, at 778, n. 9, 104 S.Ct. 1473.

The Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), which involved a class action filed in Kansas, is even less relevant. The Kansas court exercised personal jurisdiction over the claims of nonresident class members, and the defendant, Phillips Petroleum, argued that this violated the due process rights of these class members because they lacked minimum contacts with the State. [2] According to the defendant, the out-of-state class members should not have been kept in the case unless they affirmatively opted in, instead of merely failing to opt out after ***1783** receiving notice. *Id.*, at 812, 105 S.Ct. 2965.

Holding that there had been no due process violation, the Court explained that the authority of a State to entertain the claims of nonresident class members is entirely different from its authority to exercise jurisdiction over an out-of-state defendant. *Id.*, at 808–812, 105 S.Ct. 2965. Since *Shutts* concerned the due process rights of *plaintiffs*, it has no bearing on the question presented here.

Respondents nevertheless contend that *Shutts* supports their position because, in their words, it would be "absurd to believe that [this Court] would have reached the exact opposite result if the petitioner [Phillips] had only invoked its own due-process rights, rather than those of the non-resident plaintiffs." Brief for Respondents 28–29, n. 6 (emphasis deleted). But the fact remains that Phillips did not assert that Kansas improperly exercised personal jurisdiction over it, and the Court did not address that issue. [3] Indeed, the Court stated specifically that its "discussion of personal jurisdiction [did not] address class actions where the jurisdiction is asserted against a *defendant* class." *Shutts, supra*, at 812, n. 3, 105 S.Ct. 2965.

C

[21] In a last ditch contention, respondents contend that BMS's "decision to contract with a California company [McKesson] to distribute [Plavix] nationally" provides a sufficient basis for personal jurisdiction. Tr. of Oral Arg. 32. But as we have explained, "[t]he requirements of *International Shoe* ... must be met as to each defendant over whom a state court exercises jurisdiction." *Rush v. Savchuk*, 444 U.S. 320, 332, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980); see *Walden*, 571 U.S., at ——, 134 S.Ct., at 1123 ("[A] defendant's relationship with a ... third party, standing alone, is an insufficient basis for jurisdiction"). In this case, it is not alleged that BMS engaged in relevant acts together with McKesson in California. Nor is it alleged that BMS is derivatively liable for McKesson's conduct in California. And the nonresidents "have adduced no evidence to show how or by whom the Plavix they took was distributed to the pharmacies that dispensed it to them." 1 Cal.5th, at 815, 206 Cal.Rptr.3d 636, 377 P.3d, at 895 (Werdegar, J., dissenting) (emphasis deleted). See Tr. of Oral Arg. 33 ("It is impossible to trace a particular pill to a particular person.... It's not possible for us to track particularly to McKesson"). The bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State.

IV

Our straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horribles that respondents conjure up. See Brief for Respondents 38–47. Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over BMS. BMS concedes that such suits could be brought in either New York or Delaware. See Brief for Petitioner 13. Alternatively, the plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States. In addition, since our decision concerns the due process limits on the ***1784** exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court. See *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102, n. 5, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987).

* * *

The judgment of the California Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, dissenting.

Three years ago, the Court imposed substantial curbs on the exercise of general jurisdiction in its decision in *Daimler AG v. Bauman*, 571 U.S. ——, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014). Today, the Court takes its first step toward a similar contraction of specific jurisdiction by holding that a corporation that engages in a nationwide course of conduct cannot be held accountable in a state court by a group of injured people unless all of those people were injured in the forum State.

I fear the consequences of the Court's decision today will be substantial. The majority's rule will make it difficult to aggregate the claims of plaintiffs across the country whose claims may be worth little alone. It will make it impossible to bring a nationwide mass action in state court against defendants who are "at home" in different States. And it will result in piecemeal litigation and the bifurcation of claims. None of this is necessary. A core concern in this Court's personal jurisdiction cases is fairness. And there is nothing unfair about subjecting a massive corporation to suit in a State for a nationwide course of conduct that injures both forum residents and nonresidents alike.

I

Bristol–Myers Squibb is a Fortune 500 pharmaceutical company incorporated in Delaware and headquartered in New York. It employs approximately 25,000 people worldwide and earns annual revenues of over $15 billion. In the late 1990's, Bristol–Myers began to market and sell a prescription blood thinner called Plavix. Plavix was advertised as an effective tool for reducing the risk of blood clotting for those vulnerable to heart attacks and to strokes. The ads worked: At the height of its popularity,

Plavix was a blockbuster, earning Bristol–Myers billions of dollars in annual revenues.

Bristol–Myers' advertising and distribution efforts were national in scope. It conducted a single nationwide advertising campaign for Plavix, using television, magazine, and Internet ads to broadcast its message. A consumer in California heard the same advertisement as a consumer in Maine about the benefits of Plavix. Bristol–Myers' distribution of Plavix also proceeded through nationwide channels: Consistent with its usual practice, it relied on a small number of wholesalers to distribute Plavix throughout the country. One of those distributors, McKesson Corporation, was named as a defendant below; during the relevant time period, McKesson was responsible for almost a quarter of Bristol–Myers' revenue worldwide.

The 2005 publication of an article in the New England Journal of Medicine questioning the efficacy and safety of Plavix put Bristol–Myers on the defensive, as consumers around the country began to claim that they were injured by the drug. The plaintiffs in these consolidated cases are 86 people who allege they were injured by Plavix in California and several hundred others who say they were injured by ***1785** the drug in other States. [1] They filed their suits in California Superior Court, raising product-liability claims against Bristol–Myers and McKesson. Their claims are "materially identical," as Bristol–Myers concedes. See Brief for Petitioner 4, n. 1. Bristol–Myers acknowledged it was subject to suit in California state court by the residents of that State. But it moved to dismiss the claims brought by the nonresident plaintiffs—respondents here—for lack of jurisdiction. The question here, accordingly, is not whether Bristol–Myers is subject to suit in California on claims that arise out of the design, development, manufacture, marketing, and distribution of Plavix—it is. The question is whether Bristol–Myers is subject to suit in California only on the residents' claims, or whether a state court may also hear the nonresidents' "identical" claims.

II

A

As the majority explains, since our pathmarking opinion in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), the touchstone of the personal-jurisdiction analysis has been the question whether a defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.*, at 316, 66 S.Ct. 154 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). For decades this Court has considered that question through two different jurisdictional frames: "general" and "specific" jurisdiction. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, nn. 8–9, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). Under our current case law, a state court may exercise general, or all-purpose, jurisdiction over a defendant corporation only if its "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011). [2]

If general jurisdiction is not appropriate, however, a state court can exercise only specific, or case-linked, jurisdiction over a dispute. *Id.*, at 923–924, 131 S.Ct. 2846. Our cases have set out three conditions for the exercise of specific jurisdiction over a nonresident defendant. 4A C. Wright, A. Miller, & A. Steinman, Federal Practice and Procedure § 1069, pp. 22–78 (4th ed. 2015) (Wright); see also *id.*, at 22–27, n. 10 (collecting authority). First, the defendant must have " 'purposefully avail[ed] itself of the privilege of conducting activities within the forum State' " or have purposefully directed its conduct into the forum State. *J. McIntyre Machinery, Ltd.* ***1786** *v. Nicastro*, 564 U.S. 873, 877, 131 S.Ct. 2780, 180 L.Ed.2d 765 (2011) (plurality opinion) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)). Second, the plaintiff's claim must "arise out of or relate to" the defendant's forum conduct. *Helicopteros*, 466 U.S., at 414, 104 S.Ct. 1868. Finally, the exercise of jurisdiction must be reasonable under the circumstances. *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 113–114, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477–478, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). The factors relevant to such an analysis include "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in

obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Id.*, at 477, 105 S.Ct. 2174 (internal quotation marks omitted).

B

Viewed through this framework, the California courts appropriately exercised specific jurisdiction over respondents' claims.

First, there is no dispute that Bristol–Myers "purposefully avail[ed] itself," *Nicastro*, 564 U.S., at 877, 131 S.Ct. 2780 of California and its substantial pharmaceutical market. Bristol–Myers employs over 400 people in California and maintains half a dozen facilities in the State engaged in research, development, and policymaking. *Ante*, at 1777 – 1778. It contracts with a California-based distributor, McKesson, whose sales account for a significant portion of its revenue. *Supra*, at 1784 – 1785. And it markets and sells its drugs, including Plavix, in California, resulting in total Plavix sales in that State of nearly $1 billion during the period relevant to this suit.

Second, respondents' claims "relate to" Bristol–Myers' in-state conduct. A claim "relates to" a defendant's forum conduct if it has a "connect[ion] with" that conduct. *International Shoe*, 326 U.S., at 319, 66 S.Ct. 154. So respondents could not, for instance, hale Bristol–Myers into court in California for negligently maintaining the sidewalk outside its New York headquarters—a claim that has no connection to acts Bristol–Myers took in California. But respondents' claims against Bristol–Myers look nothing like such a claim. Respondents' claims against Bristol–Myers concern conduct materially identical to acts the company took in California: its marketing and distribution of Plavix, which it undertook on a nationwide basis in all 50 States. That respondents were allegedly injured by this nationwide course of conduct in Indiana, Oklahoma, and Texas, and not California, does not mean that their claims do not "relate to" the advertising and distribution efforts that Bristol–Myers undertook in that State. All of the plaintiffs—residents and nonresidents alike—allege that they were injured by the same essential acts. Our cases require no connection more direct than that.

Finally, and importantly, there is no serious doubt that the exercise of jurisdiction over the nonresidents' claims is reasonable. Because Bristol–Myers already faces claims that are identical to the nonresidents' claims in this suit, it will not be harmed by having to defend against respondents' claims: Indeed, the alternative approach—litigating those claims in separate suits in as many as 34 different States—would prove far more burdensome. By contrast, the plaintiffs' "interest in obtaining convenient and effective relief," *Burger King*, 471 U.S., at 477, 105 S.Ct. 2174 (internal quotation marks omitted), ***1787** is obviously furthered by participating in a consolidated proceeding in one State under shared counsel, which allows them to minimize costs, share discovery, and maximize recoveries on claims that may be too small to bring on their own. Cf. *American Express Co. v. Italian Colors Restaurant*, 570 U.S. ——, ——, 133 S.Ct. 2304, 2316, 186 L.Ed.2d 417 (2013) (KAGAN, J., dissenting) ("No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands"). California, too, has an interest in providing a forum for mass actions like this one: Permitting the nonresidents to bring suit in California alongside the residents facilitates the efficient adjudication of the residents' claims and allows it to regulate more effectively the conduct of both nonresident corporations like Bristol–Myers and resident ones like McKesson.

Nothing in the Due Process Clause prohibits a California court from hearing respondents' claims—at least not in a case where they are joined to identical claims brought by California residents.

III

Bristol–Myers does not dispute that it has purposefully availed itself of California's markets, nor—remarkably—did it argue below that it would be "unreasonable" for a California court to hear respondents' claims. See 1 Cal.5th 783, 799, n. 2, 206 Cal.Rptr.3d 636, 377 P.3d 874, 885, n. 2 (2016). Instead, Bristol–Myers contends that respondents' claims do not "arise out of or relate to" its California conduct. The majority agrees, explaining that no "adequate link" exists "between the State and the nonresidents' claims," *ante*, at 1781 – 1782—a result that it says follows from "settled principles [of] specific jurisdiction," *ante*, at 1780 – 1781. But our precedents

do not require this result, and common sense says that it cannot be correct.

A

The majority casts its decision today as compelled by precedent. *Ibid.* But our cases point in the other direction.

The majority argues at length that the exercise of specific jurisdiction in this case would conflict with our decision in *Walden v. Fiore*, 571 U.S. ——, 134 S.Ct. 1115, 188 L.Ed.2d 12 (2014). That is plainly not true. *Walden* concerned the requirement that a defendant "purposefully avail" himself of a forum State or "purposefully direc[t]" his conduct toward that State, *Nicastro*, 564 U.S., at 877, 131 S.Ct. 2780 not the separate requirement that a plaintiff's claim "arise out of or relate to" a defendant's forum contacts. The lower court understood the case that way. See *Fiore v. Walden*, 688 F.3d 558, 576–582 (C.A.9 2012). The parties understood the case that way. See Brief for Petitioner 17–31, Brief for Respondent 20–44, Brief for United States as *Amicus Curiae* 12–18, in *Walden v. Fiore*, O.T. 2013, No. 12–574. And courts and commentators have understood the case that way. See, *e.g.*, 4 Wright § 1067.1, at 388–389. *Walden* teaches only that a defendant must have purposefully availed itself of the forum, and that a plaintiff cannot rely solely on a defendant's contacts with a forum resident to establish the necessary relationship. See 571 U.S., at ——, 134 S.Ct., at 1122 ("[T]he plaintiff cannot be the only link between the defendant and the forum"). But that holding has nothing to do with the dispute between the parties: Bristol-Myers has purposefully availed itself of California —to the tune of millions of dollars in annual revenue. Only if its language is taken out of context, *ante*, at 1781 – 1782, can *Walden* be made to seem relevant to the case at hand.

*1788 By contrast, our decision in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984), suggests that there should be no such barrier to the exercise of jurisdiction here. In *Keeton*, a New York resident brought suit against an Ohio corporation, a magazine, in New Hampshire for libel. She alleged that the magazine's nationwide course of conduct—its publication of defamatory statements—had injured her in every State, including New Hampshire. This Court unanimously rejected the defendant's argument that it should not be subject to "nationwide damages" when only a small portion of those damages arose in the forum State, *id.*, at 781, 104 S.Ct. 1473; exposure to such liability, the Court explained, was the consequence of having "continuously and deliberately exploited the New Hampshire market," *ibid.* The majority today dismisses *Keeton* on the ground that the defendant there faced one plaintiff's claim arising out of its nationwide course of conduct, whereas Bristol-Myers faces many more plaintiffs' claims. See *ante*, at 1782 – 1783. But this is a distinction without a difference: In either case, a defendant will face liability in a single State for a single course of conduct that has impact in many States. *Keeton* informs us that there is no unfairness in such a result.

The majority's animating concern, in the end, appears to be federalism: "[T]erritorial limitations on the power of the respective States," we are informed, may—and today do—trump even concerns about fairness to the parties. *Ante*, at 1780. Indeed, the majority appears to concede that this is not, at bottom, a case about fairness but instead a case about power: one in which " 'the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; ... the forum State has a strong interest in applying its law to the controversy; [and] the forum State is the most convenient location for litigation' " but personal jurisdiction still will not lie. *Ante*, at 1780 – 1781 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)). But I see little reason to apply such a principle in a case brought against a large corporate defendant arising out of its nationwide conduct. What interest could any single State have in adjudicating respondents' claims that the other States do not share? I would measure jurisdiction first and foremost by the yardstick set out in *International Shoe*—"fair play and substantial justice," 326 U.S., at 316, 66 S.Ct. 154 (internal quotation marks omitted). The majority's opinion casts that settled principle aside.

B

I fear the consequences of the majority's decision today will be substantial. Even absent a rigid requirement that a defendant's in-state conduct must actually cause a plaintiff's claim,[3] the upshot of today's opinion is that plaintiffs cannot join their claims together and sue a defendant in a State in which only some of them

have *1789 been injured. That rule is likely to have consequences far beyond this case.

First, and most prominently, the Court's opinion in this case will make it profoundly difficult for plaintiffs who are injured in different States by a defendant's nationwide course of conduct to sue that defendant in a single, consolidated action. The holding of today's opinion is that such an action cannot be brought in a State in which only some plaintiffs were injured. Not to worry, says the majority: The plaintiffs here could have sued Bristol–Myers in New York or Delaware; could "probably" have subdivided their separate claims into 34 lawsuits in the States in which they were injured; and might have been able to bring a single suit in federal court (an "open ... question"). *Ante,* at 1783 – 1784. Even setting aside the majority's caveats, what is the purpose of such limitations? What interests are served by preventing the consolidation of claims and limiting the forums in which they can be consolidated? The effect of the Court's opinion today is to eliminate nationwide mass actions in any State other than those in which a defendant is " 'essentially at home.' "[4] See *Daimler,* 571 U.S., at ——, 134 S.Ct., at 754. Such a rule hands one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions.

Second, the Court's opinion today may make it impossible to bring certain mass actions at all. After this case, it is difficult to imagine where it might be possible to bring a nationwide mass action against two or more defendants headquartered and incorporated in different States. There will be no State where both defendants are "at home," and so no State in which the suit can proceed. What about a nationwide mass action brought against a defendant not headquartered or incorporated in the United States? Such a defendant is not "at home" in any State. Cf. *id.,* at —— – ——, 134 S.Ct., at 772–773 (SOTOMAYOR, J., concurring in judgment). Especially in a world in which defendants are subject to general jurisdiction in only a handful of States, see *ibid.,* the effect of today's opinion will be to curtail—and in some cases eliminate—plaintiffs' ability to hold corporations fully accountable for their nationwide conduct.

The majority chides respondents for conjuring a "parade of horribles," *ante,* at 1783, but says nothing about how suits like those described here will survive its opinion in this case. The answer is simple: They will not.

* * *

It "does not offend 'traditional notions of fair play and substantial justice,' " *International Shoe,* 326 U.S., at 316, 66 S.Ct. 154 to permit plaintiffs to aggregate claims arising out of a single nationwide course of conduct in a single suit in a single State where some, but not all, were injured. But that is exactly what the Court holds today is barred by the Due Process Clause.

This is not a rule the Constitution has required before. I respectfully dissent.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 California law provides that its courts may exercise jurisdiction "on any basis not inconsistent with the Constitution ... of the United States," Cal. Civ. Proc. Code Ann. § 410.10 (West 2004); see *Daimler AG v. Bauman,* 571 U.S. ——, ——, 134 S.Ct. 746, 753, 187 L.Ed.2d 624 (2014).

2 The Court held that the defendant had standing to argue that the Kansas court had improperly exercised personal jurisdiction over the claims of the out-of-state class members because that holding materially affected the defendant's own interests, specifically, the res judicata effect of an adverse judgment. 472 U.S., at 803–806, 105 S.Ct. 2965.

3 Petitioner speculates that Phillips did not invoke its own due process rights because it was believed at the time that the Kansas court had general jurisdiction. See Reply Brief 7, n. 1.

1 Like the parties and the majority, I refer to these people as "residents" and "nonresidents" of California as a convenient shorthand. See *ante*, at 1778; Brief for Petitioner 4–5, n. 1; Brief for Respondents 2, n. 1. For jurisdictional purposes, the important question is generally (as it is here) where a plaintiff was injured, not where he or she resides.

2 Respondents do not contend that the California courts would be able to exercise general jurisdiction over Bristol–Myers —a concession that follows directly from this Court's opinion in *Daimler AG v. Bauman*, 571 U.S. ——, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014). As I have explained, I believe the restrictions the Court imposed on general jurisdiction in *Daimler* were ill advised. See *BNSF R. Co. v. Tyrrell*, 581 U.S. ——, ——, 137 S.Ct. 1549, —— L.Ed.2d —— (2017) (SOTOMAYOR, J., concurring in part and dissenting in part); *Daimler*, 571 U.S., at ——, 134 S.Ct. at 772–773 (SOTOMAYOR, J., concurring in judgment). But I accept respondents' concession, for the purpose of this case, that Bristol–Myers is not subject to general jurisdiction in California.

3 Bristol–Myers urges such a rule upon us, Brief for Petitioner 14–37, but its adoption would have consequences far beyond those that follow from today's factbound opinion. Among other things, it might call into question whether even a plaintiff *injured* in a State by an item identical to those sold by a defendant in that State could avail himself of that State's courts to redress his injuries—a result specifically contemplated by *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). See Brief for Civil Procedure Professors as *Amici Curiae* 14–18; see also *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 906–907, 131 S.Ct. 2780, 180 L.Ed.2d 765 (2011) (GINSBURG, J., dissenting). That question, and others like it, appears to await another case.

4 The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there. Cf. *Devlin v. Scardelletti*, 536 U.S. 1, 9–10, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002) ("Nonnamed class members ... may be parties for some purposes and not for others"); see also Wood, Adjudicatory Jurisdiction and Class Actions, 62 Ind. L.J. 597, 616–617 (1987).

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta Harris v. comScore, Inc., N.D.Ill., April 2, 2013

133 S.Ct. 1426
Supreme Court of the United States

COMCAST CORPORATION, et al., Petitioners
v.
Caroline BEHREND et al.

No. 11–864.
|
Argued Nov. 5, 2012.
|
Decided March 27, 2013.

Synopsis

Background: Customers brought antitrust class action against cable television company, alleging that company obtained monopoly via transactions with competitors for allocation of regional cable markets and that company engaged in conduct excluding and preventing competition. The United States District Court for the Eastern District of Pennsylvania, John R. Padova, J., 264 F.R.D. 150, certified class, and company appealed. The United States Court of Appeals for the Third Circuit, Aldisert, Circuit Judge, 655 F.3d 182, affirmed. Certiorari was granted.

[Holding:] The Supreme Court, Justice Scalia, held that regression model developed by plaintiffs' expert could not be accepted as evidence that damages were susceptible of measurement across entire class, as required for certification of class on theory that questions of law or fact common to class members predominated over any questions affecting only individual members.

Reversed.

Justices Ginsburg and Breyer dissented and filed opinion, in which Justices Sotomayor and Kagan joined.

West Headnotes (9)

[1] Federal Civil Procedure
Class Actions

Class action is exception to usual rule that litigation is conducted by and on behalf of individual named parties only. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

189 Cases that cite this headnote

[2] Federal Civil Procedure
Evidence;pleadings and supplementary material

Party seeking to maintain class action must affirmatively demonstrate his compliance with Federal Rule of Civil Procedure governing class litigation. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

147 Cases that cite this headnote

[3] Federal Civil Procedure
Evidence;pleadings and supplementary material

Federal Rule of Civil Procedure governing class litigation does not set forth mere pleading standard; rather, party seeking to maintain class action must not only be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by first subsection of the Rule, but must also satisfy through evidentiary proof at least one provision of second subsection. Fed.Rules Civ.Proc.Rule 23(a, b), 28 U.S.C.A.

272 Cases that cite this headnote

[4] Federal Civil Procedure
Consideration of merits

Analysis as to whether requirements for class certification are met will frequently entail overlap with merits of plaintiff's underlying claim, since class determination generally involves considerations that are enmeshed in factual and legal issues comprising plaintiff's cause of action. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

169 Cases that cite this headnote

[5] **Federal Civil Procedure**
Common interest in subject matter, questions and relief;damages issues

Provision of Federal Rule of Civil Procedure authorizing certification of class when, inter alia, questions of law or fact common to class members predominated over any questions affecting only individual members is an adventuresome innovation, that is designed for situations in which class-action treatment is not as clearly called for. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

481 Cases that cite this headnote

[6] **Federal Civil Procedure**
Common interest in subject matter, questions and relief;damages issues

Federal Civil Procedure
Evidence;pleadings and supplementary material

Federal Civil Procedure
Consideration of merits

In deciding whether damages were capable of measurement on classwide basis, as required for certification of class upon theory that questions of law or fact common to class members predominated over any questions affecting only individual members, lower court should not have refused to entertain arguments against damages model designed by plaintiffs' expert simply because those arguments would also be pertinent to the merits determination. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

358 Cases that cite this headnote

[7] **Federal Civil Procedure**
Evidence;pleadings and supplementary material

Federal Civil Procedure
Antitrust plaintiffs

Regression model that attempted to calculate what competitive price would have been for cable television services in relevant market if market contained none of the four anticompetitive impacts that plaintiffs attributed to cable television provider's conduct, on assumption that claims based on each of these anticompetitive impacts would be accepted for class certification, and with no attempt to measure the damages attributable to each such impact, could not, in case in which district court accepted only one antitrust impact as capable of classwide proof, be accepted as evidence that damages as result of this impact were susceptible of measurement across entire class, as required for certification of class on theory that questions of law or fact common to class members predominated over any questions affecting only individual members. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

142 Cases that cite this headnote

[8] **Federal Civil Procedure**
Common interest in subject matter, questions and relief;damages issues

Federal Civil Procedure
Evidence;pleadings and supplementary material

Model purporting to serve as evidence of damages in class action must measure only those damages attributable to plaintiffs' theory of liability; if model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across entire class, as required for certification of class on theory that questions of law or fact common to class members predominated over any questions affecting only individual members. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

832 Cases that cite this headnote

[9] **Federal Civil Procedure**
Antitrust plaintiffs

While damages calculations did not need to be exact in order to support determination that damages from defendant's alleged anticompetitive activity were susceptible of measurement across entire class, as required for certification of antitrust class on theory that questions of law or fact common to class members predominated over any questions affecting only individual members, any model supporting plaintiffs' damages case had to be consistent with its liability case, particularly with respect to alleged anticompetitive effect of violation, and district court, in deciding whether to certify class, had to conduct rigorous analysis to determine whether that was so. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

545 Cases that cite this headnote

**1428 *Syllabus* *

*27 Petitioners, Comcast Corporation and its subsidiaries, allegedly "cluster" their cable television operations within a particular region by swapping their systems outside the region for competitor systems inside the region. Respondents, named plaintiffs in this class-action antitrust suit, claim that they and other Comcast subscribers in the Philadelphia "cluster" are harmed because Comcast's strategy lessens competition and leads to supra-competitive prices. They sought class certification under Federal Rule of Civil Procedure 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." The District Court required them to show (1) that the "antitrust impact" of the violation could be proved at trial through evidence common to the class and (2) that the damages were measurable on a classwide basis through a "common methodology." The court accepted only one of respondents' four proposed theories of antitrust impact: that Comcast's actions lessened competition from "overbuilders," *i.e.*, companies that build competing networks in areas where an incumbent cable company already operates. It then certified the class, finding that the damages from overbuilder deterrence could be calculated on a classwide basis, even though respondents' expert acknowledged that his regression model did not isolate damages resulting from any one of respondents' theories. In affirming, the Third Circuit refused to consider petitioners' argument that the model failed to attribute damages to overbuilder deterrence because doing so would require reaching the merits of respondents' claims at the class certification stage.

Held : Respondents' class action was improperly certified under Rule 23(b)(3). Pp. 1432 – 1435.

(a) A party seeking to maintain a class action must be prepared to show that Rule 23(a)'s numerosity, commonality, typicality, and adequacy-of-representation requirements have been met, *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. ——, ——, 131 S.Ct. 2541, 180 L.Ed.2d 374, and must satisfy through evidentiary proof at least one of Rule 23(b)'s provisions. The same analytical principles govern certification **1429 under both Rule 23(a) and Rule 23(b). Courts may have to " 'probe behind the pleadings before coming to rest on the certification question,' and [a] certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that [Rule 23's] prerequisites *28 ... have been satisfied.' " *Ibid.* The analysis will frequently "overlap with the merits of the plaintiff's underlying claim" because a " 'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Ibid.* P. 1432.

(b) The Third Circuit ran afoul of this Court's precedents when it refused to entertain arguments against respondents' damages model that bore on the propriety of class certification simply because they would also be pertinent to the merits determination. If they prevail, respondents would be entitled only to damages resulting from reduced overbuilder competition. A model that does not attempt to measure only those damages attributable to that theory cannot establish that damages are susceptible of measurement across the entire class for Rule 23(b)(3) purposes. The lower courts' contrary reasoning flatly contradicts this Court's cases, which require a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim. *Wal–Mart, supra*, at ——, and n. 6, 131 S.Ct. 2541. Pp. 1434 – 1435.

(c) Under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages can be measured classwide. The figure

respondents' expert used was calculated assuming the validity of all four theories of antitrust impact initially advanced by respondents. Because the model cannot bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to overbuilder deterrence, Rule 23(b)(3) cannot authorize treating subscribers in the Philadelphia cluster as members of a single class. Pp. 1433 – 1435.

655 F.3d 182, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and ALITO, JJ., joined. GINSBURG and BREYER, JJ., filed a dissenting opinion, in which SOTOMAYOR and KAGAN, JJ., joined.

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Opinion

Justice SCALIA delivered the opinion of the Court.

***29** The District Court and the Court of Appeals approved certification of a class of more than 2 million current and former Comcast subscribers who seek damages ****1430** for alleged violations of the federal antitrust laws. We consider whether certification was appropriate under Federal Rule of Civil Procedure 23(b)(3).

I

Comcast Corporation and its subsidiaries, petitioners here, provide cable-television services to residential and commercial customers. From 1998 to 2007, petitioners engaged in a series of transactions that the parties have described as "clustering," a strategy of concentrating operations within a particular region. The region at issue here, which the parties have referred to as the Philadelphia "cluster" or the Philadelphia "Designated Market Area" (DMA), includes 16 counties located in Pennsylvania, Delaware, and New Jersey.[1] Petitioners pursued their clustering strategy by acquiring competitor cable providers in the region and swapping their own systems outside the region for competitor systems located in the region. For instance, in 2001, petitioners ***30** obtained Adelphia Communications' cable systems in the Philadelphia DMA, along with its 464,000 subscribers; in exchange, petitioners sold to Adelphia their systems in Palm Beach, Florida, and Los Angeles, California. As a result of nine clustering transactions, petitioners' share of subscribers in the region allegedly increased from 23.9 percent in 1998 to 69.5 percent in 2007. See 264 F.R.D. 150, 156, n. 8, 160 (E.D.Pa.2010).

The named plaintiffs, respondents here, are subscribers to Comcast's cable-television services. They filed a class-action antitrust suit against petitioners, claiming that petitioners entered into unlawful swap agreements, in violation of § 1 of the Sherman Act, and monopolized or attempted to monopolize services in the cluster, in violation of § 2. Ch. 647, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2. Petitioners' clustering scheme, respondents contended, harmed subscribers in the Philadelphia cluster by eliminating competition and holding prices for cable services above competitive levels.

Respondents sought to certify a class under Federal Rule of Civil Procedure 23(b)(3). That provision permits certification only if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." The District Court held, and it is uncontested here, that to meet the predominance requirement respondents had to show (1) that the existence of individual injury resulting from the alleged antitrust violation (referred to as "antitrust impact") was "capable of proof at trial through evidence that [was] common to the class rather than individual to

its members"; and (2) that the damages resulting from that injury were measurable "on a class-wide basis" through use of a "common methodology." 264 F.R.D., at 154. [2]

*31 Respondents proposed four theories of antitrust impact: First, Comcast's clustering made it profitable for Comcast to withhold local sports programming from its competitors, resulting in decreased market penetration by direct broadcast satellite providers. Second, Comcast's activities reduced the level of competition from "overbuilders," **1431 companies that build competing cable networks in areas where an incumbent cable company already operates. Third, Comcast reduced the level of "benchmark" competition on which cable customers rely to compare prices. Fourth, clustering increased Comcast's bargaining power relative to content providers. Each of these forms of impact, respondents alleged, increased cable subscription rates throughout the Philadelphia DMA.

The District Court accepted the overbuilder theory of antitrust impact as capable of classwide proof and rejected the rest. *Id.*, at 165, 174, 178, 181. Accordingly, in its certification order, the District Court limited respondents' "proof of antitrust impact" to "the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA." App. to Pet. for Cert. 192a–193a. [3]

The District Court further found that the damages resulting from overbuilder-deterrence impact could be calculated on a classwide basis. To establish such damages, respondents had relied solely on the testimony of Dr. James McClave. *32 Dr. McClave designed a regression model comparing actual cable prices in the Philadelphia DMA with hypothetical prices that would have prevailed but for petitioners' allegedly anticompetitive activities. The model calculated damages of $875,576,662 for the entire class. App. 1388a (sealed). As Dr. McClave acknowledged, however, the model did not isolate damages resulting from any one theory of antitrust impact. *Id.*, at 189a–190a. The District Court nevertheless certified the class.

A divided panel of the Court of Appeals affirmed. On appeal, petitioners contended the class was improperly certified because the model, among other shortcomings, failed to attribute damages resulting from overbuilder deterrence, the only theory of injury remaining in the case. The court refused to consider the argument because, in its view, such an "attac[k] on the merits of the methodology [had] no place in the class certification inquiry." 655 F.3d 182, 207 (C.A.3 2011). The court emphasized that, "[a]t the class certification stage," respondents were not required to "tie each theory of antitrust impact to an exact calculation of damages." *Id.*, at 206. According to the court, it had "not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculative." *Ibid.* Rather, the court said, respondents must "assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations." *Ibid.* In the court's view, that burden was met because respondents' model calculated "supra-competitive prices regardless of the type of anticompetitive conduct." *Id.*, at 205.

We granted certiorari. 567 U.S. ——, 133 S.Ct. 24, 183 L.Ed.2d 673 (2012). [4]

*33 **1432 II

[1] [2] [3] The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). To come within the exception, a party seeking to maintain a class action "must affirmatively demonstrate his compliance" with Rule 23. *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. ——, ——, 131 S.Ct. 2541, 2551–2552, 180 L.Ed.2d 374 (2011). The Rule "does not set forth a mere pleading standard." *Ibid.* Rather, a party must not only "be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact," typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a). *Ibid.* The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b). The provision at issue here is Rule 23(b)(3), which requires a court to find that "the questions of law or fact common to class members predominate over any questions affecting only individual members."

[4] Repeatedly, we have emphasized that it " 'may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,' and that certification is proper only if 'the trial court is

satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.' " *Ibid.* (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160–161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)). Such an analysis will frequently entail "overlap with the ***34** merits of the plaintiff's underlying claim." 564 U.S., at ——, 131 S.Ct., at 2551. That is so because the " 'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Ibid.* (quoting *Falcon, supra*, at 160, 102 S.Ct. 2364).

[5] The same analytical principles govern Rule 23(b). If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623–624, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Rule 23(b)(3), as an " 'adventuresome innovation,' " is designed for situations " 'in which "class-action treatment is not as clearly called for." ' " *Wal-Mart, supra*, at ——, 131 S.Ct., at 2558 (quoting *Amchem*, 521 U.S., at 614–615, 117 S.Ct. 2231). That explains Congress's addition of procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (*e.g.*, an opportunity to opt out), and the court's duty to take a " 'close look' " at whether common questions predominate over individual ones. *Id.*, at 615, 117 S.Ct. 2231.

III

[6] **[7]** Respondents' class action was improperly certified under Rule 23(b)(3). By refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, ****1433** simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class. This case thus turns on the straightforward application of class-certification principles; it provides no occasion for the dissent's extended discussion, *post*, at 1437 – 1441 (GINSBURG and BREYER, JJ., dissenting), of substantive antitrust law.

*35 A

[8] **[9]** We start with an unremarkable premise. If respondents prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court. It follows that a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3). Calculations need not be exact, see *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 (1931), but at the class-certification stage (as at trial), any model supporting a "plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation." ABA Section of Antitrust Law, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010); see, *e.g.*, *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1224 (C.A.9 1997). And for purposes of Rule 23, courts must conduct a " 'rigorous analysis' " to determine whether that is so. *Wal-Mart, supra*, at ——, 131 S.Ct., at 2551–2552.

The District Court and the Court of Appeals saw no need for respondents to "tie each theory of antitrust impact" to a calculation of damages. 655 F.3d, at 206. That, they said, would involve consideration of the "merits" having "no place in the class certification inquiry." *Id.*, at 206–207. That reasoning flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim. *Wal-Mart, supra*, at ——, and n. 6, 131 S.Ct., at 2551–2552, and n. 6. The Court of Appeals simply concluded that respondents "provided a method to measure and quantify damages on a classwide basis," finding it unnecessary to decide "whether the methodology [was] a just and reasonable inference or speculative." 655 F.3d, at 206. Under that ***36** logic, at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements

may be. Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity.

B

There is no question that the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised.[5] The scheme devised by respondents' **1434 expert, Dr. McClave, sought to establish a "but for" baseline—a figure that would show what the competitive prices would have been if there had been no antitrust violations. Damages would then be determined by comparing to that baseline what the actual prices were during the charged period. The "but for" figure was calculated, however, by assuming a market that contained none of the four distortions that respondents attributed to petitioners' actions. In other words, the model assumed the validity of all four theories of antitrust impact initially advanced by respondents: decreased penetration by satellite providers, overbuilder deterrence, lack of benchmark competition, and increased bargaining power. At the evidentiary hearing, Dr. McClave expressly admitted that the model calculated damages resulting from "the alleged anticompetitive conduct *37 as a whole" and did not attribute damages to any one particular theory of anticompetitive impact. App. 189a–190a, 208a.

This methodology might have been sound, and might have produced commonality of damages, if all four of those alleged distortions remained in the case. But as Judge Jordan's partial dissent pointed out:

> "[B]ecause the only surviving theory of antitrust impact is that clustering reduced overbuilding, for Dr. McClave's comparison to be relevant, his benchmark counties must reflect the conditions that would have prevailed in the Philadelphia DMA but for the alleged reduction in overbuilding. In all respects unrelated to reduced overbuilding, the benchmark counties should reflect the actual conditions in the Philadelphia DMA, or else the model will identify 'damages' that are not the result of reduced overbuilding, or, in other words, that are not the certain result of the wrong." 655 F.3d, at 216 (internal quotation marks omitted).

The majority's only response to this was that "[a]t the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations." *Id.*, at 206. But such assurance is not provided by a methodology that identifies damages that are not the result of the wrong. For all we know, cable subscribers in Gloucester County may have been overcharged because of petitioners' alleged elimination of satellite competition (a theory of liability that is not capable of classwide proof); while subscribers in Camden County may have paid elevated prices because of petitioners' increased bargaining power vis-à-vis content providers (another theory that is not capable of classwide proof); while yet other subscribers in Montgomery County may have paid rates produced by the combined effects *38 of multiple forms of alleged antitrust harm; and so on. The permutations involving four theories of liability **1435 and 2 million subscribers located in 16 counties are nearly endless.

In light of the model's inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class.[6] Prices whose level above what an expert deems "competitive" has been caused by factors unrelated to an accepted theory of antitrust harm are not "anticompetitive" in any sense relevant here. "The first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*." Federal Judicial Center, Reference Manual on Scientific Evidence 432 (3d ed. 2011) (emphasis added). The District Court and the Court of Appeals ignored that first step entirely.

The judgment of the Court of Appeals for the Third Circuit is reversed.

It is so ordered.

Justice GINSBURG and Justice BREYER, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

Today the Court reaches out to decide a case hardly fit for our consideration. On both procedural and substantive grounds, we dissent.

I

This case comes to the Court infected by our misguided reformulation of the question presented. For that reason *39 alone, we would dismiss the writ of certiorari as improvidently granted.

Comcast sought review of the following question: "[W]hether a district court may certify a class action without resolving 'merits arguments' that bear on [Federal Rule of Civil Procedure] 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)." Pet. for Cert. i. We granted review of a different question: "Whether a district court may certify a class action without resolving *whether the plaintiff class has introduced admissible evidence*, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." 567 U.S. ——, 133 S.Ct. 24, 183 L.Ed.2d 673 (2012) (emphasis added).

Our rephrasing shifted the focus of the dispute from the District Court's Rule 23(b)(3) analysis to its attention (or lack thereof) to the admissibility of expert testimony. The parties, responsively, devoted much of their briefing to the question whether the standards for admissibility of expert evidence set out in Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), apply in class certification proceedings. See Brief for Petitioners 35–49; Brief for Respondents 24–37. Indeed, respondents confirmed at oral argument that they understood our rewritten question to center on admissibility, not Rule 23(b)(3). See, *e.g.*, Tr. of Oral Arg. 25.

As it turns out, our reformulated question was inapt. To preserve a claim of error in the admission of evidence, a party must timely object to or move to strike the evidence. Fed. Rule Evid. 103(a)(1). In **1436 the months preceding the District Court's class certification order, Comcast did not object to the admission of Dr. McClave's damages model under Rule 702 or *Daubert*. Nor did Comcast move to strike his testimony and expert report. Consequently, Comcast forfeited any objection to the admission of Dr. McClave's model at the certification stage. At this late date, Comcast may *40 no longer argue that respondents' damages evidence was inadmissible.

Comcast's forfeiture of the question on which we granted review is reason enough to dismiss the writ as improvidently granted. See *Rogers v. United States*, 522 U.S. 252, 259, 118 S.Ct. 673, 139 L.Ed.2d 686 (1998) (O'Connor, J., concurring in result) ("[W]e ought not to decide the question if it has not been cleanly presented."); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183, 79 S.Ct. 710, 3 L.Ed.2d 723 (1959) (dismissal appropriate in light of "circumstances ... not fully apprehended at the time certiorari was granted" (internal quotation marks omitted)). The Court, however, elects to evaluate whether respondents "failed to show that the case is susceptible to awarding damages on a class-wide basis." *Ante*, at 1431, n. 4 (internal quotation marks omitted). To justify this second revision of the question presented, the Court observes that Comcast "argued below, and continue[s] to argue here, that certification was improper because respondents had failed to establish that damages could be measured on a classwide basis." *Ibid.* And so *Comcast* did, in addition to endeavoring to address the question on which we granted review. By treating the first part of our reformulated question as though it did not exist, the Court is hardly fair to respondents.

Abandoning the question we instructed the parties to brief does "not reflect well on the processes of the Court." *Redrup v. New York*, 386 U.S. 767, 772, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967) (Harlan, J., dissenting). Taking their cue from our order, respondents did not train their energies on defending the District Court's finding of predominance in their briefing or at oral argument. The Court's newly revised question, focused on predominance, phrased only after briefing was done, left respondents without an unclouded opportunity to air the issue the Court today decides against them. And by resolving a complex and fact-intensive question without the benefit of full briefing, the Court invites the error into which it has fallen. See *infra*, at 1437 – 1441.

*41 II

While the Court's decision to review the merits of the District Court's certification order is both unwise and unfair to respondents, the opinion breaks no new ground

on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3). In particular, the decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable " 'on a class-wide basis.' " See *ante*, at 1431 – 1432 (acknowledging Court's dependence on the absence of contest on the matter in this case); Tr. of Oral Arg. 41.

To gain class-action certification under Rule 23(b)(3), the named plaintiff must demonstrate, and the District Court must find, "that the questions of law or fact common to class members predominate over any questions affecting only individual members." This predominance requirement is meant to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), but it scarcely demands commonality as to all questions. See ****1437** 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778, p. 121 (3d ed. 2005) (hereinafter Wright, Miller, & Kane). In particular, when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate. See Advisory Committee's 1966 Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., p. 141 ("[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class."); 7AA Wright, Miller, & Kane § 1781, at 235–237.*

***42** Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal. See 2 W. Rubenstein, Newberg on Class Actions § 4:54, p. 205 (5th ed. 2012) (ordinarily, "individual damage[s] calculations should not scuttle class certification under Rule 23(b)(3)"). Legions of appellate decisions across a range of substantive claims are illustrative. See, *e.g.*, *Tardiff v. Knox County*, 365 F.3d 1, 6 (C.A.1 2004) (Fourth Amendment); *Chiang v. Veneman*, 385 F.3d 256, 273 (C.A.3 2004) (Equal Credit Opportunity Act); *Bertulli v. Independent Assn. of Continental Pilots*, 242 F.3d 290, 298 (C.A.5 2001) (Labor–Management Reporting and Disclosure Act and Railway Labor Act); *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564–566 (C.A.6 2007) (Federal Communications Act); *Arreola v. Godinez*, 546 F.3d 788, 801 (C.A.7 2008) (Eighth Amendment). Antitrust cases, which typically involve common allegations of antitrust violation, antitrust impact, and the fact of damages, are classic examples. See *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 139–140 (C.A.2 2001). See also 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, Antitrust Law ¶ 331, p. 56 (3d ed. 2007) (hereinafter Areeda & Hovenkamp); 6 A. Conte & H. Newberg, Newberg on Class Actions § 18:27, p. 91 (4th ed. 2002). As this Court has rightly observed, "[p]redominance is a test readily met" in actions alleging "violations of the antitrust laws." *Amchem*, 521 U.S., at 625, 117 S.Ct. 2231.

The oddity of this case, in which the need to prove damages on a classwide basis through a common methodology was never challenged by respondents, see Brief for Plaintiffs–Appellees in No. 10–2865(CA3), pp. 39–40, is a further reason to dismiss the writ as improvidently granted. The Court's ruling is good for this day and case only. In the mine run of cases, it remains the "black letter rule" that a ***43** class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members. 2 Rubenstein, *supra*, § 4:54, at 208.

III

Incautiously entering the fray at this interlocutory stage, the Court sets forth a profoundly mistaken view of antitrust law. And in doing so, it relies on its own version of the facts, a version inconsistent with factual findings made by the District Court and affirmed by the Court of Appeals.

A

To understand the antitrust problem, some (simplified) background discussion is ****1438** necessary. Plaintiffs below, respondents here, alleged that Comcast violated §§ 1 and 2 of the Sherman Act. See 15 U.S.C. §§ 1, 2. For present purposes, the § 2 claim provides the better illustration. A firm is guilty of monopolization under § 2 if the plaintiff proves (1) "the possession of monopoly power in the relevant market" and (2) "the willful acquisition

or maintenance of that power[,] as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–571, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). A private plaintiff seeking damages must also show that (3) the monopolization caused "injur[y]." 15 U.S.C. § 15. We have said that antitrust injuries must be "of the type the antitrust laws were intended to prevent and that flo[w] from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977)). See 2A Areeda & Hovenkamp ¶ 391a, at 320 (To prove antitrust injury, "[a] private plaintiff must identify the economic rationale for a business practice's illegality under the antitrust laws and show that its harm flows from whatever it is that makes the practice unlawful.").

***44** As plaintiffs below, respondents attempted to meet these requirements by showing that (1) Comcast obtained a 60% or greater share of the Philadelphia market, and that its share provides it with monopoly power; (2) Comcast acquired its share through exclusionary conduct consisting of a series of mergers with competitors and "swaps" of customers and locations; and (3) Comcast consequently injured respondents by charging them supra-competitive prices.

If, as respondents contend, Philadelphia is a separate well-defined market, and the alleged exclusionary conduct permitted Comcast to obtain a market share of at least 60%, then proving the § 2 violation may not be arduous. As a point of comparison, the government considers a market shared by four firms, each of which has 25% market share, to be "highly concentrated." Dept. of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 5.3, p. 19 (2010). A market, such as the one alleged by respondents, where *one* firm controls 60% is far worse. See *id.*, § 5.3, at 18–19, and n. 9 (using a concentration index that determines a market's concentration level by summing the squares of each firm's market share, one firm with 100% yielding 10,000, five firms with 20% each yielding 2000, while a market where one firm accounts for 60% yields an index number of *at least* 3,600). The Guidelines, and any standard antitrust treatise, explain why firms in highly concentrated markets normally have the power to raise prices significantly above competitive levels. See, *e.g.*, 2B Areeda & Hovenkamp ¶ 503, at 115.

B

So far there is agreement. But consider the last matter respondents must prove: Can they show that Comcast injured them by charging higher prices? After all, a firm with monopoly power will not necessarily exercise that power by charging higher prices. It could instead act less competitively in other ways, such as by leading the quiet life. See J. Hicks, Annual Survey of Economic Theory: The ***45** Theory of Monopoly, 3 Econometrica 1, 8 (1935) ("The best of all monopoly profits is a quiet life.").

It is at this point that Dr. McClave's model enters the scene. His model first selects a group of comparable *outside*-Philadelphia ****1439** "benchmark" counties, where Comcast enjoyed a lower market share (and where satellite broadcasting accounted for more of the local business). Using multiple regression analysis, McClave's model measures the effect of the anticompetitive conduct by comparing the class counties to the benchmark counties. The model concludes that the prices Philadelphia area consumers would have paid had the Philadelphia counties shared the properties of the benchmark counties (including a diminished Comcast market share), would have been 13.1% lower than those they actually paid. Thus, the model provides evidence that Comcast's anticompetitive conduct, which led to a 60% market share, caused the class to suffer injuriously higher prices.

C

1

The special antitrust-related difficulty present here stems from the manner in which respondents attempted to prove their antitrust injuries. They proffered four "non-exclusive mechanisms" that allegedly "cause[d] the high prices" in the Philadelphia area. App. 403a. Those four theories posit that (1) due to Comcast's acquisitions of competitors, customers found it more difficult to compare prices; (2) one set of potential competitors, namely Direct Broadcast Satellite companies, found it more difficult to obtain access to local sports broadcasts

and consequently decided not to enter the Philadelphia market; (3) Comcast's ability to obtain programming material at lower prices permitted it to raise prices; and (4) a number of potential competitors (called "overbuilders"), whose presence in the market would have limited Comcast's power to raise prices, were ready to enter some parts of the market but decided not to do so in light of Comcast's ***46** anticompetitive conduct. 264 F.R.D. 150, 161–162 (E.D.Pa.2010).

For reasons not here relevant, the District Court found the first three theories inapplicable and limited the liability-phase proof to the "overbuilder" theory. See App. to Pet. for Cert. 192a–193a. It then asked the parties to brief whether doing so had any impact on the viability of McClave's model as a measure of classwide damages. See 264 F.R.D., at 190. After considering the parties' arguments, the District Court found that striking the three theories "does not impeach Dr. McClave's damages model" because "[a]ny anticompetitive conduct is reflected in the [higher Philadelphia] price [which Dr. McClave's model determines], not in the [the model's] selection of the comparison counties, [*i.e.*, the lower-price 'benchmark counties' with which the Philadelphia area prices were compared]." *Id.*, at 190–191. The court explained that "whether or not we accepted all [four] ... theories ... is inapposite to Dr. McClave's methods of choosing benchmarks." *Ibid.* On appeal, the Third Circuit held that this finding was not an abuse of discretion. 655 F.3d 182, 207 (2011).

2

The Court, however, concludes that "the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised." *Ante*, at 1433. To reach this conclusion the Court must consider fact-based matters, namely what this econometric multiple-regression model is about, what it proves, and how it does so. And it must overturn two lower courts' related factual findings to the contrary.

We are normally "reluctant to disturb findings of fact in which two courts below have concurred." ****1440** *United States v. Doe*, 465 U.S. 605, 614, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984). See also *United States v. Virginia*, 518 U.S. 515, 589, n. 5, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (SCALIA, J., dissenting) (noting "our well-settled rule that we will not 'undertake to review concurrent findings of fact by two courts below in the ***47** absence of a very obvious and exceptional showing of error' " (quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 93 L.Ed. 672 (1949))). Here, the District Court found McClave's econometric model capable of measuring damages on a classwide basis, even after striking three of the injury theories. 264 F.R.D., at 190–191. Contrary to the Court's characterization, see *ante*, at 1433 – 1434, n. 5, this was not a legal conclusion about what the model proved: it was a factual finding about *how* the model worked. Under our typical practice, we should leave that finding alone.

In any event, as far as we can tell, the lower courts were right. On the basis of the record as we understand it, the District Court did not abuse its discretion in finding that McClave's model could measure damages suffered by the class—even if the damages were limited to those caused by deterred overbuilding. That is because respondents alleged that Comcast's anticompetitive conduct increased Comcast's market share (and market power) by deterring potential entrants, in particular, overbuilders, from entering the Philadelphia area market. See App. 43a–66a. By showing that this was so, respondents' proof tends to show the same in respect to other entrants. The overbuilders' failure to enter deprives the market of the price discipline that their entry would have provided in other parts via threat of the overbuilders' expansion or that of others potentially led on by their example. Indeed, in the District Court, Comcast argued that the three other theories, *i.e.*, the three rejected theories, had no impact on prices. See 264 F.R.D., at 166, 176, 180–181. If Comcast was right, then the damages McClave's model found must have stemmed exclusively from conduct that deterred new entry, say from "overbuilders." Not surprisingly, the Court offers no support at all for its contrary conclusion, namely, that the District Court's finding was " 'obvious [ly] and exceptional[ly]' erroneous." *Ante*, at 1433 – 1434, n. 5 (quoting *Virginia*, 518 U.S., at 589, n. 5, 116 S.Ct. 2264 (SCALIA, J., dissenting)).

***48** We are particularly concerned about the matter because the Court, in reaching its contrary conclusion, makes broad statements about antitrust law that it could not mean to apply in other cases. The Court begins with what it calls an "unremarkable premise" that respondents could be "entitled only to damages resulting from reduced overbuilder competition." *Ante*, at

1433. in most § 2 CASES, HOWEVER, THE COURT'S STARTING PLACE WOULD SEEM *remarkable,* not "unremarkable."

Suppose in a different case a plaintiff were to prove that Widget, Inc. has obtained, through anticompetitive means, a 90% share of the California widget market. Suppose the plaintiff also proves that the two small remaining firms—one in Ukiah, the other in San Diego —lack the capacity to expand their widget output to the point where that possibility could deter Widget, Inc. from raising its prices. Suppose further that the plaintiff introduces a model that shows California widget prices are now twice those in every other State, which, the model concludes is (after accounting for other possible reasons) the result of lack of competition in the California widget market. Why would a court hearing that case restrict damages solely to customers in the vicinity of Ukiah and San Diego?

**1441 Like the model in this example, Dr. McClave's model does not purport to show precisely *how* Comcast's conduct led to higher prices in the Philadelphia area. It simply shows *that* Comcast's conduct brought about higher prices. And it measures the amount of subsequent harm.

* * *

Because the parties did not fully argue the question the Court now answers, all Members of the Court may lack a complete understanding of the model or the meaning of related statements in the record. The need for focused argument is particularly strong here where, as we have said, the underlying considerations are detailed, technical, and fact-based. *49 The Court departs from our ordinary practice, risks inaccurate judicial decisionmaking, and is unfair to respondents and the courts below. For these reasons, we would not disturb the Court of Appeals' judgment and, instead, would dismiss the writ as improvidently granted.

All Citations

569 U.S. 27, 133 S.Ct. 1426, 185 L.Ed.2d 515, 81 USLW 4217, 2013-1 Trade Cases P 78,316, 85 Fed.R.Serv.3d 118, 13 Cal. Daily Op. Serv. 3396, 2013 Daily Journal D.A.R. 4027, 57 Communications Reg. (P&F) 1487, 24 Fla. L. Weekly Fed. S 125

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 A "Designated Market Area" is a term used by Nielsen Media Research to define a broadcast-television market. Strictly speaking, the Philadelphia DMA comprises 18 counties, not 16.

2 Respondents sought certification for the following class: "All cable television customers who subscribe or subscribed at any times since December 1, 1999, to the present to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster." App. 35a.

3 The District Court did not hold that the three alternative theories of liability failed to establish antitrust impact, but merely that those theories could not be determined in a manner common to all the class plaintiffs. The other theories of liability may well be available for the plaintiffs to pursue as individual actions. Any contention that the plaintiffs should be allowed to recover damages attributable to all four theories in this class action would erroneously suggest one of two things—either that the plaintiffs may *also* recover such damages in individual actions or that they are precluded from asserting those theories in individual actions.

4 The question presented reads: "Whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." 567 U.S., at ——, 133 S.Ct. 24. Respondents contend that petitioners forfeited their ability to answer this question in the negative because they did not make an objection to the admission of Dr. McClave's testimony under the Federal Rules of Evidence. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Such a forfeit would make it impossible for petitioners to argue that Dr. McClave's testimony was not "admissible evidence" under the Rules; but it does not make it impossible for them to argue that the evidence failed "to show that the case is susceptible to awarding damages on a class-wide basis." Petitioners argued

below, and continue to argue here, that certification was improper because respondents had failed to establish that damages could be measured on a classwide basis. That is the question we address here.

5 The dissent is of the view that what an econometric model proves is a "question of fact" on which we will not "undertake to review concurrent findings ... by two courts below in the absence of a very obvious and exceptional showing of error." *Post,* at 1440 (quoting *United States v. Virginia,* 518 U.S. 515, 589, n. 5, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (SCALIA, J., dissenting) (internal quotation marks omitted)). To begin with, neither of the courts below found that the model established damages attributable to overbuilding alone. Second, while the data contained within an econometric model may well be "questions of fact" in the relevant sense, what those data prove is no more a question of fact than what our opinions hold. And finally, even if it were a question of fact, concluding that the model here established damages attributable to overbuilding alone would be "obvious[ly] and exceptional[ly]" erroneous.

6 We might add that even if the model had identified subscribers who paid more solely because of the deterrence of overbuilding, it still would not have established the requisite commonality of damages unless it plausibly showed that the extent of overbuilding (absent deterrence) would have been the same in all counties, or that the extent is irrelevant to effect upon ability to charge supra-competitive prices.

* A class may be divided into subclasses for adjudication of damages. Fed. Rule Civ. Proc. 23(c)(4)–(5). Or, at the outset, a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings. See 2 W. Rubenstein, Newberg on Class Actions § 4:54, pp. 206–208 (5th ed. 2012). Further, a certification order may be altered or amended as the case unfolds. Rule 23(c)(1)(C).

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KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta Chen-Oster v. Goldman, Sachs & Co., S.D.N.Y., April 12, 2017

131 S.Ct. 2541
Supreme Court of the United States

WAL–MART STORES, INC., Petitioner,
v.
DUKES et al.

No. 10–277.
|
Argued March 29, 2011.
|
Decided June 20, 2011.

Synopsis

Background: Female employees of retail store chain brought Title VII against employer alleging sex discrimination and seeking injunctive and declaratory relief, back pay, and punitive damages. The United States District Court for the Northern District of California, Martin J. Jenkins, J., 222 F.R.D. 137, granted in part and denied in part plaintiffs' motion for class certification, and the Ninth Circuit Court of Appeals, Pregerson, Circuit Judge, 509 F.3d 1168, affirmed. On rehearing en banc, the Court of Appeals, Michael Daly Hawkins, Circuit Judge, 603 F.3d 571,affirmed in part and remanded in part. Certiorari was granted.

Holdings: The Supreme Court, Justice Scalia, held that:

[1] evidence presented by members of putative class did not rise to level of significant proof that company operated under general policy of discrimination, as required to satisfy commonality requirement and to permit certification of plaintiff class;

[2] certification of plaintiff class upon theory that defendant has acted, or refused to act, on grounds that apply generally to class, thereby making final injunctive or declaratory relief appropriate with respect to class as whole, is not appropriate with respect to claims for monetary relief, at least where monetary relief is not incidental to injunctive or declaratory relief; and

[3] necessity of litigation to resolve employer's statutory defenses to claims for backpay asserted by individual members of putative employee class prevented court from treating these backpay claims as "incidental" to claims for declaratory or injunctive relief.

Reversed.

Justice Ginsburg concurred in part and dissented in part and filed opinion, in which Justices Breyer, Sotomayor, and Kagan joined.

West Headnotes (17)

[1] **Federal Civil Procedure**
Class Actions

Class action is exception to the usual rule that litigation is conducted by and on behalf of individual named parties only. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

395 Cases that cite this headnote

[2] **Federal Civil Procedure**
Representation of class;typicality; standing in general

In order to justify a departure from usual rule that litigation is conducted by and on behalf of individual named parties only, class representative must be part of class and possess same interest and suffer same injury as class members. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

963 Cases that cite this headnote

[3] **Federal Civil Procedure**
Impracticability of joining all members of class;numerosity

Federal Civil Procedure
Representation of class;typicality; standing in general

Federal Civil Procedure
Common interest in subject matter, questions and relief;damages issues

Numerosity, commonality, typicality, and adequate representation requirements of Federal Rule of Civil Procedure governing class actions ensure that the named plaintiffs are appropriate representatives of class whose claims they wish to litigate by effectively limiting the class claims to those fairly encompassed by named plaintiffs' claims. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

529 Cases that cite this headnote

[4] **Federal Civil Procedure**

Common interest in subject matter, questions and relief;damages issues

Commonality requirement for class certification obligates the named plaintiff to demonstrate that class members have suffered the "same injury," not merely that they have all suffered violation of same provision of law; claims must depend upon a common contention, and that common contention must be of such a nature that it is capable of classwide resolution, meaning that determination of its truth or falsity will resolve issue that is central to validity of each one of the claims in one stroke. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

2519 Cases that cite this headnote

[5] **Federal Civil Procedure**

Common interest in subject matter, questions and relief;damages issues

What matters to class certification is not the raising of common questions, even in droves, but rather the capacity of classwide proceeding to generate common answers apt to drive resolution of litigation. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

1540 Cases that cite this headnote

[6] **Federal Civil Procedure**

Evidence;pleadings and supplementary material

Federal Rule of Civil Procedure governing class actions does not set forth mere pleading standard; party seeking class certification must affirmatively demonstrate his compliance with Rule, that is, he must be prepared to prove that there are in fact sufficiently numerous parties, and that other requirements of the Rule are met. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

1060 Cases that cite this headnote

[7] **Federal Civil Procedure**

Consideration of merits

Class determination generally involves considerations that are enmeshed in factual and legal issues comprising plaintiff's cause of action. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

198 Cases that cite this headnote

[8] **Civil Rights**

Practices prohibited or required in general;elements

Crux of court's inquiry in resolving an individual's Title VII claim is reason for particular employment decision. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

12 Cases that cite this headnote

[9] **Federal Civil Procedure**

Discrimination and civil rights actions in general

Conceptually, there is wide gap between an individual employee's claim that he or she has been denied promotion on discriminatory grounds and employee's otherwise unsupported allegation, in moving for certification of employee class, that company has policy of discrimination, a conceptual gap that may be bridged by showing that employer used a biased testing procedure, or by presenting significant proof that employer operated under general policy of discrimination; such proof could conceivably justify a class of both applicants and employees if discrimination manifested

itself in hiring and promotion practices in same general fashion, such as through entirely subjective decisionmaking processes. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

49 Cases that cite this headnote

[10] **Federal Civil Procedure**
Sex discrimination actions

Evidence presented by members of putative class, consisting of testimony of sociological expert that employer's corporate culture made it "vulnerable" to gender bias, but without being able to definitively say whether 0.5 percent or 95 percent of employment decisions in company were based on stereotypical thinking, statistical evidence that employer's policy of according discretion to local supervisors over pay and promotion matters had resulted in an overall, sex-based disparity among employees at company's 3,400 stores, and anecdotal evidence of allegedly discriminatory employment decisions did not rise to level of significant proof that company operated under general policy of discrimination, as required to satisfy commonality requirement and to permit certification of plaintiff class, especially given that company's announced policy was to forbid sex discrimination, and that company imposed penalties for denial of equal employment opportunities. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

97 Cases that cite this headnote

[11] **Civil Rights**
Disparate impact

Federal Civil Procedure
Discrimination and civil rights actions in general

In appropriate cases, giving discretion to lower-level supervisors can be basis of Title VII liability under disparate-impact theory, since employer's undisciplined system of subjective decisionmaking can have precisely the same effects as system pervaded by impermissible intentional discrimination; however, recognition that this type of Title VII claim "can" exist does not lead to conclusion that every employee in company using such a system of discretion has such a claim in common, for purposes of certifying employee class. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

41 Cases that cite this headnote

[12] **Declaratory Judgment**
Representative or class actions

Federal Civil Procedure
Common interest in subject matter, questions and relief;damages issues

Certification of plaintiff class upon theory that defendant has acted, or refused to act, on grounds that apply generally to class, thereby making final injunctive or declaratory relief appropriate with respect to class as whole, is not appropriate with respect to claims for monetary relief, at least where monetary relief is not incidental to injunctive or declaratory relief. Fed.Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

390 Cases that cite this headnote

[13] **Declaratory Judgment**
Representative or class actions

Federal Civil Procedure
Common interest in subject matter, questions and relief;damages issues

Certification of plaintiff class upon theory that defendant has acted, or refused to act, on grounds that apply generally to class, thereby making final injunctive or declaratory relief appropriate with respect to class as whole, is appropriate only when single injunction or declaratory judgment would provide relief to each member of class; certification is not authorized when each individual class member would be entitled to

different injunction or declaratory judgment against defendant, or when each class member would be entitled to individualized award of monetary damages. Fed.Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

956 Cases that cite this headnote

[14] **Declaratory Judgment**
Representative or class actions

Federal Civil Procedure
Discrimination and civil rights actions in general

Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples of circumstances under which certification of plaintiff class may be warranted on ground that defendant has acted, or refused to act, on grounds that apply generally to class, thereby making final injunctive or declaratory relief appropriate with respect to class as whole. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

130 Cases that cite this headnote

[15] **Declaratory Judgment**
Representative or class actions

Federal Civil Procedure
Sex discrimination actions

Even assuming that "incidental" monetary relief can be awarded to class certified upon theory that defendant has acted, or refused to act, on grounds generally applicable to class, thereby making final injunctive or declaratory relief appropriate with respect to class as whole, necessity of litigation to resolve employer's statutory defenses to claims for backpay asserted by individual members of putative employee class, who were allegedly victims of employer's, or potential employer's, gender-based discrimination, prevented court from treating these backpay claims as "incidental" to claims for declaratory or injunctive relief. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

106 Cases that cite this headnote

[16] **Civil Rights**
Effect of prima facie case;shifting burden

Civil Rights
Relief

When plaintiff in employment discrimination case seeks individual relief such as reinstatement or backpay after establishing pattern or practice of discrimination, district court must usually conduct additional proceedings to determine scope of individual relief, and at that phase, burden of proof will shift to employer, but it will have right to raise any individual affirmative defenses that it may have and to demonstrate that individual employee was denied employment opportunity for lawful reasons. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

27 Cases that cite this headnote

[17] **Federal Civil Procedure**
Sex discrimination actions

Because the Rules Enabling Act forbade interpretation of Federal Rule of Civil Procedure that governs class actions so as to abridge, enlarge or modify any substantive right, employee class could not be certified in employment discrimination action on premise that employer would not be entitled to litigate its statutory defenses to class members' claims for backpay. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; 28 U.S.C.A. § 2072(b); Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

64 Cases that cite this headnote

****2544** *Syllabus* *

Respondents, current or former employees of petitioner Wal–Mart, sought judgment against the company for injunctive and declaratory relief, punitive damages, and backpay, on behalf of themselves and a nationwide class of some 1.5 million female employees, because of Wal–Mart's alleged discrimination against women in violation of Title VII of the Civil Rights Act of 1964. They claim that local managers exercise their discretion over pay and promotions disproportionately in favor of men, which has an unlawful disparate impact on female employees; and that Wal–Mart's refusal to cabin its managers' authority amounts to disparate treatment. The District Court certified the class, finding that respondents satisfied Federal Rule of Civil Procedure 23(a), and Rule 23(b)(2)'s requirement of showing that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The Ninth Circuit substantially affirmed, concluding, *inter alia*, that respondents met Rule 23(a)(2)'s commonality requirement and that their backpay claims could be certified as part of a (b)(2) class because those claims did not predominate over the declaratory and injunctive relief requests. It also ruled that the class action could be manageably tried without depriving Wal–Mart of its right to present its statutory defenses if the District Court selected a random set of claims for valuation and then extrapolated the validity and value of the untested claims from the sample set.

Held:

1. The certification of the plaintiff class was not consistent with Rule 23(a). Pp. 2550 – 2557.

**2545 (a) Rule 23(a)(2) requires a party seeking class certification to prove that the class has common "questions of law or fact." Their claims must depend upon a common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. Here, proof of commonality necessarily overlaps with respondents' merits contention that Wal–Mart engages in a pattern or practice of discrimination. The crux of a Title VII inquiry is "the reason for a particular employment decision," *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876, 104 S.Ct. 2794, 81 L.Ed.2d 718, and respondents wish to sue for millions of employment decisions at once. Without some glue holding together the alleged reasons for those decisions, it will be impossible to say that examination of all the class members' claims will produce a common answer to the crucial discrimination question. Pp. 2550 – 2553.

(b) *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740, describes the proper approach to commonality. On the facts of this case, the conceptual gap between an individual's discrimination claim and "the existence of a class of persons who have suffered the same injury," *id.*, at 157–158, 102 S.Ct. 2364, must be bridged by "[s]ignificant proof that an employer operated under a general policy of discrimination," *id.*, at 159, n. 15, 102 S.Ct. 2364. Such proof is absent here. Wal–Mart's announced policy forbids sex discrimination, and the company has penalties for denials of equal opportunity. Respondents' only evidence of a general discrimination policy was a sociologist's analysis asserting that Wal–Mart's corporate culture made it vulnerable to gender bias. But because he could not estimate what percent of Wal–Mart employment decisions might be determined by stereotypical thinking, his testimony was worlds away from "significant proof" that Wal–Mart "operated under a general policy of discrimination." Pp. 2553 – 2554.

(c) The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal–Mart's "policy" of giving local supervisors discretion over employment matters. While such a policy could be the basis of a Title VII disparate-impact claim, recognizing that a claim "can" exist does not mean that every employee in a company with that policy has a common claim. In a company of Wal–Mart's size and geographical scope, it is unlikely that all managers would exercise their discretion in a common way without some common direction. Respondents' attempt to show such direction by means of statistical and anecdotal evidence falls well short. Pp. 2554 – 2557.

2. Respondents' backpay claims were improperly certified under Rule 23(b)(2). Pp. 2557 – 2561.

(a) Claims for monetary relief may not be certified under Rule 23(b)(2), at least where the monetary relief is not incidental to the requested injunctive or declaratory relief. It is unnecessary to decide whether monetary claims can ever be certified under the Rule because, at a minimum,

claims for individualized relief, like backpay, are excluded. Rule 23(b)(2) applies only when a single, indivisible remedy would provide relief to each class member. The Rule's history and structure indicate that individualized monetary claims belong instead in Rule 23(b)(3), with its procedural protections of predominance, superiority, mandatory notice, and the right to opt out. Pp. 2557 – 2559.

(b) Respondents nonetheless argue that their backpay claims were appropriately **2546 certified under Rule 23(b)(2) because those claims do not "predominate" over their injunctive and declaratory relief requests. That interpretation has no basis in the Rule's text and does obvious violence to the Rule's structural features. The mere "predominance" of a proper (b)(2) injunctive claim does nothing to justify eliminating Rule 23(b)(3)'s procedural protections, and creates incentives for class representatives to place at risk potentially valid monetary relief claims. Moreover, a district court would have to reevaluate the roster of class members continuously to excise those who leave their employment and become ineligible for classwide injunctive or declaratory relief. By contrast, in a properly certified (b)(3) class action for backpay, it would be irrelevant whether the plaintiffs are still employed at Wal–Mart. It follows that backpay claims should not be certified under Rule 23(b)(2). Pp. 2559 – 2561.

(c) It is unnecessary to decide whether there are any forms of "incidental" monetary relief that are consistent with the above interpretation of Rule 23(b)(2) and the Due Process Clause because respondents' backpay claims are not incidental to their requested injunction. Wal–Mart is entitled to individualized determinations of each employee's eligibility for backpay. Once a plaintiff establishes a pattern or practice of discrimination, a district court must usually conduct "additional proceedings ... to determine the scope of individual relief." *Teamsters v. United States,* 431 U.S. 324, 361, 97 S.Ct. 1843, 52 L.Ed.2d 396. The company can then raise individual affirmative defenses and demonstrate that its action was lawful. *Id.,* at 362, 97 S.Ct. 1843. The Ninth Circuit erred in trying to replace such proceedings with Trial by Formula. Because Rule 23 cannot be interpreted to "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b), a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims. Pp. 2561.

603 F.3d 571, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and ALITO, JJ., joined, and in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined as to Parts I and III. Ginsburg, J., filed an opinion concurring in part and dissenting in part, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

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Opinion

**2547 Justice SCALIA delivered the opinion of the Court.

*342 We are presented with one of the most expansive class actions ever. The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs, current and former female employees of petitioner Wal–Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by

discriminating against women. In addition to injunctive and declaratory relief, the plaintiffs seek an award of backpay. We consider whether the certification of the plaintiff class was consistent with Federal Rules of Civil Procedure 23(a) and (b)(2).

I

A

Petitioner Wal–Mart is the Nation's largest private employer. It operates four types of retail stores throughout the country: Discount Stores, Supercenters, Neighborhood Markets, and Sam's Clubs. Those stores are divided into seven nationwide divisions, which in turn comprise 41 regions of 80 to 85 stores apiece. Each store has between 40 and 53 separate departments and 80 to 500 staff positions. In all, Wal–Mart operates approximately 3,400 stores and employs more than one million people.

***343** Pay and promotion decisions at Wal–Mart are generally committed to local managers' broad discretion, which is exercised "in a largely subjective manner." 222 F.R.D. 137, 145 (N.D.Cal.2004). Local store managers may increase the wages of hourly employees (within limits) with only limited corporate oversight. As for salaried employees, such as store managers and their deputies, higher corporate authorities have discretion to set their pay within preestablished ranges.

Promotions work in a similar fashion. Wal–Mart permits store managers to apply their own subjective criteria when selecting candidates as "support managers," which is the first step on the path to management. Admission to Wal–Mart's management training program, however, does require that a candidate meet certain objective criteria, including an above-average performance rating, at least one year's tenure in the applicant's current position, and a willingness to relocate. But except for those requirements, regional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—*e.g.*, assistant manager, co-manager, or store manager—is similarly at the discretion of the employee's superiors after prescribed objective factors are satisfied.

B

The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified class, are three current or former Wal–Mart employees who allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e–1 *et seq.* [1]

***344** Betty Dukes began working at a Pittsburgh, California, Wal–Mart in 1994. She started as a cashier, but later sought and ****2548** received a promotion to customer service manager. After a series of disciplinary violations, however, Dukes was demoted back to cashier and then to greeter. Dukes concedes she violated company policy, but contends that the disciplinary actions were in fact retaliation for invoking internal complaint procedures and that male employees have not been disciplined for similar infractions. Dukes also claims two male greeters in the Pittsburgh store are paid more than she is.

Christine Kwapnoski has worked at Sam's Club stores in Missouri and California for most of her adult life. She has held a number of positions, including a supervisory position. She claims that a male manager yelled at her frequently and screamed at female employees, but not at men. The manager in question "told her to 'doll up,' to wear some makeup, and to dress a little better." App. 1003a.

The final named plaintiff, Edith Arana, worked at a Wal–Mart store in Duarte, California, from 1995 to 2001. In 2000, she approached the store manager on more than one occasion about management training, but was brushed off. Arana concluded she was being denied opportunity for advancement because of her sex. She initiated internal complaint procedures, whereupon she was told to apply directly to the district manager if she thought her store manager was being unfair. Arana, however, decided against that and never applied for management training again. In 2001, she was fired for failure to comply with Wal–Mart's timekeeping policy.

These plaintiffs, respondents here, do not allege that Wal–Mart has any express corporate policy against the advancement of women. Rather, they claim that their

local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees, see ***345** 42 U.S.C. § 2000e–2(k). And, respondents say, because Wal–Mart is aware of this effect, its refusal to cabin its managers' authority amounts to disparate treatment, see § 2000e–2(a). Their complaint seeks injunctive and declaratory relief, punitive damages, and backpay. It does not ask for compensatory damages.

Importantly for our purposes, respondents claim that the discrimination to which they have been subjected is common to *all* Wal–Mart's female employees. The basic theory of their case is that a strong and uniform "corporate culture" permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal–Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice. Respondents therefore wish to litigate the Title VII claims of all female employees at Wal–Mart's stores in a nationwide class action.

C

Class certification is governed by Federal Rule of Civil Procedure 23. Under Rule 23(a), the party seeking certification must demonstrate, first, that:

> "(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 defenses of the class, and
>
> "(4) the representative parties will fairly and adequately protect the interests of the class" (paragraph breaks added).

Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b). Respondents rely on Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to ****2549** act on grounds that apply generally to the class, so that final injunctive relief or corresponding ***346** declaratory relief is appropriate respecting the class as a whole." [2]

Invoking these provisions, respondents moved the District Court to certify a plaintiff class consisting of " '[a]ll women employed at any Wal–Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal–Mart's challenged pay and management track promotions policies and practices.' " 222 F.R.D., at 141–142 (quoting Plaintiff 's Motion for Class Certification in case No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, p. 37). As evidence that there were indeed "questions of law or fact common to" all the women of Wal–Mart, as Rule 23(a)(2) requires, respondents relied chiefly on three forms of proof: statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of Wal–Mart's female employees, and the testimony of a sociologist, Dr. William Bielby, who conducted a "social framework analysis" of Wal–Mart's "culture" and personnel practices, and concluded that the company was "vulnerable" to gender discrimination. 603 F.3d 571, 601 (C.A.9 2010) (en banc).

Wal–Mart unsuccessfully moved to strike much of this evidence. It also offered its own countervailing statistical and other proof in an effort to defeat Rule 23(a)'s requirements ***347** of commonality, typicality, and adequate representation. Wal–Mart further contended that respondents' monetary claims for backpay could not be certified under Rule 23(b)(2), first because that Rule refers only to injunctive and declaratory relief, and second because the backpay claims could not be manageably tried as a class without depriving Wal–Mart of its right to present certain statutory defenses. With one limitation not relevant here, the District Court granted respondents' motion and certified their proposed class. [3]

D

A divided en banc Court of Appeals substantially affirmed the District Court's certification order. 603 F.3d 571. The majority concluded that respondents' evidence of commonality was sufficient to "raise the common question whether Wal–Mart's female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII." *Id.*, at 612 (emphasis deleted). It also agreed with the District

Court that the named plaintiffs' claims were sufficiently typical of the class **2550 as a whole to satisfy Rule 23(a)(3), and that they could serve as adequate class representatives, see Rule 23(a)(4). *Id.*, at 614–615. With respect to the Rule 23(b)(2) question, the Ninth Circuit held that respondents' backpay claims could be certified as part of a (b)(2) class because they did not "predominat[e]" over the requests for declaratory and injunctive relief, meaning they were not "superior in strength, influence, or authority" to *348 the nonmonetary claims. *Id.*, at 616 (internal quotation marks omitted).[4]

Finally, the Court of Appeals determined that the action could be manageably tried as a class action because the District Court could adopt the approach the Ninth Circuit approved in *Hilao v. Estate of Marcos*, 103 F.3d 767, 782–787 (1996). There compensatory damages for some 9,541 class members were calculated by selecting 137 claims at random, referring those claims to a special master for valuation, and then extrapolating the validity and value of the untested claims from the sample set. See 603 F.3d, at 625–626. The Court of Appeals "s[aw] no reason why a similar procedure to that used in *Hilao* could not be employed in this case." *Id.*, at 627. It would allow Wal–Mart "to present individual defenses in the randomly selected 'sample cases,' thus revealing the approximate percentage of class members whose unequal pay or nonpromotion was due to something other than gender discrimination." *Ibid.*, n. 56 (emphasis deleted).

We granted certiorari. 562 U.S. ——, 131 S.Ct. 795, 178 L.Ed.2d 530 (2010).

II

[1] [2] [3] The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). In order to justify a departure from that rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the *349 class members." *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)). Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—"effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.' " *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (quoting *General Telephone Co. of Northwest v. EEOC*, 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980)).

A

[4] [5] The crux of this case is commonality—the rule requiring a plaintiff to show that "there are questions of law or fact **2551 common to the class." Rule 23(a)(2).[5] That language is easy to misread, since "[a]ny competently crafted class complaint literally raises common 'questions.' " Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L.Rev. 97, 131–132 (2009). For example: Do all of us plaintiffs indeed work for Wal–Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality *350 requires the plaintiff to demonstrate that the class members "have suffered the same injury," *Falcon, supra*, at 157, 102 S.Ct. 2364. This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

> "What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common

answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." Nagareda, *supra,* at 132.

[6] [7] Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," 457 U.S., at 160, 102 S.Ct. 2364, and that certification is proper only if "the trial court is satisfied, after a ***351** rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied," *id.,* at 161, 102 S.Ct. 2364; see *id.,* at 160, 102 S.Ct. 2364 (" [A]ctual, not presumed, conformance with Rule 23(a) remains ... indispensable"). Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. " ' [T]he ****2552** class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Falcon, supra,* at 160, 102 S.Ct. 2364 (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 469, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978); some internal quotation marks omitted).[6] Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve ***352** preliminary matters, *e.g.,* jurisdiction and venue, is a familiar feature of litigation. See *Szabo v. Bridgeport Machines, Inc.,* 249 F.3d 672, 676–677 (C.A.7 2001) (Easterbrook, J.).

[8] In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal–Mart engages in a *pattern or practice* of discrimination.[7] That is so because, in resolving an individual's Title VII claim, the crux of the inquiry is "the reason for a particular employment decision," *Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 876, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984). Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*

B

[9] This Court's opinion in *Falcon* describes how the commonality issue must be ****2553** approached. There an employee who claimed that he was deliberately denied a promotion on account of race obtained certification of a class comprising all employees wrongfully denied promotions and all applicants wrongfully denied jobs. 457 U.S., at 152, 102 S.Ct. 2364. We rejected that composite class for lack of commonality and typicality, explaining:

> "Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion [or ***353** higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claims." *Id.,* at 157–158, 102 S.Ct. 2364.

Falcon suggested two ways in which that conceptual gap might be bridged. First, if the employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." *Id.,* at 159, n. 15, 102 S.Ct. 2364. Second, "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Ibid.* We think that statement precisely describes respondents' burden in this case. The first manner of bridging the gap obviously has no application here; Wal–Mart has no testing procedure or other companywide evaluation method that can be charged with bias. The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.

[10] The second manner of bridging the gap requires "significant proof" that Wal–Mart "operated under a general policy of discrimination." That is entirely absent here. Wal–Mart's announced policy forbids sex discrimination, see App. 1567a–1596a, and as the District

Court recognized the company imposes penalties for denials of equal employment opportunity, 222 F.R.D., at 154. The only evidence of a "general policy of discrimination" respondents produced was the testimony of Dr. William Bielby, their sociological ***354** expert. Relying on "social framework" analysis, Bielby testified that Wal–Mart has a " strong corporate culture," that makes it " 'vulnerable' " to "gender bias." *Id.*, at 152. He could not, however, "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal–Mart. At his deposition ... Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal–Mart might be determined by stereotyped thinking." 222 F.R.D. 189, 192 (N.D.Cal.2004). The parties dispute whether Bielby's testimony even met the standards for the admission of expert testimony under Federal Rule of Evidence 702 and our *Daubert* case, see *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).[8] the District Court concluded ****2554** that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. 222 F.R.D., at 191. We doubt that is so, but even if properly considered, Bielby's testimony does nothing to advance respondents' case. " [W]hether 0.5 percent or 95 percent of the employment decisions at Wal–Mart might be determined by stereotyped thinking" is the essential question on which respondents' theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard ***355** what he has to say. It is worlds away from "significant proof" that Wal–Mart "operated under a general policy of discrimination."

C

The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal–Mart's "policy" of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have said "should itself raise no inference of discriminatory conduct," *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).

[11] To be sure, we have recognized that, "in appropriate cases," giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since "an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination." *Id.*, at 990–991, 108 S.Ct. 2777. But the recognition that this type of Title VII claim "can" exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements, see *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager's use ***356** of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions.

Respondents have not identified a common mode of exercising discretion that ****2555** pervades the entire company—aside from their reliance on Dr. Bielby's social frameworks analysis that we have rejected. In a company of Wal–Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. Respondents attempt to make that showing by means of statistical and anecdotal evidence, but their evidence falls well short.

The statistical evidence consists primarily of regression analyses performed by Dr. Richard Drogin, a statistician, and Dr. Marc Bendick, a labor economist. Drogin conducted his analysis region-by-region, comparing the number of women promoted into management positions with the percentage of women in the available pool of hourly workers. After considering regional and national data, Drogin concluded that "there are statistically significant disparities between men and women at Wal–Mart ... [and] these disparities ... can be explained only

by gender discrimination." 603 F.3d, at 604 (internal quotation marks omitted). Bendick compared workforce data from Wal–Mart and competitive retailers and concluded that Wal–Mart "promotes a lower percentage of women than its competitors." *Ibid.*

Even if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a classwide basis. In *Falcon*, we held that one named plaintiff's experience of discrimination was insufficient to infer that "discriminatory treatment is typical of [the employer's employment] practices." 457 U.S., at 158, 102 S.Ct. 2364. A similar failure of inference arises here. As Judge Ikuta observed in her dissent, "[i]nformation about disparities at the regional and national level does not establish the existence ***357** of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level." 603 F.3d, at 637. A regional pay disparity, for example, may be attributable to only a small set of Wal–Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends.

There is another, more fundamental, respect in which respondents' statistical proof fails. Even if it established (as it does not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal–Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists. Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store. In the landmark case of ours which held that giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory, the plurality opinion *conditioned* that holding on the corollary that merely proving that the discretionary system has produced a racial or sexual disparity *is not enough*. "[T]he plaintiff must begin by identifying the specific employment practice that is challenged." *Watson*, 487 U.S., at 994, 108 S.Ct. 2777; accord, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (approving that statement), superseded by statute on other grounds, 42 U.S.C. § 2000e–2(k). That is all the more necessary when a class of plaintiffs is sought to be certified. Other than the bare existence of delegated discretion, respondents have identified no "specific employment practice"—much less one that ties all their 1.5 million claims ****2556** together. Merely showing that Wal–Mart's policy of discretion has produced an overall sex-based disparity does not suffice.

***358** Respondents' anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory. In *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), in addition to substantial statistical evidence of company-wide discrimination, the Government (as plaintiff) produced about 40 specific accounts of racial discrimination from particular individuals. See *id.*, at 338, 97 S.Ct. 1843. That number was significant because the company involved had only 6,472 employees, of whom 571 were minorities, *id.*, at 337, 97 S.Ct. 1843, and the class itself consisted of around 334 persons, *United States v. T.I.M.E.-D.C., Inc.*, 517 F.2d 299, 308 (C.A.5 1975), overruled on other grounds, *Teamsters, supra*. The 40 anecdotes thus represented roughly one account for every eight members of the class. Moreover, the Court of Appeals noted that the anecdotes came from individuals "spread throughout" the company who "for the most part" worked at the company's operational centers that employed the largest numbers of the class members. 517 F.2d, at 315, and n. 30. Here, by contrast, respondents filed some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal–Mart's 3,400 stores. 603 F.3d, at 634 (Ikuta, J., dissenting). More than half of these reports are concentrated in only six States (Alabama, California, Florida, Missouri, Texas, and Wisconsin); half of all States have only one or two anecdotes; and 14 States have no anecdotes about Wal–Mart's operations at all. *Id.*, at 634–635, and n. 10. Even if every single one of these accounts is true, that would not demonstrate that the entire company "operate [s] under a general policy of discrimination," *Falcon, supra*, at 159, n. 15, 102 S.Ct. 2364, which is what respondents must show to certify a companywide class. [9]

***359** The dissent misunderstands the nature of the foregoing analysis. It criticizes our focus on the dissimilarities between the putative class members on the ground that we have "blend[ed]" Rule 23(a)(2)'s

commonality requirement with Rule 23(b)(3)'s inquiry into whether common questions "predominate" over individual ones. See *post,* at 2550 – 2552 (GINSBURG, J., concurring in part and dissenting in part). That is not so. We quite agree that for purposes of Rule 23(a)(2) " '[e]ven a single [common] question' " will do, *post,* at 2566, n. 9 (quoting Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L.Rev. 149, 176, n. 110 (2003)). We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate,* but in order to determine (as Rule 23(a)(2) requires) whether there *is* "[e]ven a single [common] question." And there is not here. Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have ****2557** not established the existence of any common question. [10]

In sum, we agree with Chief Judge Kozinski that the members of the class:

> "held a multitude of different jobs, at different levels of Wal–Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of ***360** regional policies that all differed .... Some thrived while others did poorly. They have little in common but their sex and this lawsuit." 603 F.3d, at 652 (dissenting opinion).

III

[12] We also conclude that respondents' claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2). Our opinion in *Ticor Title Ins. Co. v. Brown,* 511 U.S. 117, 121, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994) *(per curiam)* expressed serious doubt about whether claims for monetary relief may be certified under that provision. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.

A

[13] Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." One possible reading of this provision is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all. We need not reach that broader question in this case, because we think that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule. The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Nagareda, 84 N.Y.U.L.Rev., at 132. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not ***361** authorize class certification when each class member would be entitled to an individualized award of monetary damages.

[14] That interpretation accords with the history of the Rule. Because Rule 23 "stems from equity practice" that predated its codification, *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), in determining its meaning we have previously looked to the historical models on which the Rule was based, *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 841–845, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). As we observed in *Amchem,* "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of what (b)(2) is meant to capture. ****2558** 521 U.S., at 614, 117 S.Ct. 2231. In particular, the Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order. In none of the cases cited by the Advisory Committee as examples of (b)(2)'s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction. See Advisory Committee's Note, 39 F.R.D. 69, 102 (1966) (citing cases); *e.g., Potts v. Flax,* 313 F.2d 284, 289, n. 5 (C.A.5 1963); *Brunson v. Board of Trustees of Univ. of School Dist. No. 1, Clarendon Cty.,* 311 F.2d 107, 109 (C.A.4 1962) *(per curiam); Frasier v. Board of Trustees of N.C.,* 134 F.Supp. 589, 593 (NC 1955) (three-judge court), aff'd, 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. 848 (1956).

Permitting the combination of individualized and classwide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b). Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a(b)(1) class,[11] or that the relief sought must perforce ***362** affect the entire class at once, as in a (b)(2) class. For that reason these are also mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action. Rule 23(b)(3), by contrast, is an "adventuresome innovation" of the 1966 amendments, *Amchem*, 521 U.S., at 614, 117 S.Ct. 2231 (internal quotation marks omitted), framed for situations "in which 'class-action treatment is not as clearly called for'," *id.*, at 615, 117 S.Ct. 2231 (quoting Advisory Committee's Notes, 28 U.S.C.App., p. 697 (1994 ed.)). It allows class certification in a much wider set of circumstances but with greater procedural protections. Its only prerequisites are that "the 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." Rule 23(b)(3). And unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory; class members are entitled to receive "the best notice that is practicable under the circumstances" and to withdraw from the class at their option. See Rule 23(c)(2)(B).

Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3). The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*. When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating ***363** the dispute. Predominance and superiority are self-evident. But with respect to each class member's individualized claim for money, that is not so—which ****2559** is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class. Similarly, (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.

B

Against that conclusion, respondents argue that their claims for backpay were appropriately certified as part of a class under Rule 23(b)(2) because those claims do not "predominate" over their requests for injunctive and declaratory relief. They rely upon the Advisory Committee's statement that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages." 39 F.R.D., at 102 (emphasis added). The negative implication, they argue, is that it *does* extend to cases in which the appropriate final relief relates only partially and nonpredominantly to money damages. Of course it is the Rule itself, not the Advisory Committee's description of it, that governs. And a mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule's text, and that does obvious violence to the Rule's structural features. The mere "predominance" of a proper (b)(2) injunctive claim ***364** does nothing to justify elimination of Rule 23(b)(3)'s procedural protections: It neither establishes the superiority of *class* adjudication over *individual* adjudication nor cures the notice and opt-out problems. We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a "predominating request"—for an injunction.

Respondents' predominance test, moreover, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief. In this case, for example, the named plaintiffs declined to include employees' claims for compensatory damages in their complaint. That strategy of including only backpay claims made it more likely that monetary relief would

not "predominate." But it also created the possibility (if the predominance test were correct) that individual class members' compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from. If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was *not* the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial. That possibility underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone—a choice Rule 23(b)(2) does not ensure that they have.

The predominance test would also require the District Court to reevaluate the roster of class members continually. The Ninth Circuit recognized the necessity for this when it concluded that those plaintiffs **2560 no longer employed by Wal–Mart lack standing to seek injunctive or declaratory relief against its employment practices. The Court of Appeals' response to that difficulty, however, was not to eliminate *all* former employees from the certified class, but to eliminate only those who had left the company's employ by the date *365 the complaint was filed. That solution has no logical connection to the problem, since those who have left their Wal–Mart jobs *since* the complaint was filed have no more need for prospective relief than those who left beforehand. As a consequence, even though the validity of a (b)(2) class depends on whether "final injunctive relief or corresponding declaratory relief is appropriate respecting the class *as a whole*," Rule 23(b)(2) (emphasis added), about half the members of the class approved by the Ninth Circuit have no claim for injunctive or declaratory relief at all. Of course, the alternative (and logical) solution of excising plaintiffs from the class as they leave their employment may have struck the Court of Appeals as wasteful of the District Court's time. Which indeed it is, since if a backpay action were properly certified for class treatment under *(b)(3)*, the ability to litigate a plaintiff's backpay claim as part of the class would not turn on the irrelevant question whether she is still employed at Wal–Mart. What follows from this, however, is not that some arbitrary limitation on class membership should be imposed but that the backpay claims should not be certified under Rule 23(b)(2) at all.

Finally, respondents argue that their backpay claims are appropriate for a (b)(2) class action because a backpay award is equitable in nature. The latter may be true, but it is irrelevant. The Rule does not speak of "equitable" remedies generally but of injunctions and declaratory judgments. As Title VII itself makes pellucidly clear, backpay is neither. See 42 U.S.C. § 2000e–5(g)(2)(B)(i) and (ii) (distinguishing between declaratory and injunctive relief and the payment of "backpay," see § 2000e–5(g)(2)(A)).

C

[15] In *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (C.A.5 1998), the Fifth Circuit held that a (b)(2) class would permit the certification of monetary relief that is "incidental to requested injunctive or declaratory relief," which it defined *366 as "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." In that court's view, such "incidental damage should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new substantial legal or factual issues, nor entail complex individualized determinations." *Ibid.* We need not decide in this case whether there are any forms of "incidental" monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause. Respondents do not argue that they can satisfy this standard, and in any event they cannot.

Contrary to the Ninth Circuit's view, Wal–Mart is entitled to individualized determinations of each employee's eligibility for backpay. Title VII includes a detailed remedial scheme. If a plaintiff prevails in showing that an employer has discriminated against him in violation of the statute, the court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, [including] reinstatement or hiring of employees, with or without backpay ... or any other equitable relief as the court deems appropriate." § 2000e–5(g)(1). But if the employer can show that it took an adverse employment action against an employee for any **2561 reason other than discrimination, the court cannot order the "hiring, reinstatement, or promotion of an individual as

an employee, or the payment to him of any backpay." § 2000e–5(g)(2)(A).

[16] We have established a procedure for trying pattern-or-practice cases that gives effect to these statutory requirements. When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, "a district court must usually conduct additional proceedings ... to determine the scope of individual relief." *Teamsters,* 431 U.S., at 361, 97 S.Ct. 1843. At this phase, the burden of proof will shift to the company, but it ***367** will have the right to raise any individual affirmative defenses it may have, and to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.,* at 362, 97 S.Ct. 1843.

[17] The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. 603 F.3d, at 625–627. We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b); see *Ortiz,* 527 U.S., at 845, 119 S.Ct. 2295, a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being "incidental" to the classwide injunction, respondents' class could not be certified even assuming, *arguendo,* that "incidental" monetary relief can be awarded to a 23(b)(2) class.

* * *

The judgment of the Court of Appeals is

Reversed.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, concurring in part and dissenting in part.

The class in this case, I agree with the Court, should not have been certified under Federal Rule of Civil Procedure 23(b)(2). The plaintiffs, alleging discrimination in violation ***368** of Title VII, 42 U.S.C. § 2000e *et seq.*, seek monetary relief that is not merely incidental to any injunctive or declaratory relief that might be available. See *ante,* at 2557 – 2561. A putative class of this type may be certifiable under Rule 23(b)(3), if the plaintiffs show that common class questions "predominate" over issues affecting individuals—*e.g.,* qualification for, and the amount of, backpay or compensatory damages—and that a class action is "superior" to other modes of adjudication.

Whether the class the plaintiffs describe meets the specific requirements of Rule 23(b)(3) is not before the Court, and I would reserve that matter for consideration and decision on remand.[1] The Court, ****2562** however, disqualifies the class at the starting gate, holding that the plaintiffs cannot cross the "commonality" line set by Rule 23(a)(2). In so ruling, the Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment.

I

A

Rule 23(a)(2) establishes a preliminary requirement for maintaining a class action: "[T]here are questions of law or fact common to the class."[2] The Rule "does not require that all questions of law or fact raised in the litigation be common," ***369** 1 H. Newberg & A. Conte, Newberg on Class Actions § 3.10, pp. 3–48 to 3–49 (3d ed.1992); indeed, "[e]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement," Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L.Rev. 149, 176, n. 110 (2003). See Advisory Committee's 1937 Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., p. 138 (citing with approval cases in which "there was only a question of law or fact common to" the class members).

A "question" is ordinarily understood to be "[a] subject or point open to controversy." American Heritage Dictionary 1483 (3d ed.1992). See also Black's Law Dictionary 1366 (9th ed.2009) (defining "question of fact" as "[a] disputed issue to be resolved ... [at] trial" and "question of law" as "[a]n issue to be decided by the judge"). Thus, a "question" "common to the class" must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims. [3]

B

The District Court, recognizing that "one significant issue common to the class may be sufficient to warrant certification," 222 F.R.D. 137, 145 (N.D.Cal.2004), found that the plaintiffs easily met that test. Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality. See *Califano v. Yamasaki,* 442 U.S. 682, 703, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) ("[M]ost issues arising under Rule 23 ... [are] committed in the first instance to the discretion of the district court.").

***370** The District Court certified a class of "[a]ll women employed at any Wal–Mart domestic retail store at any time since December 26, 1998." 222 F.R.D., at 141–143 (internal quotation marks omitted). The named plaintiffs, led by Betty Dukes, propose to litigate, on behalf of the class, allegations that Wal–Mart discriminates on the basis of gender in pay and promotions. ****2563** They allege that the company "[r]eli[es] on gender stereotypes in making employment decisions such as ... promotion[s] [and] pay." App. 55a. Wal–Mart permits those prejudices to infect personnel decisions, the plaintiffs contend, by leaving pay and promotions in the hands of "a nearly all male managerial workforce" using "arbitrary and subjective criteria." *Ibid.* Further alleged barriers to the advancement of female employees include the company's requirement, "as a condition of promotion to management jobs, that employees be willing to relocate." *Id.*, at 56a. Absent instruction otherwise, there is a risk that managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men. See Dept. of Labor, Federal Glass Ceiling Commission, Good for Business: Making Full Use of the Nation's Human Capital 151 (1995).

Women fill 70 percent of the hourly jobs in the retailer's stores but make up only "33 percent of management employees." 222 F.R.D., at 146. "[T]he higher one looks in the organization the lower the percentage of women." *Id.*, at 155. The plaintiffs' "largely uncontested descriptive statistics" also show that women working in the company's stores "are paid less than men in every region" and "that the salary gap widens over time even for men and women hired into the same jobs at the same time." *Ibid.*; cf. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007) (GINSBURG, J., dissenting).

The District Court identified "systems for ... promoting in-store employees" that were "sufficiently similar across regions and stores" to conclude that "the manner in which ***371** these systems affect the class raises issues that are common to all class members." 222 F.R.D., at 149. The selection of employees for promotion to in-store management "is fairly characterized as a 'tap on the shoulder' process," in which managers have discretion about whose shoulders to tap. *Id.*, at 148. Vacancies are not regularly posted; from among those employees satisfying minimum qualifications, managers choose whom to promote on the basis of their own subjective impressions. *Ibid.*

Wal–Mart's compensation policies also operate uniformly across stores, the District Court found. The retailer leaves open a $2 band for every position's hourly pay rate. Wal–Mart provides no standards or criteria for setting wages within that band, and thus does nothing to counter unconscious bias on the part of supervisors. See *id.*, at 146–147.

Wal–Mart's supervisors do not make their discretionary decisions in a vacuum. The District Court reviewed means Wal–Mart used to maintain a "carefully constructed ... corporate culture," such as frequent meetings to reinforce the common way of thinking, regular transfers of managers between stores to ensure uniformity throughout the company, monitoring of stores "on a close and constant basis," and "Wal–Mart TV," "broadcas[t] ... into all stores." *Id.*, at 151–153 (internal quotation marks omitted).

The plaintiffs' evidence, including class members' tales of their own experiences, [4] suggests that gender bias suffused Wal–Mart's company culture. Among illustrations,

**2564 senior management often refer to female associates as "little Janie *372 Qs." Plaintiffs' Motion for Class Certification in No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, p. 13 (internal quotation marks omitted). One manager told an employee that "[m]en are here to make a career and women aren't." 222 F.R.D., at 166 (internal quotation marks omitted). A committee of female Wal–Mart executives concluded that " [s]tereotypes limit the opportunities offered to women." Plaintiffs' Motion for Class Certification in No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, at 16 (internal quotation marks omitted).

Finally, the plaintiffs presented an expert's appraisal to show that the pay and promotions disparities at Wal–Mart "can be explained only by gender discrimination and not by ... neutral variables." 222 F.R.D., at 155. Using regression analyses, their expert, Richard Drogin, controlled for factors including, *inter alia,* job performance, length of time with the company, and the store where an employee worked. *Id.*, at 159. [5] The results, the District Court found, were sufficient to raise an "inference of discrimination." *Id.*, at 155–160.

C

The District Court's identification of a common question, whether Wal–Mart's pay and promotions policies gave rise to unlawful discrimination, was hardly infirm. The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases *373 of which they are unaware. [6] The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.

The plaintiffs' allegations resemble those in one of the prototypical cases in this area, *Leisner v. New York Tel. Co.*, 358 F.Supp. 359, 364–365 (S.D.N.Y.1973). In deciding on promotions, supervisors in that case were to start with objective measures; but ultimately, they were to "look at the individual as a total individual." *Id.*, at 365 (internal quotation marks omitted). The final question they were to ask and answer: "Is this person going to be successful in our business?" *Ibid.* (internal quotation marks omitted). It is hardly surprising that for many managers, the ideal candidate was someone with characteristics similar to their own.

We have held that "discretionary employment practices" can give rise to Title **2565 VII claims, not only when such practices are motivated by discriminatory intent but also when they produce discriminatory results. See *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 988, 991, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). But see *ante,* at 2555 ("[P]roving that [a] discretionary system has produced a ... disparity *is not enough.*"). In *Watson,* as here, an employer had given its managers large authority over promotions. An employee sued the bank under Title VII, alleging that the "discretionary promotion system" *374 caused a discriminatory effect based on race. 487 U.S., at 984, 108 S.Ct. 2777 (internal quotation marks omitted). Four different supervisors had declined, on separate occasions, to promote the employee. *Id.*, at 982, 108 S.Ct. 2777. Their reasons were subjective and unknown. The employer, we noted "had not developed precise and formal criteria for evaluating candidates"; "[i]t relied instead on the subjective judgment of supervisors." *Ibid.*

Aware of "the problem of subconscious stereotypes and prejudices," we held that the employer's "undisciplined system of subjective decisionmaking" was an "employment practic[e]" that "may be analyzed under the disparate impact approach." *Id.*, at 990–991, 108 S.Ct. 2777. See also *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 657, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989) (recognizing "the use of 'subjective decision making' " as an "employment practic[e]" subject to disparate-impact attack).

The plaintiffs' allegations state claims of gender discrimination in the form of biased decisionmaking in both pay and promotions. The evidence reviewed by the District Court adequately demonstrated that resolving those claims would necessitate examination of particular policies and practices alleged to affect, adversely and globally, women employed at Wal–Mart's stores. Rule 23(a)(2), setting a necessary but not a sufficient criterion for class-action certification, demands nothing further.

II

A

The Court gives no credence to the key dispute common to the class: whether Wal–Mart's discretionary pay and promotion policies are discriminatory. See *ante,* at 2551 ("Reciting" questions like "Is [giving managers discretion over pay] an unlawful employment practice?" "is not sufficient to obtain class certification."). "What matters," the Court asserts, "is not the raising of common 'questions,' " but whether there are "[d]issimilarities within the proposed ***375** class" that "have the potential to impede the generation of common answers." *Ante,* at 2551 (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L.Rev. 97, 132 (2009); some internal quotation marks omitted).

The Court blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer "easily satisfied," 5 J. Moore et al., Moore's Federal Practice § 23.23[2], p. 23–72 (3d ed.2011).[7] Rule 23(b)(3) certification ****2566** requires, in addition to the four 23(a) findings, determinations 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 ... adjudicating the controversy."[8]

***376** The Court's emphasis on differences between class members mimics the Rule 23(b)(3) inquiry into whether common questions "predominate" over individual issues. And by asking whether the individual differences "impede" common adjudication, *ante,* at 2551 – 2552 (internal quotation marks omitted), the Court duplicates 23(b)(3)'s question whether "a class action is superior" to other modes of adjudication. Indeed, Professor Nagareda, whose "dissimilarities" inquiry the Court endorses, developed his position in the context of Rule 23(b)(3). See 84 N.Y.U.L.Rev., at 131 (Rule 23(b)(3) requires "some decisive degree of similarity across the proposed class" because it "speaks of common 'questions' that 'predominate' over individual ones").[9] "The Rule 23(b)(3) predominance inquiry" is meant to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). If courts must conduct a "dissimilarities" analysis at the Rule 23(a)(2) stage, no mission remains for Rule 23(b)(3).

Because Rule 23(a) is also a prerequisite for Rule 23(b)(1) and Rule 23(b)(2) classes, the Court's "dissimilarities" position is far reaching. Individual differences should not bar a Rule 23(b)(1) or Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met. See *Amchem Products,* 521 U.S., at 623, n. 19, 117 S.Ct. 2231 (Rule 23(b)(1)(B) "does not have a predominance requirement"); *Yamasaki,* 442 U.S., at 701, 99 S.Ct. 2545 (Rule 23(b)(2) action in which the Court noted that "[i]t is unlikely that differences in the factual background of each claim will affect the outcome of the legal ***377** issue"). For example, in *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), a Rule 23(b)(2) class of African–American truckdrivers complained that the defendant had ****2567** discriminatorily refused to hire black applicants. We recognized that the "qualification[s] and performance" of individual class members might vary. *Id.,* at 772, 96 S.Ct. 1251 (internal quotation marks omitted). "Generalizations concerning such individually applicable evidence," we cautioned, "cannot serve as a justification for the denial of [injunctive] relief to the entire class." *Ibid.*

B

The "dissimilarities" approach leads the Court to train its attention on what distinguishes individual class members, rather than on what unites them. Given the lack of standards for pay and promotions, the majority says, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." *Ante,* at 2554.

Wal–Mart's delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways. A system of delegated discretion, *Watson* held, is a practice actionable under Title VII when it produces discriminatory outcomes. 487 U.S., at 990–991, 108 S.Ct. 2777; see *supra,* at 2564 – 2565. A finding that Wal–Mart's pay and promotions practices in fact violate the law would be the first step in the usual order of proof for plaintiffs seeking individual remedies for company-wide discrimination. *Teamsters v. United States,* 431 U.S. 324, 359, 97 S.Ct. 1843, 52 L.Ed.2d

396 (1977); see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415–423, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). That each individual employee's unique circumstances will ultimately determine whether she is entitled to backpay or damages, § 2000e–5(g)(2)(A) (barring backpay if a plaintiff "was refused ... advancement ... for any reason other than discrimination"), should not factor into the Rule 23(a)(2) determination.

* * *

***378** The Court errs in importing a "dissimilarities" notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry. I therefore cannot join Part II of the Court's opinion.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The complaint included seven named plaintiffs, but only three remain part of the certified class as narrowed by the Court of Appeals.

2 Rule 23(b)(1) allows a class to be maintained where "prosecuting separate actions by or against individual class members would create a risk of" either "(A) inconsistent or varying adjudications," or "(B) adjudications ... that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impeded their ability to protect their interests." Rule 23(b)(3) states that a class may be maintained where "questions of law or fact common to class members predominate over any questions affecting only individual members," and a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." The applicability of these provisions to the plaintiff class is not before us.

3 The District Court excluded backpay claims based on promotion opportunities that had not been publicly posted, for the reason that no applicant data could exist for such positions. 222 F.R.D. 137, 182 (N.D.Cal.2004). It also decided to afford class members notice of the action and the right to opt-out of the class with respect to respondents' punitive-damages claim. *Id.*, at 173.

4 To enable that result, the Court of Appeals trimmed the (b)(2) class in two ways: First, it remanded that part of the certification order which included respondents' punitive-damages claim in the (b)(2) class, so that the District Court might consider whether that might cause the monetary relief to predominate. 603 F.3d, at 621. Second, it accepted in part Wal–Mart's argument that since class members whom it no longer employed had no standing to seek injunctive or declaratory relief, as to them monetary claims must predominate. It excluded from the certified class "those putative class members who were no longer Wal–Mart employees *at the time Plaintiffs' complaint was filed*," *id.*, at 623 (emphasis added).

5 We have previously stated in this context that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157–158, n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). In light of our disposition of the commonality question, however, it is unnecessary to resolve whether respondents have satisfied the typicality and adequate-representation requirements of Rule 23(a).

6 A statement in one of our prior cases, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), is sometimes mistakenly cited to the contrary: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." But in that case, the judge had conducted a preliminary inquiry into the merits of a suit, not in order to determine the propriety of certification under Rules 23(a) and (b) (he had already done that, see *id.*, at

165, 94 S.Ct. 2140), but in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants. To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases.

Perhaps the most common example of considering a merits question at the Rule 23 stage arises in class-action suits for securities fraud. Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members" would often be an insuperable barrier to class certification, since each of the individual investors would have to prove reliance on the alleged misrepresentation. But the problem dissipates if the plaintiffs can establish the applicability of the so-called "fraud on the market" presumption, which says that all traders who purchase stock in an efficient market are presumed to have relied on the accuracy of a company's public statements. To invoke this presumption, the plaintiffs seeking 23(b)(3) certification must prove that their shares were traded on an efficient market, *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. ——, ——, 131 S.Ct. 2179, 2185, 180 L.Ed.2d 24, 2011 WL 2175208 (2011) (slip op., at 5), an issue they will surely have to prove *again* at trial in order to make out their case on the merits.

7 In a pattern-or-practice case, the plaintiff tries to "establish by a preponderance of the evidence that ... discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice." *Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); see also *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). If he succeeds, that showing will support a rebuttable inference that all class members were victims of the discriminatory practice, and will justify "an award of prospective relief," such as "an injunctive order against the continuation of the discriminatory practice." *Teamsters,supra,* at 361, 97 S.Ct. 1843.

8 Bielby's conclusions in this case have elicited criticism from the very scholars on whose conclusions he relies for his social-framework analysis. See Monahan, Walker, & Mitchell, Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks," 94 Va. L.Rev. 1715, 1747 (2008) ("[Bielby's] research into conditions and behavior at Wal–Mart did not meet the standards expected of social scientific research into stereotyping and discrimination"); *id.,* at 1745, 1747 ("[A] social framework necessarily contains only general statements about reliable patterns of relations among variables ... and goes no further .... Dr. Bielby claimed to present a social framework, but he testified about social facts specific to Wal–Mart"); *id.,* at 1747–1748 ("Dr. Bielby's report provides no verifiable method for measuring and testing any of the variables that were crucial to his conclusions and reflects nothing more than Dr. Bielby's 'expert judgment' about how general stereotyping research applied to all managers across all of Wal–Mart's stores nationwide for the multi-year class period").

9 The dissent says that we have adopted "a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class." *Post,* at 2563, n. 4 (GINSBURG, J., concurring in part and dissenting in part). That is not quite accurate. A discrimination claimant is free to supply as few anecdotes as he wishes. But when the claim is that a company operates under a general policy of discrimination, a few anecdotes selected from literally millions of employment decisions prove nothing at all.

10 For this reason, there is no force to the dissent's attempt to distinguish *Falcon* on the ground that in that case there were " '*no* common questions of law or fact' between the claims of the lead plaintiff and the applicant class" *post,* at 2565 – 2566, n. 7 (quoting *Falcon,* 457 U.S., at 162, 102 S.Ct. 2364 (BURGER, C.J., concurring in part and dissenting in part)). Here also there is nothing to unite all of the plaintiffs' claims, since (contrary to the dissent's contention, *post,* at 2565 – 2566, n. 7), the same employment practices do not "touch and concern all members of the class."

11 Rule 23(b)(1) applies where separate actions by or against individual class members would create a risk of "establish[ing] incompatible standards of conduct for the party opposing the class," Rule 23(b)(1)(A), such as "where the party is obliged by law to treat the members of the class alike," *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 614, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), or where individual adjudications "as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests," Rule 23(b)(1)(B), such as in " 'limited fund' cases, ... in which numerous persons make claims against a fund insufficient to satisfy all claims," *Amchem, supra,* at 614, 117 S.Ct. 2231.

1 The plaintiffs requested Rule 23(b)(3) certification as an alternative, should their request for (b)(2) certification fail. Plaintiffs' Motion for Class Certification in No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, p. 47.

2 Rule 23(a) lists three other threshold requirements for class-action certification: "(1) the class is so numerous that joinder of all members is impracticable"; "(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." The numerosity requirement is clearly met and Wal–Mart does not contend otherwise. As the Court does not reach the typicality and adequacy requirements, *ante,* at 2551, n. 5, I will not discuss them either, but will simply record my agreement with the District Court's resolution of those issues.

3 The Court suggests Rule 23(a)(2) must mean more than it says. See *ante,* at 2550 – 2552. If the word "questions" were taken literally, the majority asserts, plaintiffs could pass the Rule 23(a)(2) bar by "[r]eciting ... questions" like "Do all of us plaintiffs indeed work for Wal–Mart?" *Ante,* at 2551. Sensibly read, however, the word "questions" means disputed issues, not any utterance crafted in the grammatical form of a question.

4 The majority purports to derive from *Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class. *Ante,* at 17–18. *Teamsters,* the Court acknowledges, see *ante,* at 2556, n. 9, instructs that statistical evidence alone may suffice, 431 U.S., at 339, 97 S.Ct. 1843; that decision can hardly be said to establish a numerical floor before anecdotal evidence can be taken into account.

5 The Court asserts that Drogin showed only average differences at the "regional and national level" between male and female employees. *Ante,* at 2555 (internal quotation marks omitted). In fact, his regression analyses showed there were disparities *within* stores. The majority's contention to the contrary reflects only an arcane disagreement about statistical method—which the District Court resolved in the plaintiffs' favor. 222 F.R.D. 137, 157 (N.D.Cal.2004). Appellate review is no occasion to disturb a trial court's handling of factual disputes of this order.

6 An example vividly illustrates how subjective decisionmaking can be a vehicle for discrimination. Performing in symphony orchestras was long a male preserve. Goldin and Rouse, Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians, 90 Am. Econ. Rev. 715, 715–716 (2000). In the 1970's orchestras began hiring musicians through auditions open to all comers. *Id.*, at 716. Reviewers were to judge applicants solely on their musical abilities, yet subconscious bias led some reviewers to disfavor women. Orchestras that permitted reviewers to see the applicants hired far fewer female musicians than orchestras that conducted blind auditions, in which candidates played behind opaque screens. *Id.*, at 738.

7 The Court places considerable weight on *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). *Ante,* at 2553. That case has little relevance to the question before the Court today. The lead plaintiff in *Falcon* alleged discrimination evidenced by the company's failure to promote him and other Mexican–American employees and failure to hire Mexican–American applicants. There were "*no* common questions of law or fact" between the claims of the lead plaintiff and the applicant class. 457 U.S., at 162, 102 S.Ct. 2364 (Burger, C. J., concurring in part and dissenting in part) (emphasis added). The plaintiff-employee alleged that the defendant-employer had discriminated against him intentionally. The applicant class claims, by contrast, were "advanced under the 'adverse impact' theory," *ibid.*, appropriate for facially neutral practices. "[T]he only commonality [wa]s that respondent is a Mexican–American and he seeks to represent a class of Mexican–Americans." *Ibid.* Here the same practices touch and concern all members of the class.

8 "A class action may be maintained if Rule 23(a) is satisfied and if:
"(1) prosecuting separate actions by or against individual class members would create a risk of ... inconsistent or varying adjudications ... [or] adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members ...;
"(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief ... is appropriate respecting the class as a whole; or
"(3) the court finds that the 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." Fed. Rule Civ. Proc. 23(b) (paragraph breaks added).

9 Cf. *supra,* at 2545 (Rule 23(a) commonality prerequisite satisfied by "[e]ven a single question ... common to the members of the class" (quoting Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L.Rev. 149, 176, n. 110 (2003).

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Edwards v. North American Power & Gas, LLC, D.Conn., August 3, 2018

897 F.3d 88
United States Court of Appeals, Second Circuit.

Heidi **LANGAN**, on behalf of herself and all others similarly situated, Plaintiff-Appellee,

v.

JOHNSON & **JOHNSON** CONSUMER COMPANIES, INC., Defendant-Appellant.

No. 17-1605
|
August Term, 2017
|
Argued: February 6, 2018
|
Decided: July 24, 2018

Synopsis

Background: Consumer brought putative class action against seller of baby bath products, alleging violation of Connecticut Unfair Trade Practices Act (CUTPA) and other state consumer protection laws. The United States District Court for the District of Connecticut, No. 13 Civ. 1471, Jeffrey A. Meyer, J., 2017 WL 985640, certified class. Seller appealed.

[Holding:] The Court of Appeals, John M. Walker, Jr., Circuit Judge, held that district court failed to engage in rigorous analysis of similarities and difference in various state laws at issue, and thus remand was necessary.

Vacated and remanded.

West Headnotes (19)

[1] **Federal Courts**
Class actions

Appellate court reviews a district court's decision to certify a class for abuse of discretion, the legal conclusions that informed its decision de novo, and any findings of fact for clear error. Fed. R. Civ. P. 23.

1 Cases that cite this headnote

[2] **Federal Courts**
Mode and sufficiency of presentation

Because a plaintiff's standing to sue implicates appellate court's power to hear the case, appellate court must consider the issue even if it was barely raised in and not addressed by the district court.

Cases that cite this headnote

[3] **Federal Civil Procedure**
In general;injury or interest

Federal Courts
Case or Controversy Requirement

Article III of the Constitution limits the jurisdiction of the federal courts to the resolution of cases and controversies; to ensure that this bedrock case-or-controversy requirement is met, courts require that plaintiffs establish their standing as the proper parties to bring suit. U.S. Const. art. 3, § 2, cl. 1.

1 Cases that cite this headnote

[4] **Federal Civil Procedure**
In general;injury or interest

Federal Civil Procedure
Causation;redressability

To have standing to sue, a plaintiff must demonstrate (1) a personal injury in fact (2) that the challenged conduct of the defendant caused and (3) which a favorable decision will likely redress.

Cases that cite this headnote

[5] **Federal Civil Procedure**
In general;injury or interest

The doctrine of standing tests whether a prospective litigant may properly invoke the power of the federal courts.

Cases that cite this headnote

[6] **Constitutional Law**
Encroachment on Legislature
Constitutional Law
Encroachment on Executive
Federal Civil Procedure
Causation;redressability

The standing requirement acknowledges that not all injuries can be remedied by courts, and that even some injuries that could are the responsibility of the political branches instead.

Cases that cite this headnote

[7] **Constitutional Law**
Advisory Opinions

To avoid giving advisory opinions, court requires that parties that come before it have a sufficient stake in the outcome of the case to render it a case or controversy. U.S. Const. art. 3, § 2, cl. 1.

Cases that cite this headnote

[8] **Federal Civil Procedure**
Class Actions

Class actions are an exception to the general rule that one person cannot litigate injuries on behalf of another. Fed. R. Civ. P. 23.

1 Cases that cite this headnote

[9] **Federal Civil Procedure**
Class Actions

Class actions result in efficiencies of cost, time, and judicial resources and permit a collective recovery where obtaining individual judgments might not be economically feasible. Fed. R. Civ. P. 23.

Cases that cite this headnote

[10] **Federal Civil Procedure**
Representation of class;typicality; standing in general
Federal Civil Procedure
Common interest in subject matter, questions and relief;damages issues

Whether a plaintiff can bring a class action under the state laws of multiple states is a question of predominance under rule governing class actions, not a question of standing under Article III. U.S. Const. art. 3, §, 2, cl. 1; Fed. R. Civ. P. 23(b)(3).

6 Cases that cite this headnote

[11] **Federal Civil Procedure**
Common interest in subject matter, questions and relief;damages issues

Predominance requirement for class certification tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. Fed. R. Civ. P. 23(b)(3).

2 Cases that cite this headnote

[12] **Federal Civil Procedure**
Common interest in subject matter, questions and relief;damages issues

The predominance requirement for class certification is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and these particular issues are more substantial than the issues subject only to individualized proof. Fed. R. Civ. P. 23(b)(3).

4 Cases that cite this headnote

[13] **Federal Civil Procedure**
Common interest in subject matter, questions and relief;damages issues

Variations in state laws do not necessarily prevent a class from satisfying the predominance requirement for class certification. Fed. R. Civ. P. 23(b)(3).

2 Cases that cite this headnote

[14] **Federal Civil Procedure**
Evidence:pleadings and supplementary material

As with all requirements for class certification, a party seeking certification has the ultimate burden to demonstrate that any variations in relevant state laws do not predominate over the similarities. Fed. R. Civ. P. 23.

Cases that cite this headnote

[15] **Federal Civil Procedure**
Discretion of court

Federal Courts
Class actions

The decision to certify a class is a discretionary determination, which appellate court will only overturn if the district court abused its discretion; to be afforded this deference, however, the certification must be sufficiently supported and explained. Fed. R. Civ. P. 23.

1 Cases that cite this headnote

[16] **Federal Courts**
Need for further evidence, findings, or conclusions

District court failed to engage in rigorous analysis of similarities and difference in various state consumer protection laws at issue when granting motion for class certification, and thus remand was necessary to determine whether state law similarities or differences would predominate, in consumer's action against seller of baby bath products, although both parties submitted complicated and confusing summaries of state consumer protection laws in 18 states; district court's analysis consisted of one paragraph, district court did not sufficiently engage with seller's arguments about reliance, instead concluding that it appeared that none of the states' high courts had insisted on reliance, other identified differences, including whether intent to deceive was required and whether causation could be presumed, were not discussed, and district court only stated generally that identified differences were minor and should not overwhelm questions common to class. Fed. R. Civ. P. 23(b)(3).

Cases that cite this headnote

[17] **Federal Civil Procedure**
Common interest in subject matter, questions and relief;damages issues

District court has a duty, before certifying a class, to take a close look at whether the common legal questions predominate over individual ones. Fed. R. Civ. P. 23(b)(3).

1 Cases that cite this headnote

[18] **Federal Civil Procedure**
Common interest in subject matter, questions and relief;damages issues

To determine whether variations in relevant state laws do not predominate over the similarities, as required for class certification, district courts must do more than take the plaintiff's word that no material differences exist; rather, district courts themselves must undertake a considered analysis of the differences in state laws. Fed. R. Civ. P. 23(b)(3).

1 Cases that cite this headnote

[19] **Federal Civil Procedure**
Identification of class;subclasses

A district court that relies on subclasses to cure predominance issues as a prerequisite to certification must identify the required subclasses and explain why they are necessary. Fed. R. Civ. P. 23(b)(3).

Cases that cite this headnote

***90** Appeal from the United States District Court for the District of Connecticut. No. 13 Civ. 1471—Jeffrey A. Meyer, *Judge*.

Attorneys and Law Firms

Mark P. Kindall, Izard, Kindall & Raabe, LLP, West Hartford, CT (Nicole A. Veno, Simsbury, CT, on the brief), for Plaintiff-Appellee.

Harold P. Weinberger (Eileen M. Patt, Benjamin M. Arrow, on the brief), Kramer Levin Naftalis & Frankel LLP, New York, NY, for Defendant-Appellant.

Before: Walker, Lynch, and Chin, Circuit Judges.

Opinion

John M. Walker, Jr., Circuit Judge:

***91** Connecticut resident Heidi **Langan** sued **Johnson & Johnson** Consumer Companies, Inc. ("**Johnson & Johnson**") on behalf of herself and "all others similarly situated" for deceptive labeling. Plaintiff alleged that several of the company's baby products were labeled "natural" when they were not. **Langan** claimed that this labeling violated the Connecticut Unfair Trade Practices Act (CUTPA), as well as the state consumer protection laws of twenty other states, and sought to certify a plaintiff class. After both parties moved for summary judgment, the district court denied both motions, and certified a class of consumers who purchased two baby bath products in eighteen states. [1] We granted **Johnson & Johnson** leave to appeal the class certification. On appeal, **Johnson & Johnson** principally challenges the district court's conclusions that (1) **Langan** has Article III standing to bring a class-action claim on behalf of consumers in states other than Connecticut and (2) the state laws in the other states are sufficiently similar to support certifying the class. Although we hold that **Langan** has Article III standing, on the record before us, it is not clear that the district court undertook the requisite considered analysis of the material differences in the state laws at issue before concluding that their similarities predominated over their differences. We therefore VACATE the district court's grant of certification, and REMAND for further proceedings consistent with this opinion.

BACKGROUND

Connecticut resident Heidi **Langan** purchased several **Johnson & Johnson** sunscreens and bath products for her baby in 2012. **Langan** alleges that she purchased those products in part because their labels said they contained "natural" ingredients. In reality, the products were made up of a high percentage of non-natural, non-water ingredients.

In October 2013, **Langan** sued **Johnson & Johnson** on behalf of herself and "all others similarly situated" alleging that the company's labeling was deceptive and violated CUTPA as well as the "mini-FTC acts" of twenty other states. **Langan** sought to certify a plaintiff class and requested compensatory and punitive damages as well as attorney's fees. Both parties moved for summary judgment.

The district court denied both parties' motions for summary judgment and certified a class as to two bath products, but not the sunscreens. The two products, sold under the Aveeno Baby Brand, were the "Calming Comfort Bath" ("bath") and the "Wash and Shampoo" ("wash"). App'x 197. **Johnson & Johnson** petitioned for permission to appeal pursuant to Federal Rules of Civil Procedure 23(f), and we granted leave. On appeal, **Johnson & Johnson** principally challenges the district court's conclusions that (1) **Langan** has Article III standing to bring a class-action claim on behalf of consumers in states other than Connecticut, and (2) the state laws in the other states are sufficiently similar to support certifying the class. [2]

*92 DISCUSSION

[1] "We review a district court's decision to certify a class under Rule 23 for abuse of discretion, the legal conclusions that informed its decision *de novo*, and any findings of fact for clear error." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 79 (2d Cir. 2015) (internal quotation marks omitted).

I. Article III Standing

[2] **Johnson & Johnson** argues that **Langan** lacks constitutional standing to represent putative class members whose claims are governed by the laws of states other than Connecticut. Because a plaintiff's standing to sue implicates our power to hear the case, we must consider the issue even though it was barely raised in and not addressed by the district court. *See Keepers, Inc. v.*

City of Milford, 807 F.3d 24, 39 (2d Cir. 2015) (noting that standing may be raised "for the first time on appeal").

[3] [4] "Article III, Section 2 of the Constitution limits the jurisdiction of the federal courts to the resolution of 'cases' and 'controversies.' " *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir. 2012) (internal quotation marks omitted). "To ensure that this bedrock case-or-controversy requirement is met, courts require that plaintiffs establish their standing as the proper parties to bring suit." *Id.* (internal quotation marks and alterations omitted). To have standing to sue, "a plaintiff must demonstrate (1) a personal injury in fact (2) that the challenged conduct of the defendant caused and (3) which a favorable decision will likely redress." *Id.*

Unremarkably, the parties agree that Connecticut's consumer protection statute, CUTPA, does not apply to the purchase of bath and wash products in other states. Likewise, the parties agree that **Langan** herself has standing to sue **Johnson & Johnson** under CUTPA because she alleged that she paid a premium in Connecticut for the products, based on **Johnson & Johnson**'s representations that they were natural, and that those injuries can be redressed by an order compelling **Johnson & Johnson** to pay **Langan** money damages. *See Mahon*, 683 F.3d at 62.

The only point of contention is whether **Langan** has standing to bring a class action on behalf of unnamed, yet-to-be-identified class members from other states under those states' consumer protection laws. ***93** Because there has been considerable disagreement over this question in the district courts, we write to make explicit what we previously assumed in *In re Foodservice Inc. Pricing Litigation*, 729 F.3d 108 (2d Cir. 2013): as long as the named plaintiffs have standing to sue the named defendants, any concern about whether it is proper for a class to include out-of-state, nonparty class members with claims subject to different state laws is a question of predominance under Rule 23(b)(3), *id.* At 126–27, not a question of "adjudicatory competence" under Article III, *Morrison v. YTB Int'l, Inc.*, 649 F.3d 533, 536 (7th Cir. 2011). *Compare Richards v. Direct Energy Servs., LLC*, 120 F.Supp.3d 148, 154–56 (D. Conn. 2015) (denying certification as to out-of-state class members for lack of standing), *with In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 701 F.Supp.2d 356, 376–77 (E.D.N.Y. 2010) (distinguishing standing from the Rule 23 inquiry and certifying class action brought under laws of multiple states after finding no standing problem).

"[A]s the Supreme Court has acknowledged, there is some 'tension' in its case law as to whether 'variation' between (1) a named plaintiff's claims and (2) the claims of putative class members 'is a matter of Article III standing ... or whether it goes to the propriety of class certification ....' " *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 160 (2d Cir. 2012) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 263 & n.15, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003)). To understand why variations in state law present a class certification problem and not a constitutional standing problem, it is helpful to consider the complicated relationship between the standing requirement and class actions generally.

[5] [6] [7] The doctrine of standing tests whether a prospective litigant may properly invoke the power of the federal courts. *See Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). The standing requirement acknowledges that not all injuries can be remedied by courts, and that even some injuries that could are the responsibility of the political branches instead. *See id.* ("The law of Article III standing serves to prevent the judicial process from being used to usurp the powers of the political branches." (internal quotation marks and alterations omitted)); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). To avoid giving advisory opinions, we require that parties that come before us have a sufficient stake in the outcome of the case to render it a case or controversy. *See Steel Co.*, 523 U.S. at 97, 101, 118 S.Ct. 1003; *see also* U.S. Const. art. III, § 2.

[8] [9] Class actions under Rule 23 of the Federal Rules of Civil Procedure are an exception to the general rule that one person cannot litigate injuries on behalf of another. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). Through Rule 23, Congress has authorized plaintiffs to bring, under limited circumstances, a suit in federal court on behalf of, not just themselves, but others who were similarly injured. *See id.* at 348–49, 131 S.Ct. 2541. Such suits result in efficiencies of cost, time, and judicial resources and permit a collective recovery where obtaining individual judgments might not be economically feasible. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("The policy at the very core of the

class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting ***94** his or her rights." (internal quotation marks omitted)); *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). Although a named class action plaintiff has not actually suffered the injuries suffered by her putative class members (and therefore would not normally have standing to bring those suits), Congress has said that the fact that the parties "possess the same interest" and "suffer[ed] the same injury" gives the named plaintiff a sufficient stake in the outcome of her putative class members' cases. *Wal-Mart*, 564 U.S. at 348–49, 131 S.Ct. 2541.

This requirement is easy enough to satisfy when the would-be class members' cases are substantially identical. For example, a plaintiff who purchased the same product, on the same day, at the same place, from the same defendant, because of the same misleading offer as many other purchasers would plainly have standing to sue on behalf of those similarly situated purchasers.

In reality, it rarely happens that the circumstances surrounding one plaintiff's claim end up being identical to the claims of another putative class member, let alone all of the others. Anticipating this, some of Rule 23's requirements (*e.g.*, commonality and typicality under 23(a), and predominance under 23(b)) exist to prevent courts from certifying classes that do not share sufficiently similar characteristics. *See Wal-Mart*, 564 U.S. at 349, 131 S.Ct. 2541. At some point, however, a named plaintiff's claims can be so different from the claims of his putative class members that they present an issue not of the prudence of certifying a class under Rule 23 but of constitutional standing. *See Mahon*, 683 F.3d at 62–63. The question for our purposes is at what point the claim of a named plaintiff is so different from the claims of her would-be class members that the exception that we make to the general standing requirements for class actions should not apply. Our caselaw supplies a few answers.

We have held that the claims of putative class members are too dissimilar to support standing against a particular defendant when that defendant did not actually injure a named plaintiff. In *Mahon*, we considered a putative consumer class action against title insurance companies that allegedly concealed the availability of reduced rates. *See id.* at 60. The district court denied certification as to one of the defendant companies that had not actually sold insurance to the plaintiff, and we affirmed. *See id.* at 60–61. Even though the company used forms and practices that were similar to those used by the company that did sell to the plaintiff and was owned by the same parent company, we held that the plaintiff lacked standing to sue the company that had not actually misled her because, "with respect to each asserted claim" against each defendant, "a plaintiff must always have suffered a distinct and palpable injury to herself." *Id.* at 64 (alterations, quotation marks, and emphasis omitted).

On the other hand, non-identical injuries of the same general character can support standing. *See NECA*, 693 F.3d at 148–49. In *NECA*, we held that the plaintiff, a purchaser of mortgage-backed certificates, could certify a class including certificate holders outside the specific tranche from which the named plaintiff purchased certificates, even though the certificates from each tranche varied in their payout priority. *See id.* at 164. We reasoned that these different payment priorities did not render a certificate holder who would be paid sooner incapable of representing a certificate holder who would be paid later, or vice versa, because all certificate holders had "the same necessary stake in litigating ***95** whether [the] lenders ... abandoned their" responsibilities to follow underwriting guidelines. *Id.* (internal quotation marks omitted). *Compare Gratz*, 539 U.S. at 262–63, 123 S.Ct. 2411 (finding no standing problem even though factual differences existed between the challenged race-based transfer policy applied to plaintiff and the freshman admissions policy applicable to others in class), *with Blum v. Yaretsky*, 457 U.S. 991, 1001–02, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (holding that plaintiffs in state-run facilities who were threatened with transfers to facilities with lower levels of care did not have standing to sue on behalf of patients who were threatened with transfers to higher levels of care because the conditions of the transfers were "sufficiently different" such that "judicial assessment of their procedural adequacy would be wholly gratuitous and advisory").

The question in this case is whether there is a standing problem when a plaintiff attempts to sue on behalf of those who may have claims under different states' laws that generally prohibit the same conduct. Although we have not expressly resolved this question, we have previously assumed that this is an issue best addressed under Rule 23, rather than as a standing issue. *See*

In re Foodservice, 729 F.3d at 112. For example, in *In re Foodservice*, we considered a consumer class action against a food distributor that, the plaintiffs alleged, fraudulently overbilled its customers. *See id.* The defendants appealed the district court's certification of the class, claiming that certification was improper because the class action implicated the distinct contract laws of multiple states. *See id.* at 126. We rejected that argument and affirmed the certification, reasoning that "putative class actions involving the laws of multiple states are often not properly certified *pursuant to Rule 23(b)(3)* because the variation in the legal issues to be addressed overwhelms the issues common to the class." *Id.* at 126–27 (emphasis added).

This approach of considering variations in state laws as questions of predominance under Rule 23(b)(3), rather than standing under Article III, makes sense. For one, it acknowledges the obvious truth that class actions necessarily involve plaintiffs litigating injuries that they themselves would not have standing to litigate. *See In re Bayer Corp.*, 701 F.Supp.2d at 377 ("Whether the named plaintiffs have standing to bring suit under each of the state laws alleged is 'immaterial' because they are not bringing those claims on their own behalf, but are only seeking to represent other, similarly situated consumers in those states."). Since class action plaintiffs are not required to have individual standing to press any of the claims belonging to their unnamed class members, it makes little sense to dismiss the state law claims of unnamed class members for want of standing when there was no requirement that the named plaintiffs have individual standing to bring those claims in the first place. *See id.*

This approach also accords with the Supreme Court's preference for dealing with modest variations between class members' claims as substantive questions, not jurisdictional ones. *See Gratz*, 539 U.S. at 266, 123 S.Ct. 2411 (explaining that differences in use of race between transfer- and freshman-admissions policies "clearly ha[d] no effect on petitioners' standing to challenge the [policies]" but "might be relevant to a narrow tailoring analysis"); *see also Lewis v. Casey*, 518 U.S. 343, 358 n.6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) ("The standing determination is quite separate from certification of the class.").

Finally, the only other circuit to have addressed this issue has reached the same conclusion. *See Morrison*, 649 F.3d at 536 ***96** (explaining that whether plaintiff could bring putative class action on behalf of out-of-state class members "ha[d] nothing to do with *standing*, though it may affect whether a class should be certified—for a class action arising under the consumer-fraud laws of all 50 states may not be manageable, even though an action under one state's law could be").

We are not convinced by the reasoning of those district courts that have addressed the issue we confront as a standing issue. For example, in *Richards v. Direct Energy Servs., LLC*, the district court concluded that a Connecticut plaintiff that alleged that the defendant energy company had attracted customers with misleading promises of low rates lacked standing to sue on behalf of Massachusetts consumers who were injured by the same defendant. 120 F.Supp.3d at 151. The court reasoned that "[w]ithout an allegation that [the named plaintiff] personally was injured in Massachusetts," the plaintiff's claim was essentially that, like the plaintiffs in Massachusetts, he had "suffered in some indefinite way in common with people generally." *Id.* at 155 (internal quotation marks and alteration omitted). This reasoning falters upon its premise: the harm the plaintiff alleged was not a general grievance common to people generally; it was a specific grievance based on the defendant's falsely advertised rates, suffered by specific people (Connecticut and Massachusetts customers of the defendant), under a specific set of circumstances. *See id.* We fail to see how the fact that the defendant's wrongful conduct impacted customers in two states rendered the injuries of the Massachusetts consumers somehow more indefinite than the identical injuries of the Connecticut consumers. [3]

[10] Accordingly, we conclude that whether a plaintiff can bring a class action under the state laws of multiple states is a question of predominance under Rule 23(b)(3), not a question of standing under Article III. Since **Langan**'s individual standing to sue is not in doubt, we turn to the question of whether the district court correctly determined that the predominance requirement of Rule 23(b)(3) was satisfied.

II. Predominance

[11] **[12]** **Langan** attempted to certify a class under Rule 23(b)(3), the provision that allows for the common "opt-

out" class action, a class action designed to bind all class members except those who affirmatively choose to be excluded. *See Amchem*, 521 U.S. at 614–15, 117 S.Ct. 2231; *see also* Scott Dodson, *An Opt-In Option for Class Actions*, 115 Mich. L. Rev. 171, 177–79 (2016). To ensure that binding absent class members is fair, *see Comcast Corp. v. Behrend*, 569 U.S. 27, 34, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013), before a district court may certify a class under Rule 23(b)(3) the party seeking certification must show that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This predominance requirement ***97** "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Mazzei v. Money Store*, 829 F.3d 260, 272 (2d Cir. 2016) (internal quotation marks omitted). The predominance requirement is satisfied if "resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof," and "these particular issues are more substantial than the issues subject only to individualized proof." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015).

[13] **[14]** Variations in state laws do not necessarily prevent a class from satisfying the predominance requirement. *See In re U.S. Foodservice*, 729 F.3d at 127 (holding that there was no predominance problem with a putative class action brought under the state contract law of various states where all of the jurisdictions had adopted the Uniform Commercial Code). As with all Rule 23 requirements, the party seeking certification has the ultimate burden to demonstrate that any variations in relevant state laws do not predominate over the similarities. *See Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541; *In re U.S. Foodservice*, 729 F.3d at 127 (finding no predominance issue where defendant had alleged but not proffered evidence to support its claim that variation in evidentiary standards among states overwhelmed the similarities).

[15] The decision to certify a class is a discretionary determination, which we will only overturn if the district court abused its discretion. *See In re U.S. Foodservice*, 729 F.3d at 116. To be afforded this deference, however, the certification must be sufficiently supported and explained. *See In re Hyundai & Kia Fuel Econ. Litig.*, 881 F.3d 679, 690 (9th Cir. 2018); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1006 (D.C. Cir. 1986) ("[I]t is unquestionably the role of an appellate court to ensure that class certification determinations are made pursuant to appropriate legal standards.").

[16] The district court found that **Langan** had shown predominance since there was no indication that any of the minor differences **Johnson & Johnson** identified between the various state consumer protection laws "should overwhelm the questions common to the class" given that "[a]ll the states have a private right of action for consumer protection violations, allow class actions, and have various other important similarities." App'x 195–96. On appeal, **Johnson & Johnson** argues that the district court erred by failing to engage in a rigorous analysis of the similarities and differences in the various state laws at issue. We agree.

[17] Under Rule 23(b)(3), the district court has a "duty," before certifying a class, to "take a close look" at whether the common legal questions predominate over individual ones. *Comcast*, 569 U.S. at 34, 133 S.Ct. 1426 (internal quotation marks omitted). Although, to date, we have not explained what such a "close look" requires, out-of-circuit precedent offers helpful guidance.

[18] To begin, district courts must do more than take the plaintiff's word that no material differences exist. *See Walsh*, 807 F.2d at 1016 (refusing to accept "on faith" the plaintiffs' claims on appeal that "no variations in state ... laws relevant to [the] case exist[ed]"). Rather, district courts themselves must undertake a considered analysis of the differences in state laws. *See Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1180 (11th Cir. 2010). In *Sacred Heart*, the Eleventh Circuit reversed the district court's certification of a class of hospitals that claimed they were underpaid for medical services by a health ***98** maintenance organization. *See id.* The district court, in discussing the potential predominance issue regarding certain differences in relevant state laws, had stated only that there were "some variations" but that since the laws of "only six states" were involved, common issues would not be overwhelmed. *Id.* The Eleventh Circuit found this cursory explanation not to be a "serious analysis of the variations in applicable state law," and that by certifying a class based on it, the district court abused its discretion. *Id.*

[19] As part of its analysis, a district court that relies on subclasses to cure predominance issues as a prerequisite

to certification must identify the required subclasses and explain why they are necessary. *See id.* at 1183. In *Sacred Heart*, the district court had also suggested in passing that identifying subclasses could be a way to address predominance problems. The district court, however, had not identified any potential subclasses, nor discussed how those subclasses would cure the predominance issues. *See id.* The Eleventh Circuit concluded that the district court's oblique reference to subclasses failed to explain how subclasses would prevent "the proliferation of disparate factual and legal issues," given that, in addition to the state law variations, material provisions of the individual contracts for legal services varied as well. *Id.* Because these factual and legal differences suggested a need for multiple sets of subclasses, the district court's mere mention of subclasses was not an "adequate response." *Id.*

We are not convinced that the district court here undertook the requisite considered analysis of the variations in state law and the potential need for subclasses that might result from those variations. Although both parties submitted complicated and conflicting summaries of the state consumer protection laws in eighteen states, the district court's analysis consisted of one paragraph. In that paragraph, it is our view that the district court did not sufficiently engage with **Johnson & Johnson**'s arguments about reliance, instead concluding that "it appears" that none of the states' high courts have insisted on reliance. *See* App'x at 195. The other identified differences—including whether intent to deceive is required, and whether causation can be presumed—were not discussed. As in *Sacred Heart*, the district court only stated generally that the identified differences were "minor" and "should [not] overwhelm the questions common to the class." App'x at 195. We believe that more precise and greater depth of analysis is required to comport with the "close look" required by the precedent.

Accordingly, we remand the case to the district court to conduct a more thorough analysis. *See In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 243 (2d Cir. 2012) (vacating grant of class certification and remanding for further consideration as to predominance where it was not clear from the record on appeal "whether variations in state law might cause class members' interests to diverge"); *Walsh*, 807 F.2d at 1019 (remanding to the district court after clarifying the Rule 23(b)(3) predominance inquiry so the district court could redo the analysis). Although this court is free to consider variations in state laws in the first instance, *see, e.g.*, ***Johnson*** *v. Nextel Commc'ns Inc.*, 780 F.3d 128, 146–48 (2d Cir. 2015), the judgment whether to certify a class under Rule 23(b)(3) is a discretionary determination that we think is best made by the district court upon appropriate analysis of the circumstances of the case. *See generally In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 31 (2d Cir. 2006), *decision clarified on denial of reh'g*, 483 F.3d 70 (2d Cir. 2007). Out of respect ***99** for the district court's comparative advantage at weighing whether, under the circumstances of this case, state law similarities or differences will predominate, we remand the case to the able district judge to carefully analyze the relevant state laws, decide whether subclasses are appropriate, reconsider the predominance question, and explain in greater detail its conclusion on that question.

CONCLUSION

For these reasons, we VACATE the district court's grant of certification, and REMAND for further proceedings consistent with this opinion.

All Citations

897 F.3d 88, 101 Fed.R.Serv.3d 318

Footnotes

1 Although the district court inadvertently omitted Alaska from the list of relevant states on page 26 and in n.3 of its opinion, the district court did include Alaska in the list of states for which it certified a class. Accordingly, we refer to a plaintiff class in eighteen states.

2 **Johnson & Johnson** also argues that that the district court erred by not requiring **Langan** to demonstrate that the proposed class was "administratively feasible." This argument is foreclosed by *In re Petrobras Sec.*, 862 F.3d 250, 267–70 (2d Cir. 2017) (rejecting the argument that proposed classes must be "administratively feasible" and holding that the class was "clearly objective" and "sufficiently definite" where it included people who acquired specific securities during a specific period in "domestic transactions" because class was "identified by subject matter, timing, and location," which

made it "objectively possible" to ascertain members (emphasis omitted)). Since the class at issue here is identified by subject matter (purchasers of the two products), timing (before November 2012 and 2013 respectively), and location (the eighteen identified states), it is likewise "clearly objective" and "sufficiently definite" such that determining who purchased the products is undoubtedly "objectively possible." *Id.* at 269–70. Moreover, we think **Johnson** & **Johnson**'s identification concerns are overstated. In *Petrobas*, we cited approvingly the district court's grant of certification where the district court allowed putative class members to provide a sworn affidavit indicating when and where they purchased the olive oil at issue (862 F.3d at 267 (citing *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014))). Since we think it is more likely that a consumer would remember the time frame in which he purchased a bath or wash for his baby—that is, when his child was still a baby—than when he purchased a bottle of olive oil, we see no ascertainability problem with having the class members submit sworn affidavits describing the circumstances under which the purchases were made.

3 **Johnson** & **Johnson**'s argument that *Mahon*, discussed earlier, requires a different result is unpersuasive. First, *Mahon*'s rejection of "analyz[ing] class certification before Article III standing" only requires that a district court first determine that the party plaintiff was actually injured by each of the named defendants before proceeding to the Rule 23 inquiry. *See Mahon*, 683 F.3d at 64. Second, because the redressability and fundamental fairness concerns that arise when a plaintiff attempts to haul a non-injurious defendant into court are not present when a plaintiff initiates a class action under various state laws prohibiting similar conduct by the same defendant, this case is distinguishable from *Mahon*. *See id.* at 65–66.

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Superseded by Rule as Stated in Wilson v. Volkswagen Group of America, Inc., S.D.Fla., September 26, 2018

130 S.Ct. 1431
Supreme Court of the United States

SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A., Petitioner,
v.
ALLSTATE INSURANCE CO.

No. 08–1008.
|
Argued Nov. 2, 2009.
|
Decided March 31, 2010.

Synopsis

Background: Medical provider brought putative class action against automobile insurer, alleging breach of contract, bad faith breach of contract, and violation of New York law in failing to pay statutory interest penalties on overdue payments of insurance benefits owed under no-fault automobile insurance policies. The United States District Court for the Eastern District of New York, Nina Gershon, J., 466 F.Supp.2d 467, granted insurer's motion to dismiss. Plaintiffs appealed. The United States Court of Appeals for the Second Circuit, Pooler, Circuit Judge, 549 F.3d 137, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Scalia, held that:

[1] New York law prohibiting class actions in suits seeking penalties or statutory minimum damages conflicted with Federal Rule of Civil Procedure governing class actions, and

[2] rule is valid under the Rules Enabling Act.

Reversed and remanded.

Chief Justice Roberts, and Justices Thomas and Sotomayor, joined in Parts II–B and II–D of Justice Scalia's opinion.

Chief Justice Roberts and Justice Thomas joined in Part II–C of Justice Scalia's opinion.

Justice Stevens filed an opinion concurring in part and concurring in the judgment.

Justice Ginsburg filed a dissenting opinion, in which Justices Kennedy, Breyer, and Alito joined.

West Headnotes (9)

[1] Federal Civil Procedure
Class Actions

By its terms, Federal Rule of Civil Procedure governing class actions creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

118 Cases that cite this headnote

[2] Federal Civil Procedure
State statutes and Rules superseded

Federal Courts
Class actions

New York law prohibiting class actions in suits seeking penalties or statutory minimum damages conflicted with Federal Rule of Civil Procedure governing class actions, so that the New York law would be preempted to extent that it would not apply in federal court sitting in diversity, if federal rule was valid under the Rules Enabling Act; federal rule created a categorical rule entitling a plaintiff whose suit met the specified criteria to pursue his claim as a class action. 28 U.S.C.A. § 2072(b); Fed.Rules Civ.Proc.Rule 23(b), 28 U.S.C.A.; N.Y.McKinney's CPLR 901(b).

384 Cases that cite this headnote

[3] Federal Civil Procedure
Power of Congress

Congress has ultimate authority over the Federal Rules of Civil Procedure, and

Congress can create exceptions to an individual rule as it sees fit, either by directly amending the rule or by enacting a separate statute overriding it in certain instances.

5 Cases that cite this headnote

[4] **Federal Civil Procedure**
Construction and operation in general

Federal courts sitting in diversity should read an ambiguous Federal Rule of Civil Procedure to avoid substantial variations in outcomes between state and federal litigation, because it is reasonable to assume that Congress is concerned with avoiding significant differences between state and federal courts in adjudicating claims.

118 Cases that cite this headnote

[5] **Federal Courts**
Substance or procedure; determinativeness

Under the "*Erie* doctrine," which involves the constitutional power of federal courts to supplant state law with judge-made rules, it makes no difference whether the rule is technically one of substance or procedure; the touchstone is whether it significantly affects the result of a litigation. (Per Justice Scalia, with three Justices concurring and one Justice concurring in the judgment.)

18 Cases that cite this headnote

[6] **Federal Civil Procedure**
Substantive rights, effect of Rules on

Under the provision of the Rules Enabling Act authorizing the Supreme Court to promulgate rules of procedure subject to Congress's review, but with the limitation that those rules "shall not abridge, enlarge or modify any substantive right," the rule, to be valid, must really regulate procedure, i.e., 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. (Per Justice Scalia, with three Justices concurring and one Justice concurring in the judgment.) 28 U.S.C.A. § 2072(a, b).

49 Cases that cite this headnote

[7] **Federal Civil Procedure**
Validity

Federal Civil Procedure
Substantive rights, effect of Rules on

The test for whether a rule of procedure promulgated by the Supreme Court is valid under the Rules Enabling Act, which authorizes the Supreme Court to promulgate rules of procedure subject to Congress's review, but with the limitation that those rules "shall not abridge, enlarge or modify any substantive right," is not whether the rule affects a litigant's substantive rights, since most procedural rules do; what matters is what the rule itself regulates, and if it governs only the manner and the means by which the litigants' rights are enforced, it is valid, but if it alters the rules of decision by which the court will adjudicate those rights, it is not. (Per Justice Scalia, with three Justices concurring and one Justice concurring in the judgment.) 28 U.S.C.A. § 2072(a, b).

85 Cases that cite this headnote

[8] **Federal Civil Procedure**
Validity

Federal Civil Procedure
Substantive rights, effect of Rules on

Federal Rule of Civil Procedure governing class actions is valid under the Rules Enabling Act, which authorizes the Supreme Court to promulgate rules of procedure subject to Congress's review, but with the limitation that those rules "shall not abridge, enlarge or modify any substantive right"; Rule neither changes plaintiffs' entitlement to relief nor abridges defendants' rights, and instead, it alters only how the claims are processed. (Per Justice Scalia, with three Justices concurring and one Justice concurring in

the judgment.) 28 U.S.C.A. § 2072(a, b); Fed.Rules Civ.Proc.Rule 23(b), 28 U.S.C.A.

79 Cases that cite this headnote

[9] **Federal Civil Procedure**
State statutes and Rules superseded

Under the test for whether a rule of procedure promulgated by the Supreme Court is valid under the Rules Enabling Act, which authorizes the Supreme Court to promulgate rules of procedure subject to Congress's review, but with the limitation that those rules "shall not abridge, enlarge or modify any substantive right," what matters, with respect to federal rules that would preempt state laws, is not the substantive or procedural nature or purpose of the affected state law, but the substantive or procedural nature of the federal rule. (Per Justice Scalia, with three Justices concurring and one Justice concurring in the judgment.) 28 U.S.C.A. § 2072(a, b).

267 Cases that cite this headnote

West Codenotes

Limited on Preemption Grounds
McKinney's CPLR 901(b)

****1433 *393** *Syllabus* *

After respondent **Allstate** refused to remit the interest due under New York ****1434** law on petitioner **Shady Grove's** insurance claim, **Shady Grove** filed this class action in diversity to recover interest **Allstate** owed it and others. Despite the class action provisions set forth in Federal Rule of Civil Procedure 23, the District Court held itself deprived of jurisdiction by N.Y. Civ. Prac. Law Ann. § 901(b), which precludes a class action to recover a "penalty" such as statutory interest. Affirming, the Second Circuit acknowledged that a Federal Rule adopted in compliance with the Rules Enabling Act, 28 U.S.C. § 2072, would control if it conflicted with § 901(b), but held there was no conflict because § 901(b) and Rule 23 address different issues—eligibility of the particular type of claim for class treatment and certifiability of a given class, respectively. Finding no Federal Rule on point, the Court of Appeals held that § 901(b) must be applied by federal courts sitting in diversity because it is "substantive" within the meaning of *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

Held: The judgment is reversed, and the case is remanded.

549 F.3d 137, reversed and remanded.

Justice SCALIA delivered the opinion of the Court with respect to Parts I and II–A, concluding that § 901(b) does not preclude a federal district court sitting in diversity from entertaining a class action under Rule 23. Pp. 1437–1442.

(a) If Rule 23 answers the question in dispute, it governs here unless it exceeds its statutory authorization or Congress's rulemaking power. *Burlington Northern R. Co. v. Woods,* 480 U.S. 1, 4–5, 107 S.Ct. 967, 94 L.Ed.2d 1. P. 1437.

(b) Rule 23(b) answers the question in dispute—whether **Shady Grove's** suit may proceed as a class action—when it states that "[a] class action may be maintained" if certain conditions are met. Since § 901(b) attempts to answer the same question, stating that **Shady Grove's** suit "may not be maintained as a class action" because of the relief it seeks, that provision cannot apply in diversity suits unless Rule 23 is ultra vires. The Second Circuit's view that § 901(b) and Rule 23 address different issues is rejected. The line between eligibility and certifiability ***394** is entirely artificial and, in any event, Rule 23 explicitly empowers a federal court to certify a class in every case meeting its criteria. **Allstate's** arguments based on the exclusion of some federal claims from Rule 23's reach pursuant to federal statutes and on § 901's structure are unpersuasive. Pp. 1437–1439.

(c) The dissent's claim that § 901(b) can coexist with Rule 23 because it addresses only the remedy available to class plaintiffs is foreclosed by § 901(b)'s text, notwithstanding its perceived purpose. The principle that courts should read ambiguous Federal Rules to avoid overstepping the authorizing statute, 28 U.S.C. § 2072(b), does not apply because Rule 23 is clear. The dissent's approach does not avoid a conflict between § 901(b) and Rule 23 but instead would render Rule 23 partially invalid. Pp. 1439–1442.

Justice SCALIA, joined by THE CHIEF JUSTICE, Justice THOMAS, and Justice SOTOMAYOR, concluded in Parts II–B and II–D:

(a) The Rules Enabling Act, 28 U.S.C. § 2072, not *Erie*, controls the validity of a Federal Rule of Procedure. Section 2072(b)'s requirement that federal procedural rules "not abridge, enlarge or modify any substantive right" means that a Rule must "really regulat[e] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and ****1435** for justly administering remedy and redress for disregard or infraction of them," *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14, 61 S.Ct. 422, 85 L.Ed. 479. Though a Rule may incidentally affect a party's rights, it is valid so long as it regulates only the process for enforcing those rights, and not the rights themselves, the available remedies, or the rules of decision for adjudicating either. Rule 23 satisfies that criterion, at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants. **Allstate's** arguments asserting § 901(b)'s substantive impact are unavailing: It is not the substantive or procedural nature of the affected state law that matters, but that of the Federal Rule. See, *e.g.*, *id.* at 14, 61 S.Ct. 422. Pp. 1442–1444.

(b) Opening federal courts to class actions that cannot proceed in state court will produce forum shopping, but that is the inevitable result of the uniform system of federal procedure that Congress created. Pp. 1447–1448.

Justice SCALIA, joined by THE CHIEF JUSTICE and Justice THOMAS, concluded in Part II–C that the concurrence's analysis—under which a Federal Rule may displace a state procedural rule that is not "bound up" or "sufficiently intertwined" with substantive rights and remedies under state law—squarely conflicts with *Sibbach*'s single criterion that the Federal Rule "really regulat[e] procedure," 312 U.S. at 13–14, 61 S.Ct. 422. Pp. 1444–1448.

***395** Justice STEVENS agreed that Federal Rule of Civil Procedure 23 must apply because it governs whether a class must be certified, and it does not violate the Rules Enabling Act in this case. Pp. 1448–1460.

(a) When the application of a federal rule would "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b), the federal rule cannot govern. In rare cases, a federal rule that dictates an answer to a traditionally procedural question could, if applied, displace an unusual state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right. Examples may include state laws that make it significantly more difficult to bring or to prove a claim or that function as limits on the amount of recovery. An application of a federal rule that directly collides with such a state law violates the Rules Enabling Act. Pp. 1448–1455.

(b) N.Y. Civ. Prac. Law Ann. § 901(b), however, is not such a state law. It is a procedural rule that is not part of New York's substantive law. Pp. 1457–1460.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II–A, in which ROBERTS, C.J., and STEVENS, THOMAS, and SOTOMAYOR, JJ., joined, an opinion with respect to Parts II–B and II–D, in which ROBERTS, C.J., and THOMAS, and SOTOMAYOR, JJ., joined, and an opinion with respect to Part II–C, in which ROBERTS, C.J., and, THOMAS, J., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment. GINSBURG, J., filed a dissenting opinion, in which KENNEDY, BREYER, and ALITO, JJ., joined.

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Opinion

Justice SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II–A, an opinion with respect to Parts II–B and II–D, in ***396** which THE CHIEF JUSTICE, Justice THOMAS, and Justice SOTOMAYOR join, and

an opinion with respect to Part II–C, in which THE CHIEF JUSTICE and Justice THOMAS join.

New York law prohibits class actions in suits seeking penalties or statutory minimum damages. [1] We consider whether this precludes a federal district court sitting in diversity from entertaining a class action under Federal Rule of Civil Procedure 23. [2]

***397 I**

The petitioner's complaint alleged the following: **Shady Grove Orthopedic** Associates, P. A., provided medical care to Sonia E. Galvez for injuries she suffered in an automobile accident. As partial payment for that care, Galvez assigned to **Shady Grove** her rights to insurance benefits under a policy issued in New York by **Allstate** Insurance Co. **Shady Grove** tendered a claim for the assigned benefits to **Allstate**, which under New York law had 30 days to pay the claim or deny it. See N.Y. Ins. Law Ann. § 5106(a) (West 2009). **Allstate** apparently paid, but not on time, and it refused to pay the statutory interest that accrued on the overdue benefits (at two percent per month), see *ibid.*

Shady Grove filed this diversity suit in the Eastern District of New York to recover the unpaid statutory interest. Alleging that **Allstate** routinely refuses to pay interest on overdue benefits, **Shady Grove** ****1437** sought relief on behalf of itself and a class of all others to whom **Allstate** owes interest. The District Court dismissed the suit for lack of jurisdiction. 466 F.Supp.2d 467 (2006). It reasoned that N.Y. Civ. Prac. Law Ann. § 901(b), which precludes a suit to recover a "penalty" from proceeding as a class action, applies in diversity suits in federal court, despite Federal Rule of Civil Procedure 23. Concluding that statutory interest is a "penalty" under New York law, it held that § 901(b) prohibited the proposed class action. And, since **Shady Grove** conceded that its individual claim (worth roughly $500) fell far short of the amount-in-controversy requirement for individual suits under 28 U.S.C. § 1332(a), the suit did not belong in federal court. [3]

***398** The Second Circuit affirmed. 549 F.3d 137 (2008). The court did not dispute that a federal rule adopted in compliance with the Rules Enabling Act, 28 U.S.C. § 2072, would control if it conflicted with § 901(b). But there was no conflict because (as we will describe in more detail below) the Second Circuit concluded that Rule 23 and § 901(b) address different issues. Finding no federal rule on point, the Court of Appeals held that § 901(b) is "substantive" within the meaning of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and thus must be applied by federal courts sitting in diversity.

We granted certiorari, 556 U.S. 1220, 129 S.Ct. 2160, 173 L.Ed.2d 1155 (2009).

II

The framework for our decision is familiar. We must first determine whether Rule 23 answers the question in dispute. *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 4–5, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987). If it does, it governs—New York's law notwithstanding—unless it exceeds statutory authorization or Congress's rulemaking power. *Id.* at 5, 107 S.Ct. 967; see *Hanna v. Plumer*, 380 U.S. 460, 463–464, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). We do not wade into *Erie*'s murky waters unless the federal rule is inapplicable or invalid. See 380 U.S. at 469–471, 85 S.Ct. 1136.

A

[1] **[2]** The question in dispute is whether **Shady Grove's** suit may proceed as a class action. Rule 23 provides an answer. It states that "[a] class action may be maintained" if two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (*i.e.*, numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b). Fed. Rule Civ. Proc. 23(b). By its terms this creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action. (The Federal Rules regularly use "may" to confer categorical permission, see, *e.g.*, Fed. Rules Civ. Proc. 8(d)(2)-(3), 14(a)(1), 18(a)-(b), 20(a)(1)-(2), 27(a)(1), 30(a)(1), as do federal statutes that establish ***399** procedural entitlements, see, *e.g.*, 29 U.S.C. § 626(c)(1); 42 U.S.C. § 2000e–5(f)(1).) 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" (emphasis added) because of

the relief it seeks—it cannot apply in diversity suits unless Rule 23 is ultra vires.

1438 The Second Circuit believed that § 901(b) and Rule 23 do not conflict because they address different issues. Rule 23, it said, concerns only the criteria for determining whether a given class can and should be certified; section 901(b), on the other hand, addresses an antecedent question: whether the particular type of claim is eligible for class treatment in the first place—a question on which Rule 23 is silent. See 549 F.3d at 143–144. **Allstate embraces this analysis. Brief for Respondent 12–13.

We disagree. To begin with, the line between eligibility and certifiability is entirely artificial. Both are preconditions for maintaining a class action. **Allstate** suggests that eligibility must depend on the "particular cause of action" asserted, instead of some other attribute of the suit, *id.* at 12. But that is not so. Congress could, for example, provide that only claims involving more than a certain number of plaintiffs are "eligible" for class treatment in federal court. In other words, relabeling Rule 23(a)'s prerequisites "eligibility criteria" would obviate **Allstate's** objection—a sure sign that its eligibility-certifiability distinction is made-to-order.

There is no reason, in any event, to read Rule 23 as addressing only whether claims made eligible for class treatment by some *other* law should be certified as class actions. **Allstate** asserts that Rule 23 neither explicitly nor implicitly empowers a federal court "to certify a class in each and every case" where the Rule's criteria are met. *Id.* at 13–14. But that is *exactly* what Rule 23 does: It says that if the *400 prescribed preconditions are satisfied "[a] class action *may be maintained* " (emphasis added) —not "*a class action may be permitted.*" Courts do not maintain actions; litigants do. The discretion suggested by Rule 23's "may" is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes. And like the rest of the Federal Rules of Civil Procedure, Rule 23 *automatically* applies "in all civil actions and proceedings in the United States district courts," Fed. Rule Civ. Proc. 1. See *Califano v. Yamasaki,* 442 U.S. 682, 699–700, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979).

[3] **Allstate** points out that Congress has carved out some federal claims from Rule 23's reach, see, *e.g.,* 8 U.S.C. § 1252(e)(1)(B)—which shows, **Allstate** contends, that Rule 23 does not authorize class actions for all claims, but rather leaves room for laws like § 901(b). But Congress, unlike New York, has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain instances. Cf. *Henderson v. United States,* 517 U.S. 654, 668, 116 S.Ct. 1638, 134 L.Ed.2d 880 (1996). The fact that Congress has created specific exceptions to Rule 23 hardly proves that the Rule does not apply generally. In fact, it proves the opposite. If Rule 23 did *not* authorize class actions across the board, the statutory exceptions would be unnecessary.

Allstate next suggests that the structure of § 901 shows that Rule 23 addresses only certifiability. Section 901(*a*), it notes, establishes class-certification criteria roughly analogous to those in Rule 23 (wherefore it agrees *that* subsection is pre-empted). But § 901(b)'s rule barring class actions for certain claims is set off as its own subsection, and where it applies § 901(a) does not. This shows, according to **Allstate**, that § 901(b) concerns a separate subject. Perhaps it does concern a subject separate from the subject of § 901(a). But the question before us is **1439 whether it concerns a subject separate from the subject of *Rule 23*—and for purposes of answering *401 *that* question the way New York has structured its statute is immaterial. Rule 23 permits all class actions that meet its requirements, and a State cannot limit that permission by structuring one part of its statute to track Rule 23 and enacting another part that imposes additional requirements. Both of § 901's subsections undeniably answer the same question as Rule 23: whether a class action may proceed for a given suit. Cf. *Burlington,* 480 U.S. at 7–8, 107 S.Ct. 967.

The dissent argues that § 901(b) has nothing to do with whether **Shady Grove** may maintain its suit as a class action, but affects only the *remedy* it may obtain if it wins. See *post* at 1464–1469 (opinion of GINSBURG, J.). Whereas "Rule 23 governs procedural aspects of class litigation" by "prescrib[ing] the considerations relevant to class certification and postcertification proceedings," § 901(b) addresses only "the size of a monetary award a class plaintiff may pursue." *Post* at 1465–1466. Accordingly, the dissent says, Rule 23 and New York's law may coexist in peace.

We need not decide whether a state law that limits the remedies available in an existing class action would conflict with Rule 23; that is not what § 901(b) does. By its terms, the provision precludes a plaintiff from "maintain[ing]" a class action seeking statutory penalties. 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. [4] Consequently, ***402** a court bound by § 901(b) could not certify a class action seeking both statutory penalties and other remedies even if it announces in advance that it will refuse to award the penalties in the event the plaintiffs prevail; to do so would violate the statute's clear prohibition on "maintain[ing]" such suits as class actions.

The dissent asserts that a plaintiff can avoid § 901(b)'s barrier by omitting from his complaint (or removing) a request for statutory penalties. See *post* at 1467–1468. Even assuming all statutory penalties are waivable, [5] the fact that a complaint omitting them could be brought as a class action would not at all prove that § 901(b) is addressed only to remedies. If the state law instead banned class actions for fraud claims, a would-be class-action plaintiff could drop the fraud counts from his complaint and proceed with the remainder in a class action. Yet that would not mean the law provides no remedy for fraud; the ban would affect only the procedural means by which the remedy may be pursued. In short, although the dissent correctly abandons **Allstate's** eligibility-certifiability distinction, ****1440** the alternative it offers fares no better.

The dissent all but admits that the literal terms of § 901(b) address the same subject as Rule 23—*i.e.*, whether a class action may be maintained—but insists the provision's *purpose* is to restrict only remedies. See *post* at 1466–1468; *post* at 1467 ("[W]hile phrased as responsive to the question whether certain class actions may begin, § 901(b) is unmistakably aimed at controlling how those actions must end"). Unlike Rule 23, designed to further procedural fairness and efficiency, § 901(b) (we are told) "responds to an entirely different concern": the fear that allowing statutory damages to be awarded on a class-wide basis would "produce overkill." *Post* at 1466, 1464 (internal quotation marks omitted). The ***403** dissent reaches this conclusion on the basis of (1) constituent concern recorded 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," V. Alexander, Practice Commentaries, C901:11, reprinted in 7B McKinney's Consolidated Laws of New York Ann., p. 104 (2006) (internal quotation marks omitted); (3) a remark by the Governor in his signing statement that § 901(b) " 'provides a controlled remedy,' " *post* at 1464 (quoting Memorandum on Approving L. 1975, Ch. 207, reprinted in 1975 N.Y. Laws, at 1748; emphasis deleted), and (4) a state court's statement that the final text of § 901(b) " 'was the result of a compromise among competing interests,' " *post* at 1464 (quoting *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 211, 831 N.Y.S.2d 760, 863 N.E.2d 1012, 1015 (2007)).

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. The manner in which the law "could have been written," *post* at 1472, has no bearing; what matters is the law the Legislature *did* enact. We cannot rewrite that to reflect our perception of legislative purpose, see *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79–80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). [6] The dissent's concern ***404** 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.

The dissent's approach of determining whether state and federal rules conflict based on the subjective intentions of the ****1441** state legislature is an enterprise destined to produce "confusion worse confounded," *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14, 61 S.Ct. 422, 85 L.Ed. 479 (1941). It would mean, to begin with, that one State's statute could survive pre-emption (and accordingly affect the procedures in federal court) while another State's identical law would not, merely because its authors had different aspirations. It would also mean that district courts would have to discern, in every diversity case, the purpose behind any putatively pre-empted state procedural rule, even if its text squarely conflicts with federal law. That task will often prove arduous. Many laws further more than one aim, and the aim of others may be impossible to discern. Moreover, to the extent

the dissent's purpose-driven approach depends on its characterization of § 901(b)'s aims as substantive, it would apply to many state rules ostensibly addressed to procedure. Pleading standards, for example, often embody policy preferences about the types of claims that should succeed—as do rules governing summary judgment, pretrial discovery, and the admissibility of certain evidence. Hard cases will abound. It is not even clear that a state supreme court's pronouncement of the law's purpose would settle the issue, since existence of the factual predicate ***405** for avoiding federal pre-emption is ultimately a federal question. Predictably, federal judges would be condemned to poring through state legislative history—which may be less easily obtained, less thorough, and less familiar than its federal counterpart, see R. Mersky & D. Dunn, Fundamentals of Legal Research 233 (8th ed.2002); Torres & Windsor, State Legislative Histories: A Select, Annotated Bibliography, 85 L. Lib. J. 545, 547 (1993).

[4] But while the dissent does indeed artificially narrow the scope of § 901(b) by finding that it pursues only substantive policies, that is not the central difficulty of the dissent's position. The central difficulty is that even artificial narrowing cannot render § 901(b) compatible with Rule 23. *Whatever* the policies they pursue, they flatly contradict each other. **Allstate** asserts (and the dissent implies, see *post* at 1461, 1465–1466) that we can (and must) *interpret* Rule 23 in a manner that avoids overstepping its authorizing statute.[7] If the Rule were susceptible of two meanings—one that would violate ***406** § 2072(b) and another that would not—we would agree. See ****1442** *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842, 845, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999); cf. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503–504, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001). But it is not. Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met. We cannot contort its text, even to avert a collision with state law that might render it invalid. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750, n. 9, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980).[8] What the dissent's approach achieves is not the avoiding of a "conflict between Rule 23 and § 901(b)," *post* at 1469, but rather the invalidation of Rule 23 (pursuant to § 2072(b) of the Rules Enabling Act) to the extent that it conflicts with the substantive policies of § 901. There is no other way to reach the dissent's destination. We must therefore confront head-on whether Rule 23 falls within the statutory authorization.

B

[5] *Erie* involved the constitutional power of federal courts to supplant state law with judge-made rules. In that context, it made no difference whether the rule was technically one of substance or procedure; the touchstone was whether it "significantly affect[s] the result of a litigation." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945). That is not the test for either the constitutionality or the statutory validity of a Federal Rule of Procedure. Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters "rationally capable of classification" as procedure. *Hanna*, 380 U.S. at 472, 85 S.Ct. 1136. In the Rules Enabling ***407** Act, Congress authorized this Court to promulgate rules of procedure subject to its review, 28 U.S.C. § 2072(a), but with the limitation that those rules "shall not abridge, enlarge or modify any substantive right," § 2072(b).

[6] [7] We have long held that this limitation 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," *Sibbach*, 312 U.S. at 14, 61 S.Ct. 422; see *Hanna, supra* at 464, 85 S.Ct. 1136; *Burlington*, 480 U.S. at 8, 107 S.Ct. 967. The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445, 66 S.Ct. 242, 90 L.Ed. 185 (1946). 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. *Id.* at 446, 66 S.Ct. 242 (internal quotation marks omitted).

Applying that test, we have rejected every statutory challenge to a Federal Rule that has come before us. We have found to be in compliance with § 2072(b) rules prescribing methods for serving process, see *id.* at 445–446, 66 S.Ct. 242 (Fed. Rule Civ. Proc. 4(f)); *Hanna, supra* at 463–465, 85 S.Ct. 1136 (Fed. Rule Civ. Proc. 4(d)(1)), and requiring litigants whose mental or physical

condition is in dispute to submit to examinations, see *Sibbach, supra* at 14–16, 61 S.Ct. 422 (Fed. Rule Civ. Proc. 35); ****1443** *Schlagenhauf v. Holder,* 379 U.S. 104, 113–114, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964) (same). Likewise, we have upheld rules authorizing imposition of sanctions upon those who file frivolous appeals, see *Burlington, supra* at 8, 107 S.Ct. 967 (Fed. Rule App. Proc. 38), or who sign court papers without a reasonable inquiry into the facts asserted, see *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.,* 498 U.S. 533, 551–554, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991) (Fed. Rule Civ. Proc. 11). Each of these rules had some practical effect on the parties' rights, but each undeniably regulated only the process for enforcing those rights; none altered the rights ***408** themselves, the available remedies, or the rules of decision by which the court adjudicated either.

[8] Applying that criterion, we think it obvious that rules allowing multiple claims (and claims by or against multiple parties) to be litigated together are also valid. See, *e.g.,* Fed. Rules Civ. Proc. 18 (joinder of claims), 20 (joinder of parties), 42(a) (consolidation of actions). Such rules neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed. For the same reason, Rule 23—at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action—falls within § 2072(b)'s authorization. A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.

Allstate contends that the authorization of class actions is not substantively neutral: Allowing **Shady Grove** to sue on behalf of a class "transform[s][the] dispute over a five *hundred* dollar penalty into a dispute over a five *million* dollar penalty." Brief for Respondent 1. **Allstate's** aggregate liability, however, does not depend on whether the suit proceeds as a class action. Each of the 1,000-plus members of the putative class could (as **Allstate** acknowledges) bring a freestanding suit asserting his individual claim. It is undoubtedly true that some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action. That has no bearing, however, on **Allstate's** or the plaintiffs' legal rights. The likelihood that some (even many) plaintiffs will be induced to sue by the availability of a class action is just the sort of "incidental effec[t]" we have long held does not violate § 2072(b), *Mississippi Publishing, supra* at 445, 66 S.Ct. 242.

Allstate argues that Rule 23 violates § 2072(b) because the state law it displaces, § 901(b), creates a right that the Federal ***409** Rule abridges—namely, a "substantive right ... not to be subjected to aggregated class-action liability" in a single suit. Brief for Respondent 31. To begin with, we doubt that that is so. Nothing in the text of § 901(b) (which is to be found in New York's procedural code) confines it to claims under New York law; and of course New York has no power to alter substantive rights and duties created by other sovereigns. As we have said, the *consequence* of excluding certain class actions may be to cap the damages a defendant can face in a single suit, but the law itself alters only procedure. In that respect, § 901(b) is no different from a state law forbidding simple joinder. As a fallback argument, **Allstate** argues that even if § 901(b) is a procedural provision, it was enacted "for *substantive reasons,*" *id.* at 24 (emphasis added). Its end was not to improve "the conduct of the litigation process itself" but to alter "the outcome of that process." *Id.* at 26.

****1444** The fundamental difficulty with both these 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 in *Sibbach:*

> "The petitioner says the phrase ['substantive rights' in the Rules Enabling Act] connotes more; that by its use Congress intended that in regulating procedure this Court should not deal with important and substantial rights theretofore recognized. Recognized where and by whom? The state courts are divided as to the power in the absence of statute to order a physical examination. In a number such an order is authorized by statute or rule. ..."
>
> "The asserted right, moreover, is no more important than many others enjoyed by litigants in District Courts sitting in the several states before the Federal Rules ***410** of Civil Procedure altered and abolished old rights or privileges and created new ones in connection

> with the conduct of litigation. ... If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure. ..." 312 U.S. at 13–14, 61 S.Ct. 422 (footnotes omitted).

Hanna unmistakably expressed the same understanding that compliance of a Federal Rule with the Enabling Act is to be assessed by consulting the Rule itself, and not its effects in individual applications:

> "[T]he court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." 380 U.S. at 471, 85 S.Ct. 1136.

[9] In sum, it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule. We have held since *Sibbach,* and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure. See *Sibbach*, *supra* at 14, 61 S.Ct. 422; *Hanna*, *supra* at 464, 85 S.Ct. 1136; *Burlington,* 480 U.S. at 8, 107 S.Ct. 967. If it does, it is authorized by § 2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights.

C

A few words in response to the concurrence. We understand it to accept the framework we apply—which requires first, determining whether the federal and state rules can be reconciled (because they answer different questions), and second, if they cannot, determining whether the Federal Rule runs afoul of § 2072(b). *Post* at 1450–1452 (STEVENS, J., ***411** concurring in part and concurring in judgment). The concurrence agrees with us that Rule 23 and § 901(b) conflict, *post* at 1456–1457 and departs from us only with respect to the second part of the test, *i.e.*, whether application of the Federal Rule violates § 2072(b), *post* at 1451–1455. Like us, it answers no, but for a reason different from ours. *Post* at 1457–1460.

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 ****1445** "function as a part of the State's definition of substantive rights and remedies." *Post* at 1448. 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," *post* at 1448, 1455.

This analysis squarely conflicts with *Sibbach,* which established the rule we apply. The concurrence contends that *Sibbach* did not rule out its approach, but that is not so. Recognizing the impracticability of a test that turns on the idiosyncrasies of state law, *Sibbach* adopted and applied a rule with a single criterion: whether the Federal Rule "really regulates procedure." 312 U.S. at 14, 61 S.Ct. 422.[9] That the ***412** concurrence's approach would have yielded the same result in *Sibbach* proves nothing; what matters is the rule we *did* apply, and that rule leaves no room for special exemptions based on the function or purpose of a particular state rule.[10] We have rejected an attempt to read into *Sibbach* an exception with no basis in the opinion, see *Schlagenhauf,* 379 U.S. at 113–114, 85 S.Ct. 234, and we see no reason to find such an implied limitation today.

In reality, the concurrence seeks not to apply *Sibbach,* but to overrule it (or, what is the same, to rewrite it). Its approach, the concurrence insists, gives short shrift to the statutory text forbidding the Federal Rules from "abridg[ing], enlarg[ing], or modify[ing] any substantive right," § 2072(b). See *post* at 1452–1453. There is something to that. It is possible to understand how it can be determined whether a Federal Rule "enlarges" substantive rights without consulting State law: If the Rule creates a substantive right, even one that duplicates some state-created rights, it establishes a new *federal* right. But it is hard to understand how it can be determined whether a Federal Rule ****1446** "abridges" or "modifies" substantive rights without knowing what state-created rights would obtain if the Federal Rule did not exist. *Sibbach* ***413** 's exclusive focus on the challenged Federal Rule—driven by the very real concern that Federal Rules which vary from State to State would be chaos, see 312 U.S. at 13–14, 61 S.Ct. 422—is hard to square with § 2072(b)'s terms.[11]

Sibbach has been settled law, however, for nearly seven decades. [12] Setting aside any precedent requires a "special justification" beyond a bare belief that it was wrong. *Patterson v. McLean Credit Union,* 491 U.S. 164, 172, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (internal quotation marks omitted). And a party seeking to ***414** overturn a *statutory* precedent bears an even greater burden, since Congress remains free to correct us, *ibid.*, and adhering to our precedent enables it do so, see, *e.g., Finley v. United States,* 490 U.S. 545, 556, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989); 28 U.S.C. § 1367; *Exxon Mobil Corp. v. Allapattah Services, Inc.,* 545 U.S. 546, 558, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005). We do Congress no service by presenting it a moving target. In all events, **Allstate** has not even asked us to overrule *Sibbach,* let alone carried its burden of persuading us to do so. Cf. *IBP, Inc. v. Alvarez,* 546 U.S. 21, 32, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005). Why we should cast aside our decades-old decision escapes us, especially since (as the concurrence explains) that would not affect the result. [13]

****1447** The concurrence also contends that applying *Sibbach* and assessing whether a Federal Rule regulates substance or procedure is not always easy. See *post* at 1454, n. 10. Undoubtedly some hard cases will arise (though we have managed to muddle through well enough in the 69 years since ***415** *Sibbach* was decided). But as the concurrence acknowledges, *post* at 1453–1454, the basic difficulty is unavoidable: The statute itself refers to "substantive right [s]," § 2072(b), so there is no escaping the substance-procedure distinction. What is more, the concurrence's approach does nothing to diminish the difficulty, 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. [14] And it still does not sidestep the problem it seeks to avoid. At the end of the day, one must come face to face with the decision whether or not the state policy (with which a putatively procedural state rule may be "bound up") pertains to a "substantive right or remedy," *post* at 1458—that is, whether it is substance or procedure. [15] The more one explores the alternatives to *Sibbach*' s rule, the more its wisdom becomes apparent.

D

We must acknowledge the reality that keeping the federal-court door open to class actions that cannot proceed in state court will produce forum shopping. That is unacceptable ***416** when it comes as the consequence of judge-made rules created to fill supposed "gaps" in positive federal law. See *Hanna,* 380 U.S. at 471–472, 85 S.Ct. 1136. For where neither the Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one, "state law must govern because ****1448** there can be no other law." *Ibid.;* see Clark, *Erie*'s Constitutional Source, 95 Cal. L.Rev. 1289, 1302, 1311 (2007). But divergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure. Congress itself has created the possibility that the same case may follow a different course if filed in federal instead of state court. Cf. *Hanna,* 380 U.S. at 472–473, 85 S.Ct. 1136. The short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping. To hold otherwise would be to "disembowel either the Constitution's grant of power over federal procedure" or Congress's exercise of it. *Id.* at 473–474, 85 S.Ct. 1136.

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

Justice STEVENS, concurring in part and concurring in the judgment.

The New York law at issue, N.Y. Civ. Prac. Law Ann. (CPLR) § 901(b) (West 2006), is a procedural rule that is not part of New York's substantive law. Accordingly, I agree with Justice SCALIA that Federal Rule of Civil Procedure 23 must apply in this case and join Parts I and II–A of the Court's opinion. But I also agree with Justice GINSBURG that there are some state procedural rules that federal courts must apply in diversity cases because they function ***417** as a part of the State's definition of substantive rights and remedies.

I

It is a long-recognized principle that federal courts sitting in diversity "apply state substantive law and federal procedural law." *Hanna v. Plumer*, 380 U.S. 460, 465, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).[1] This principle is governed by a statutory framework, and the way that it is administered varies depending upon whether there is a federal rule addressed to the matter. See *id.* at 469–472, 85 S.Ct. 1136. If no federal rule applies, a federal court must follow the Rules of Decision Act, 28 U.S.C. § 1652, and make the "relatively unguided *Erie* choice,"[2] *Hanna*, 380 U.S. at 471, 85 S.Ct. 1136, to determine whether the state law is the "rule of decision." But when a situation is covered by a federal rule, the Rules of Decision Act inquiry by its own terms does not apply. See § 1652; *Hanna*, 380 U.S. at 471, 85 S.Ct. 1136. Instead, the Rules Enabling Act (Enabling Act) controls. See 28 U.S.C. § 2072.

That does not mean, however, that the federal rule always governs. Congress has provided for a system of uniform federal rules, see *ibid.*, under which federal courts sitting in diversity operate as "an independent system for administering justice to litigants who properly invoke its jurisdiction," *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 537, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958), and not ****1449** as state-court clones that assume all aspects of state tribunals but are managed by Article III judges. See *Hanna*, 380 U.S. at 473–474, 85 S.Ct. 1136. But while Congress ***418** may have the constitutional power to prescribe procedural rules that interfere with state substantive law in any number of respects, that is not what Congress has done. Instead, it has provided in the Enabling Act that although "[t]he Supreme Court" may "prescribe general rules of practice and procedure," § 2072(a), those rules "shall not abridge, enlarge or modify any substantive right," § 2072(b). Therefore, "[w]hen a situation is covered by one of the Federal Rules, ... the court has been instructed to apply the Federal Rule" unless doing so would violate the Act or the Constitution. *Hanna*, 380 U.S. at 471, 85 S.Ct. 1136.

Although the Enabling Act and the Rules of Decision Act "say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law," the inquiries are not the same. *Ibid.*; see also *id.* at 469–470, 85 S.Ct. 1136. The Enabling Act does not invite federal courts to engage in the "relatively unguided *Erie* choice," *id.* at 471, 85 S.Ct. 1136, but instead instructs only that federal rules cannot "abridge, enlarge or modify any substantive right," § 2072(b). The Enabling Act's limitation does not mean that federal rules cannot displace state policy judgments; it means only that federal rules cannot displace a State's definition of its own rights or remedies. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13–14, 61 S.Ct. 422, 85 L.Ed. 479 (1941) (reasoning that "the phrase 'substantive rights' " embraces only those state rights that are sought to be enforced in the judicial proceedings).

Congress has thus struck a balance: "[H]ousekeeping rules for federal courts" will generally apply in diversity cases, notwithstanding that some federal rules "will inevitably differ" from state rules. *Hanna*, 380 U.S. at 473, 85 S.Ct. 1136. But not every federal "rul[e] of practice or procedure," § 2072(a), will displace state law. To the contrary, federal rules must be interpreted with some degree of "sensitivity to important state interests and regulatory policies," *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, n. 7, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996), and applied to diversity cases against the background of Congress' ***419** command that such rules not alter substantive rights and with consideration of "the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts," *Hanna*, 380 U.S. at 473, 85 S.Ct. 1136. This can be a tricky balance to implement.[3]

It is important to observe that the balance Congress has struck turns, in part, on the nature of the state law that is being displaced by a federal rule. And in my view, the application of that balance does not necessarily turn on whether the state law at issue takes the *form* of what is traditionally described as substantive or procedural. Rather, it turns on whether the state law actually is part of a State's framework of substantive rights or remedies. See § 2072(b); cf. *Hanna*, 380 U.S. at 471, 85 S.Ct. 1136 ("The line between 'substance' and 'procedure' shifts as the legal context changes"); *Guaranty Trust Co. v. York*, 326 U.S. 99, 108, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945) (noting that the words " 'substance' " and " 'procedure' " "[e]ach impl [y] different variables depending ****1450** upon the particular problem for which [they] are used").

Applying this balance, therefore, requires careful interpretation of the state and federal provisions at issue. "The line between procedural and substantive law is hazy," *Erie R. Co. v. Tompkins,* 304 U.S. 64, 92, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) (Reed, J., concurring), and matters of procedure and matters of substance are not "mutually exclusive categories with easily ascertainable contents," *Sibbach,* 312 U.S. at 17, 61 S.Ct. 422 (Frankfurter, J., dissenting). Rather, "[r]ules which lawyers call procedural do not always exhaust their effect by regulating procedure," *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 555, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and in some situations, "procedure and substance are so interwoven that rational separation becomes well-nigh impossible," *id.* at 559, 69 S.Ct. 1221 (Rutledge, J., dissenting). A "state procedural rule, though undeniably 'procedural' in the ordinary ***420** sense of the term," may exist "to influence substantive outcomes," *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist.,* 60 F.3d 305, 310 (C.A.7 1995) (Posner, J.), and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy. Such laws, for example, may be seemingly procedural rules that make it significantly more difficult to bring or to prove a claim, thus serving to limit the scope of that claim. See, *e.g., Cohen,* 337 U.S. at 555, 69 S.Ct. 1221 (state "procedure" that required plaintiffs to post bond before suing); *Guaranty Trust Co.,* 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (state statute of limitations).[4] Such "procedural rules" may also define the amount of recovery. See, *e.g., Gasperini,* 518 U.S. at 427, 116 S.Ct. 2211 (state procedure for examining jury verdicts as means of capping the available remedy); Moore § 124.07[3][a] (listing examples of federal courts' applying state laws that affect the amount of a judgment).

In our federalist system, Congress has not mandated that federal courts dictate to state legislatures the form that their substantive law must take. And were federal courts to ignore those portions of substantive state law that operate as procedural devices, it could in many instances limit the ways that sovereign States may define their rights and remedies. When a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice. Cf. *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 533, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949) ("Since th[e] cause of action is created ***421** by local law, the measure of it is to be found only in local law .... Where local law qualifies or abridges it, the federal court must follow suit").

II

When both a federal rule and a state law appear to govern a question before a federal court sitting in diversity, our precedents have set out a two-step framework for federal courts to negotiate this thorny area. At both steps of the inquiry, there is a critical question about what the state law and the federal rule mean.

****1451** The court must first determine whether the scope of the federal rule is " 'sufficiently broad' " to " 'control the issue' " before the court, "thereby leaving no room for the operation" of seemingly conflicting state law. See *Burlington Northern R. Co. v. Woods,* 480 U.S. 1, 4–5, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987); *Walker v. Armco Steel Corp.,* 446 U.S. 740, 749–750, and n. 9, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980). If the federal rule does not apply or can operate alongside the state rule, then there is no "Ac[t] of Congress" governing that particular question, 28 U.S.C. § 1652, and the court must engage in the traditional Rules of Decision Act inquiry under *Erie* and its progeny. In some instances, the "plain meaning" of a federal rule will not come into " 'direct collision' " with the state law, and both can operate. *Walker,* 446 U.S. at 750, n. 9, 749, 100 S.Ct. 1978. In other instances, the rule "when fairly construed," *Burlington Northern R. Co.,* 480 U.S. at 4, 107 S.Ct. 967, with "sensitivity to important state interests and regulatory policies," *Gasperini,* 518 U.S. at 427, n. 7, 116 S.Ct. 2211, will not collide with the state law.[5]

***422** If, on the other hand, the federal rule is "sufficiently broad to control the issue before the Court," such that there is a "direct collision," *Walker,* 446 U.S. at 749–750, 100 S.Ct. 1978, the court must decide whether application of the federal rule "represents a valid exercise" of the " rulemaking authority ... bestowed on this Court by the Rules Enabling Act." *Burlington Northern R. Co.,* 480 U.S. at 5, 107 S.Ct. 967; see also *Gasperini,* 518 U.S. at 427, n. 7, 116 S.Ct. 2211; *Hanna,* 380 U.S. at 471–474, 85 S.Ct. 1136. The Enabling Act requires, *inter alia,* that federal rules "not abridge, enlarge or modify *any* substantive right." 28 U.S.C. § 2072(b) (emphasis added). Unlike Justice SCALIA, I believe that an application of a federal rule that effectively abridges, enlarges, or modifies a state-created right or remedy violates this command. Congress

may have the constitutional power "to supplant state law" with rules that are "rationally capable of classification as procedure," *ante* at 1442 (internal quotation marks omitted), but we should generally presume that it has not done so. Cf. *Wyeth v. Levine*, 555 U.S. 555, ——, 129 S.Ct. 1187, 1194–95, 173 L.Ed.2d 51 (2009) (observing that "we start with the assumption" that a federal statute does not displace a State's law "unless that was the clear and manifest purpose of Congress" (internal quotation marks omitted)). Indeed, the mandate that federal rules "shall not abridge, enlarge or modify any substantive right" evinces the opposite intent, as does Congress' decision to delegate the creation of rules to this Court rather than to a political branch, see 19 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4509, p. 265 (2d ed.1996) (hereinafter Wright).

**1452 Thus, the second step of the inquiry may well bleed back into the first. When a federal rule appears to abridge, enlarge, *423 or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result. See, *e.g.*, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001) (avoiding an interpretation of Federal Rule of Civil Procedure 41(b) that "would arguably violate the jurisdictional limitation of the Rules Enabling Act" contained in § 2072(b)).[6] And when such a "saving" construction is not possible and the rule would violate the Enabling Act, federal courts cannot apply the rule. See 28 U.S.C. § 2072(b) (mandating that federal rules "shall not" alter "*any* substantive right" (emphasis added)); *Hanna*, 380 U.S. at 473, 85 S.Ct. 1136 ("[A] court, in measuring a Federal Rule against the standards contained in the Enabling Act ... need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts"); see also *Semtek Int'l Inc.*, 531 U.S. at 503–504, 121 S.Ct. 1021 (noting that if state law granted a particular right, "the federal court's extinguishment of that right ... would seem to violate [§ 2072(b)]"); cf. Statement of Justices Black and Douglas, 374 U.S. 865, 870 (1963) (observing that federal rules "as applied in given situations might have to be declared invalid"). A federal rule, therefore, cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right. And absent a governing federal rule, a federal court must engage in the traditional Rules of Decision Act inquiry, under the *Erie* line *424 of cases. This application of the Enabling Act shows "sensitivity to important state interests," *post* at 1463, and "regulatory policies," *post* at 1460, but it does so as Congress authorized, by ensuring that federal rules that ordinarily "prescribe general rules of practice and procedure," § 2072(a), do "not abridge, enlarge or modify any substantive right," § 2072(b).

Justice SCALIA believes that the sole Enabling Act question is whether the federal rule "really regulates procedure," *ante* at 1442, 1444, 1445, 1446, n. 13 (plurality opinion) (internal quotation marks omitted), which means, apparently, whether it regulates "the manner and the means by which the litigants' rights are enforced," *ante* at 1442 (internal quotation marks omitted). I respectfully disagree.[7] This interpretation of the Enabling Act is consonant with the Act's first limitation to "general rules of practice and procedure," § 2072(a). But it ignores the second limitation **1453 that such rules also "not abridge, enlarge or modify *any* substantive right," § 2072(b) (emphasis added),[8] and in so doing ignores the balance that *425 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, see Wright § 4509, at 265, and federalism presumption, see *Wyeth*, 555 U.S., at ——, 129 S.Ct. at 1194–95, that counsel against judicially created rules displacing state substantive law.[9]

*426 Although the plurality appears to agree with much of my interpretation of § 2072, see *ante* at 1445–1446, it nonetheless rejects that approach for two reasons, both of which are mistaken. First, Justice SCALIA worries that if federal courts inquire into the effect of federal rules on state law, it will enmesh federal courts in difficult determinations about whether application **1454 of a given rule would displace a state determination about substantive rights. See *ante* at 1443–1444, 1447–1448, and nn. 14, 15. I do not see why an Enabling Act inquiry that looks to state law necessarily is more taxing than Justice SCALIA's.[10] But in any event, that inquiry is what the Enabling Act requires: While it may not be easy to decide what is actually a "substantive right," "the designations substantive and procedural become important, for the Enabling Act has made them so." Ely 723; see also Wright § 4509, at 266. The question, therefore, is

not what rule *we* think would be easiest on federal courts. The question is what rule Congress established. Although, Justice SCALIA may generally prefer easily administrable, bright-line rules, his preference does not give us license to adopt a second-best interpretation of the Rules Enabling Act. Courts cannot ignore text and context in the service of simplicity.

***427** Second, the plurality argues that its interpretation of the Enabling Act is dictated by this Court's decision in *Sibbach,* which applied a Federal Rule about when parties must submit to medical examinations. But the plurality misreads that opinion. As Justice Harlan observed in *Hanna,* "shorthand formulations which have appeared in earlier opinions are prone to carry untoward results that frequently arise from oversimplification." 380 U.S. at 475, 85 S.Ct. 1136 (concurring opinion). To understand *Sibbach,* it is first necessary to understand the issue that was before the Court. The petitioner raised only the facial question whether "rules 35 and 37 [of the federal rules of civil procedure] are ... within the mandate of Congress to this court" and not the specific question of "the obligation of federal courts to apply the substantive law of a state." [11] 312 U.S. at 9, 61 S.Ct. 422. The Court, therefore, had no occasion to consider whether the particular application of the Federal Rules in question would offend the Enabling Act. [12]

****1455** ***428** Nor, in *Sibbach,* was any further analysis necessary to the resolution of the case because the matter at issue, requiring medical exams for litigants, did not pertain to "substantive rights" under the Enabling Act. Although most state rules bearing on the litigation process are adopted for some policy reason, few seemingly "procedural" rules define the scope of a substantive right or remedy. The matter at issue in *Sibbach* reflected competing federal and state judgments about privacy interests. Those privacy concerns may have been weighty and in some sense substantive; but they did not pertain to the scope of any state right or remedy at issue in the litigation. Thus, in response to the petitioner's argument in *Sibbach* that "substantive rights" include not only "rights sought to be adjudicated by the litigants" but also "general principle[s]" or "question[s] of public policy that the legislature is able to pass upon," *id.* at 2–3, 61 S.Ct. 422, we held that "the phrase 'substantive rights' " embraces only state rights, such as the tort law in that case, that are sought to be enforced in the judicial proceedings. *Id.* at 13–14, 61 S.Ct. 422. If the Federal Rule had in fact displaced a state rule that was sufficiently intertwined with a state right or remedy, then perhaps the Enabling Act analysis would have been different. [13] Our subsequent cases are not to the contrary. [14]

***429** III

Justice GINSBURG views the basic issue in this case as whether and how to ****1456** apply a federal rule that dictates an answer to a traditionally procedural question (whether to join plaintiffs together as a class), when a state law that "defines the dimensions" of a state-created claim dictates the opposite answer. *Post* at 1458. As explained above, I readily acknowledge that if a federal rule displaces a state rule that is " 'procedural' in the ordinary sense of the term," *S.A. Healy Co.,* 60 F.3d at 310, but sufficiently interwoven with the scope of a substantive right or remedy, there would be an Enabling Act problem, and the federal rule would have to give way. In my view, however, this is not such a case.

Rule 23 Controls Class Certification

When the District Court in the case before us was asked to certify a class action, Federal Rule of Civil Procedure 23 squarely governed the determination whether the court ***430** should do so. That is the explicit function of Rule 23. Rule 23, therefore, must apply unless its application would abridge, enlarge, or modify New York rights or remedies.

Notwithstanding the plain language of Rule 23, I understand the dissent to find that Rule 23 does *not* govern the question of class certification in this matter because New York has made a substantive judgment that such a class should not be certified, as a means of proscribing damages. Although, as discussed *infra* at 1469–1471, I do not accept the dissent's view of § 901(b), I also do not see how the dissent's interpretation of Rule 23 follows from that view. [15] I agree with JUSTICE GINSBURG that courts should "avoi[d] immoderate interpretations of the Federal Rules that would trench on state prerogatives," *post* at 1461–1462, and should in some instances "interpre[t] the federal rules to avoid conflict with important state regulatory policies," *post* at 1462 (internal quotation marks omitted). But that is not what the dissent ***431** has done. Simply because a rule should

be read in light of federalism concerns, it does not follow that courts may rewrite the rule.

At bottom, the dissent's interpretation of Rule 23 seems to be that Rule 23 covers only those cases in which its application would create no *Erie* problem. The dissent would apply the Rules of Decision Act inquiry under *Erie* even to cases in which there is a governing federal rule, and thus the Act, by its own terms, does not apply. But "[w]hen a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, ****1457** relatively unguided *Erie* choice." *Hanna*, 380 U.S. at 471, 85 S.Ct. 1136. The question is only whether the Enabling Act is satisfied. Although it reflects a laudable concern to protect "state regulatory policies," *post* at 1462 (internal quotation marks omitted), Justice GINSBURG's approach would, in my view, work an end run around Congress' system of uniform federal rules, see 28 U.S.C. § 2072, and our decision in *Hanna*. Federal courts can and should interpret federal rules with sensitivity to "state prerogatives," *post* at 1462; but even when "state interests ... warrant our respectful consideration," *post* at 1464, federal courts cannot rewrite the rules. If my dissenting colleagues feel strongly that § 901(b) is substantive and that class certification should be denied, then they should argue within the Enabling Act's framework. Otherwise, "the Federal Rule applies regardless of contrary state law." *Gasperini*, 518 U.S. at 427, n. 7, 116 S.Ct. 2211; accord, *Hanna*, 380 U.S. at 471, 85 S.Ct. 1136.

Applying Rule 23 Does Not Violate the Enabling Act

As I have explained, in considering whether to certify a class action such as this one, a federal court must inquire whether doing so would abridge, enlarge, or modify New York's rights or remedies, and thereby violate the Enabling Act. This inquiry is not always a simple one because "[i]t is difficult to conceive of any rule of procedure that cannot have ***432** a significant effect on the outcome of a case," Wright § 4508, at 232–233, and almost "any rule can be said to have ... 'substantive effects,' affecting society's distribution of risks and rewards," Ely 724, n. 170. Faced with a federal rule that dictates an answer to a traditionally procedural question and that displaces a state rule, one can often argue that the state rule was *really* some part of the State's definition of its rights or remedies.

In my view, however, the bar for finding an Enabling Act problem is a high one. The mere fact that a state law is designed as a procedural rule suggests it reflects a judgment about how state courts ought to operate and not a judgment about the scope of state-created rights and remedies. And for the purposes of operating a federal court system, there are costs involved in attempting to discover the true nature of a state procedural rule and allowing such a rule to operate alongside a federal rule that appears to govern the same question. The mere possibility that a federal rule would alter a state-created right is not sufficient. There must be little doubt.

The text of CPLR § 901(b) expressly and unambiguously applies not only to claims based on New York law but also to claims based on federal law or the law of any other State. And there is no interpretation from New York courts to the contrary. It is therefore hard to see how § 901(b) could be understood as a rule that, though procedural in form, serves the function of defining New York's rights or remedies. This is all the more apparent because lawsuits under New York law could be joined in federal class actions well before New York passed § 901(b) in 1975, and New York had done nothing to prevent that. It is true, as the dissent points out, that there is a limited amount of legislative history that can be read to suggest that the New York officials who supported § 901(b) wished to create a "limitation" on New York's "statutory damages." *Post* at 1464. But, as Justice SCALIA ***433** notes, that is not the law that New York adopted.[16] ****1458** See *ante* at 1439–1440 (opinion of the Court).

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 ***434** of [a] claim itself," *post* at 1466. 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, see *post* at 1464–

1465, § 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." V. Alexander, Practice Commentaries, C901:11, reprinted in 7B McKinney's Consolidated Laws of New York Ann., p. 104 (2006) (internal quotation marks omitted); see also *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 211, 831 N.Y.S.2d 760, 863 N.E.2d 1012, 1015 (2007). 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.

In addition to the fear of excessive recoveries, some opponents of a broad class-action device "argued that there was no *need* to permit class actions in order to encourage litigation ... when statutory penalties ... provided an aggrieved party with a sufficient economic incentive to pursue a claim." *Id.*, at 211, 831 N.Y.S.2d 760, 863 N.E.2d, at 1015 (emphasis added). But those opponents may have felt merely that, for any number of reasons, New York courts should not conduct trials in the class format when that format is unnecessary **1459 to motivate litigation.[17] Justice GINSBURG asserts that this could not *435 be true because "suits seeking statutory damages are arguably *best* suited to the class device because individual proof of actual damages is unnecessary." *Post* at 1464–1465. But some people believe that class actions are inefficient or at least unfair, insofar as they join together slightly disparate claims or force courts to adjudicate unwieldy lawsuits. It is not for us to dismiss the possibility that New York legislators shared in those beliefs and thus wanted to exclude the class vehicle when it appeared to be unnecessary.

The legislative history of § 901 thus reveals a classically procedural calibration of making it easier to litigate claims in New York courts (under any source of law) only when it is necessary to do so, and not making it *too* easy when the class tool is not required. This is the same sort of calculation that might go into setting filing fees or deadlines for briefs. There is of course a difference of degree between those examples and class certification, but not a difference of kind; the class vehicle may have a greater practical effect on who brings lawsuits than do low filing fees, but that does not transform it into a damages "proscription," *post* at 1466, n. 6, 1471, or "limitation," *post* at 1463, n. 2, 1464, 1464–1465, 1466, 1473.[18]

The difference of degree is relevant to the forum shopping considerations that are part of the Rules of Decision Act or *Erie* inquiry. If the applicable federal rule did not govern the particular question at issue (or could be fairly read not to do so), then those considerations would matter, for precisely the reasons given by the dissent. See *post* at 1469–1473. *436 But that is not *this* case. As the Court explained in *Hanna*, it is an "incorrect assumption that the rule of *Erie R. Co. v. Tompkins* constitutes the appropriate test of ... the applicability of a Federal Rule of Civil Procedure." 380 U.S. at 469–470, 85 S.Ct. 1136. "It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law," but the tests are different and reflect the fact that "they were designed to control very different sorts of decisions." *Id.* at 471, 85 S.Ct. 1136.

Because Rule 23 governs class certification, the only decision is whether certifying a class in this diversity case would "abridge, enlarge or modify" New York's substantive rights or remedies. § 2072(b). Although one can argue that class certification would enlarge New York's "limited" damages remedy, see *post* at 1463, n. 2, 1464, 1464–1465, 1466, 1473, such arguments rest on extensive speculation about what the New York Legislature had in mind when it created § 901(b). But given that there are two plausible competing narratives, it seems obvious to me that we **1460 should respect the plain textual reading of § 901(b), a rule in New York's procedural code about when to certify class actions brought under any source of law, and respect Congress' decision that Rule 23 governs class certification in federal courts. In order to displace a federal rule, there must be more than just a possibility that the state rule is different than it appears.

Accordingly, I concur in part and concur in the judgment.

Justice GINSBURG, with whom Justice KENNEDY, Justice BREYER, and Justice ALITO join, dissenting.
The Court today approves **Shady Grove's** attempt to transform a $500 case into a $5,000,000 award, although the State creating the right to recover has proscribed this alchemy. If **Shady Grove** had filed suit in New York state

court, the 2% interest payment authorized by New York Ins. Law Ann. § 5106(a) (West 2009) as a penalty for overdue benefits would, by **Shady Grove's** own measure, amount to no more than ***437** $500. By instead filing in federal court based on the parties' diverse citizenship and requesting class certification, **Shady Grove** hopes to recover, for the class, statutory damages of more than $5,000,000. The New York Legislature has barred this remedy, instructing that, unless specifically permitted, "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." N.Y. Civ. Prac. Law Ann. (CPLR) § 901(b) (West 2006). The Court nevertheless holds that Federal Rule of Civil Procedure 23, which prescribes procedures for the conduct of class actions in federal courts, preempts the application of § 901(b) in diversity suits.

The Court reads Rule 23 relentlessly to override New York's restriction on the availability of statutory damages. Our decisions, however, caution us to ask, before undermining state legislation: Is this conflict really necessary? Cf. Traynor, Is This Conflict Really Necessary? 37 Tex. L.Rev. 657 (1959). Had the Court engaged in that inquiry, it would not have read Rule 23 to collide with New York's legitimate interest in keeping certain monetary awards reasonably bounded. I would continue to interpret Federal Rules with awareness of, and sensitivity to, important state regulatory policies. Because today's judgment radically departs from that course, I dissent.

I

A

"Under the *Erie* doctrine," it is long settled, "federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996); see *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Justice Harlan aptly conveyed the importance of the doctrine; he described *Erie* as "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems." ***438** *Hanna v. Plumer*, 380 U.S. 460, 474, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965) (concurring opinion). Although we have found *Erie*'s application " sometimes [to be] a challenging endeavor," *Gasperini*, 518 U.S. at 427, 116 S.Ct. 2211, two federal statutes mark our way.

The first, the Rules of Decision Act,[1] prohibits federal courts from generating ****1461** substantive law in diversity actions. See *Erie*, 304 U.S. at 78, 58 S.Ct. 817. Originally enacted as part of the Judiciary Act of 1789, this restraint serves a policy of prime importance to our federal system. We have therefore applied the Act "with an eye alert to ... avoiding disregard of State law." *Guaranty Trust Co. v. York*, 326 U.S. 99, 110, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945).

The second, the Rules Enabling Act, enacted in 1934, authorizes us to "prescribe general rules of practice and procedure" for the federal courts, but with a crucial restriction: "Such rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. Pursuant to this statute, we have adopted the Federal Rules of Civil Procedure. In interpreting the scope of the Rules, including, in particular, Rule 23, we have been mindful of the limits on our authority. See, *e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999) (The Rules Enabling Act counsels against "adventurous application" of Rule 23; any tension with the Act "is best kept within tolerable limits."); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612–613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). See also *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503–504, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001).

If a Federal Rule controls an issue and directly conflicts with state law, the Rule, so long as it is consonant with the Rules Enabling Act, applies in diversity suits. See *Hanna*, 380 U.S. at 469–474, 85 S.Ct. 1136. If, however, no Federal Rule or statute governs the issue, the Rules of Decision Act, as interpreted ***439** in *Erie*, controls. That Act directs federal courts, in diversity cases, to apply state law when failure to do so would invite forum shopping and yield markedly disparate litigation outcomes. See *Gasperini*, 518 U.S. at 428, 116 S.Ct. 2211; *Hanna*, 380 U.S. at 468, 85 S.Ct. 1136. Recognizing that the Rules of Decision Act and the Rules Enabling Act simultaneously frame and inform the *Erie* analysis, we have endeavored in diversity suits to remain safely within the bounds of both congressional directives.

B

In our prior decisions in point, many of them not mentioned in the Court's opinion, we have avoided immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest. "Application of the *Hanna* analysis," we have said, "is premised on a 'direct collision' between the Federal Rule and the state law." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749–750, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980) (quoting *Hanna*, 380 U.S. at 472, 85 S.Ct. 1136). To displace state law, a Federal Rule, "when fairly construed," must be " 'sufficiently broad' " so as "to 'control the issue' before the court, thereby leaving *no room* for the operation of that law." *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 4–5, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987) (quoting *Walker*, 446 U.S. at 749–750, and n. 9, 100 S.Ct. 1978; emphasis added); cf. *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 37–38, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988) (SCALIA, J., dissenting) ("[I]n deciding whether a federal ... Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits.").

**1462 In pre-*Hanna* decisions, the Court vigilantly read the Federal Rules to avoid conflict with state laws. In *Palmer v. Hoffman*, 318 U.S. 109, 117, 63 S.Ct. 477, 87 L.Ed. 645 (1943), for example, the Court read Federal Rule 8(c), which lists affirmative defenses, to control only the manner of pleading the listed defenses in diversity cases; as to the burden of proof in such cases, *Palmer* held, state law controls.

*440 Six years later, in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949), the Court ruled that state law determines when a diversity suit commences for purposes of tolling the state limitations period. Although Federal Rule 3 specified that "[a] civil action is commenced by filing a complaint with the court," we held that the Rule did not displace a state law that tied an action's commencement to service of the summons. *Id.* at 531–533, 69 S.Ct. 1233. The "cause of action [wa]s created by local law," the Court explained, therefore "the measure of it [wa]s to be found only in local law." *Id.* at 533, 69 S.Ct. 1233.

Similarly in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), the Court held applicable in a diversity action a state statute requiring plaintiffs, as a prerequisite to pursuit of a stockholder's derivative action, to post a bond as security for costs. At the time of the litigation, Rule 23, now Rule 23.1, addressed a plaintiff's institution of a derivative action in federal court. Although the Federal Rule specified prerequisites to a stockholder's maintenance of a derivative action, the Court found no conflict between the Rule and the state statute in question; the requirements of both could be enforced, the Court observed. See *id.*, at 556, 69 S.Ct. 1221. Burdensome as the security-for-costs requirement may be, *Cohen* made plain, suitors could not escape the upfront outlay by resorting to the federal court's diversity jurisdiction.

In all of these cases, the Court stated in *Hanna*, "the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law." 380 U.S. at 470, 85 S.Ct. 1136. In *Hanna* itself, the Court found the clash "unavoidable," *ibid.*; the petitioner had effected service of process as prescribed by Federal Rule 4(d)(1), but that "how-to" method did not satisfy the special Massachusetts law applicable to service on an executor or administrator. Even as it rejected the Massachusetts prescription in favor of the federal procedure, however, "[t]he majority in Hanna recognized ... that federal rules ... must *441 be interpreted by the courts applying them, and that the process of interpretation can and should reflect an awareness of legitimate state interests." R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 593 (6th ed.2009) (hereinafter Hart & Wechsler).

Following *Hanna*, we continued to "interpre[t] the federal rules to avoid conflict with important state regulatory policies." Hart & Wechsler 593. In *Walker*, the Court took up the question whether *Ragan* should be overruled; we held, once again, that Federal Rule 3 does not directly conflict with state rules governing the time when an action commences for purposes of tolling a limitations period. 446 U.S. at 749–752, 100 S.Ct. 1978. Rule 3, we said, addresses only "the date from which various timing requirements of the Federal Rules begin to run," *id.* at 751, 100 S.Ct. 1978, and does not "purpor[t] to displace state tolling rules," *id.* at 750–751, 100 S.Ct. 1978. Significant

state policy interests would be frustrated, we observed, **1463 were we to read Rule 3 as superseding the state rule, which required actual service on the defendant to stop the clock on the statute of limitations. *Id.* at 750–752, 100 S.Ct. 1978.

We were similarly attentive to a State's regulatory policy in *Gasperini.* That diversity case concerned the standard for determining when the large size of a jury verdict warrants a new trial. Federal and state courts alike had generally employed a "shock the conscience" test in reviewing jury awards for excessiveness. See 518 U.S. at 422, 116 S.Ct. 2211. Federal courts did so pursuant to Federal Rule 59(a) which, as worded at the time of *Gasperini,* instructed that a trial court could grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. Rule Civ. Proc. 59(a) (West 1995). In an effort to provide greater control, New York prescribed procedures under which jury verdicts would be examined to determine whether they "deviate[d] materially from what would be reasonable compensation." See *442 *Gasperini,* 518 U.S. at 423–425, 116 S.Ct. 2211 (quoting CPLR § 5501(c)). This Court held that Rule 59(a) did not inhibit federal-court accommodation of New York's invigorated test.

Most recently, in *Semtek,* we addressed the claim-preclusive effect of a federal-court judgment dismissing a diversity action on the basis of a California statute of limitations. The case came to us after the same plaintiff renewed the same fray against the same defendant in a Maryland state court. (Plaintiff chose Maryland because that State's limitations period had not yet run.) We held that Federal Rule 41(b), which provided that an involuntary dismissal "operate[d] as an adjudication on the merits," did not bar maintenance of the renewed action in Maryland. To hold that Rule 41(b) precluded the Maryland courts from entertaining the case, we said, "would arguably violate the jurisdictional limitation of the Rules Enabling Act," 531 U.S. at 503, 121 S.Ct. 1021, and "would in many cases violate [*Erie*' s] federalism principle," *id.* at 504, 121 S.Ct. 1021.

In sum, both before and after *Hanna,* the above-described decisions show, federal courts have been cautioned by this Court to "interpre[t] the Federal Rules ... with sensitivity to important state interests," *Gasperini,* 518 U.S. at 427, n. 7, 116 S.Ct. 2211, and a will "to avoid conflict with important state regulatory policies," *id.* at 438, n. 22, 116 S.Ct. 2211 (internal quotation marks omitted).[2] The Court **1464 veers away from that approach—and *443 conspicuously, its most recent reiteration in *Gasperini, ante* at 1441, n. 7—in favor of a mechanical reading of Federal Rules, insensitive to state interests and productive of discord.

C

Our decisions instruct over and over again that, in the adjudication of diversity cases, state interests—whether advanced in a statute, *e.g., Cohen,* or a procedural rule, *e.g., Gasperini*—warrant our respectful consideration. Yet today, the Court gives no quarter to New York's limitation on statutory damages and requires the lower courts to thwart the regulatory policy at stake: To prevent excessive damages, New York's law controls the penalty to which a defendant may be exposed in a single suit. The story behind § 901(b)'s enactment deserves telling.

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." Judicial Conference Report on CPLR, reprinted in 1975 N.Y. Laws pp. 1477, 1493 (McKinney). As originally drafted, the legislation addressed only the procedural aspects of class actions; it specified, for example, five prerequisites for certification, eventually codified at § 901(a), that closely tracked those listed in Rule 23. See CPLR § 901(a) (requiring, for class certification, numerosity, *444 predominance, typicality, adequacy of representation, and superiority).

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." *Sperry v. Crompton Corp.,* 8 N.Y.3d 204, 211, 831 N.Y.S.2d 760, 863 N.E.2d 1012, 1015 (2007). These constituents "feared that recoveries beyond actual damages could lead to excessively harsh results." *Ibid.* "They 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." *Ibid.* Such penalties, constituents observed, often far exceed a plaintiff's actual damages.

"When lumped together," they argued, "penalties and class actions produce overkill." Attachment to Letter from G. Perkinson, New York State Council of Retail Merchants, Inc., to J. Gribetz, Executive Chamber (June 4, 1975) (Legislative Report), Bill Jacket, L. 1975, Ch. 207.

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. V. Alexander, Practice Commentaries, C901:11, reprinted in 7B McKinney's Consolidated Laws of New York Ann., p. 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 *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." *Sperry*, 8 N.Y.3d at 211, 831 N.Y.S.2d 760, 863 N.E.2d at 1015. Section 901(a) allows ****1465** courts leeway in deciding whether to certify a class, but § 901(b) rejects the use of the class mechanism to pursue the particular remedy of statutory ***445** damages. The limitation was not designed with the fair conduct or efficiency of litigation in mind. Indeed, suits seeking statutory damages are arguably *best* suited to the class device because individual proof of actual damages is unnecessary. 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: Limiting a defendant's liability in a single lawsuit in order to prevent the exorbitant inflation of penalties—remedies the New York Legislature created with individual suits in mind. [3]

D

Shady Grove contends—and the Court today agrees—that Rule 23 unavoidably preempts New York's prohibition on the recovery of statutory damages in class actions. The Federal Rule, the Court emphasizes, states that **Shady Grove's** suit "may be" maintained as a class action, which conflicts with § 901(b)'s instruction that it "may not" so proceed. *Ante* at 1437 (internal quotation marks omitted and emphasis deleted). Accordingly, the Court insists, § 901(b) "cannot apply in diversity suits unless Rule 23 is ultra vires." *Ibid.* Concluding that Rule 23 does not violate the Rules Enabling Act, the Court holds that the federal provision controls **Shady Grove's** ability to seek, on behalf of a class, a statutory penalty of over $5,000,000. *Ante* at 1442–1444 (plurality opinion); ***446** *ante* at 1457–1460 (STEVENS, J., concurring in part and concurring in judgment).

The Court, I am convinced, finds conflict where none is necessary. Mindful of the history behind § 901(b)'s enactment, the thrust of our precedent, and the substantive-rights limitation in the Rules Enabling Act, I conclude, as did the Second Circuit and every District Court to have considered the question in any detail, [4] that Rule 23 does not collide with § 901(b). As the Second Circuit well understood, Rule 23 prescribes the considerations relevant to class certification and postcertification proceedings—but it does not command that a particular remedy be available when a party sues in a representative capacity. See 549 F.3d 137, 143 (2008). [5] Section 901(b), ****1466** in contrast, trains on that latter issue. Sensibly read, Rule 23 governs procedural aspects of class litigation, ***447** but allows state law to control the size of a monetary award a class plaintiff may pursue.

In other words, Rule 23 describes a method of enforcing a claim for relief, while § 901(b) defines the dimensions of the claim itself. In this regard, it is immaterial that § 901(b) bars statutory penalties in wholesale, rather than retail, fashion. The New York Legislature could have embedded the limitation in every provision creating a cause of action for which a penalty is authorized; § 901(b) operates as shorthand to the same effect. It is as much a part of the delineation of the claim for relief as it would be were it included claim by claim in the New York Code.

The Court single-mindedly focuses on whether a suit "may" or "may not" be maintained as a class action. See *ante* at 1437–1439. Putting the question that way, the Court does not home in on the reason *why*. Rule 23 authorizes class treatment for suits satisfying its prerequisites because the class mechanism generally affords a fair and efficient way to aggregate claims for adjudication. Section 901(b) responds to an entirely different concern; it does not allow class members to recover statutory damages because the New York Legislature considered the result of adjudicating such claims en masse to be exorbitant. [6] The fair and efficient

conduct of class litigation is the legitimate concern of Rule 23; the *remedy* for an infraction of state law, however, is the legitimate concern of the State's lawmakers and not of the federal rulemakers. Cf. Ely, The Irrepressible Myth of *Erie*, 87 Harv. L.Rev. 693, 722 (1974) (It is relevant "whether the state provision embodies a substantive policy or represents ***448** only a procedural disagreement with the federal rulemakers respecting the fairest and most efficient way of conducting litigation.").

Suppose, for example, that a State, wishing to cap damages in class actions at $1,000,000, enacted a statute providing that "a suit to recover more than $1,000,000 may not be maintained as a class action." Under the Court's reasoning—which attributes dispositive significance to the words "may not be maintained"—Rule 23 would preempt this provision, nevermind that Congress, by authorizing the promulgation of rules of procedure for federal courts, surely did not intend to displace state-created ceilings on damages.[7] The Court suggests ****1467** that the analysis might differ if the statute "limit[ed] the remedies available in an existing class action," *ante* at 1439, such that Rule 23 might not conflict with a state statute prescribing that "no more than $1,000,000 may be recovered in a class action." There is no real difference in the purpose and intended effect of these two hypothetical statutes. The notion that one directly impinges on Rule 23's domain, while the other does not, fundamentally misperceives the office of Rule 23.[8]

***449** The absence of an inevitable collision between Rule 23 and § 901(b) becomes evident once it is comprehended that a federal court sitting in diversity can accord due respect to both state and federal prescriptions. Plaintiffs seeking to vindicate claims for which the State has provided a statutory penalty may pursue relief through a class action if they forgo statutory damages and instead seek actual damages or injunctive or declaratory relief; any putative class member who objects can opt out and pursue actual damages, if available, and the statutory penalty in an individual action. See, *e.g.*, *Mendez v. The Radec Corp.*, 260 F.R.D. 38, 55 (W.D.N.Y.2009); *Brzychnalski v. Unesco, Inc.*, 35 F.Supp.2d 351, 353 (S.D.N.Y.1999).[9] See also Alexander, Practice Commentaries, at 105 ("Even if a statutory penalty or minimum recovery is involved, most courts hold that it can be waived, thus confining the class recovery to actual damages and eliminating the bar of CPLR 901(b)."). In this manner, the Second Circuit ***450** explained, "Rule 23's procedural requirements for class actions can be applied along with the substantive requirement of CPLR 901(b)." 549 F.3d, at 144. In sum, while phrased as responsive to the question whether certain class actions may begin, § 901(b) is unmistakably aimed at controlling how those ****1468** actions must end. On that remedial issue, Rule 23 is silent.

Any doubt whether Rule 23 leaves § 901(b) in control of the remedial issue at the core of this case should be dispelled by our *Erie* jurisprudence, including *Hanna*, which counsels us to read Federal Rules moderately and cautions against stretching a rule to cover every situation it could conceivably reach.[10] The Court states that "[t]here is no reason ... to read Rule 23 as addressing only whether claims made eligible for class treatment by some *other* law should be certified as class actions." *Ante* at 1438. To the contrary, *Palmer, Ragan, Cohen, Walker, Gasperini*, and *Semtek* provide good reason to look to the law that creates the right to recover. See *supra* at 1437–1439. That is plainly so on a more accurate statement of what is at stake: Is there any reason to read Rule 23 as authorizing a claim for relief when the State that created the remedy disallows its pursuit on behalf of a class? None at all is the answer our federal system should give.

Notably, New York is not alone in its effort to contain penalties and minimum recoveries by disallowing class relief; Congress, too, has precluded class treatment for certain claims seeking a statutorily designated minimum recovery. See, *e.g.*, 15 U.S.C. § 1640(a)(2)(B) (Truth in Lending Act) ("[I]n the case of a class action ... no minimum recovery shall be applicable."); § 1693m(a)(2)(B) (Electronic Fund ***451** Transfer Act) (same); 12 U.S.C. § 4010(a)(2)(B)(i) (Expedited Fund Availability Act) (same). Today's judgment denies to the States the full power Congress has to keep certain monetary awards within reasonable bounds. Cf. *Beard v. Kindler*, 558 U.S. 53, ——, 130 S.Ct. 612, 618–19, 175 L.Ed.2d 417 (2009) ("In light of ... federalism and comity concerns ... it would seem particularly strange to disregard state ... rules that are substantially similar to those to which we give full force in our own courts."). States may hesitate to create determinate statutory penalties in the future if they are impotent to prevent federal-court distortion of the remedy they have shaped.[11]

By finding a conflict without considering whether Rule 23 rationally should be read to avoid any collision, the Court unwisely and unnecessarily retreats from the federalism principles undergirding *Erie*. Had the Court reflected on the respect for state regulatory interests endorsed in our decisions, it would have found no cause to interpret Rule 23 so woodenly—and every ****1469** reason not to do so. Cf. Traynor, 37 Tex. L.Rev., at 669 ("It is bad enough for courts to prattle unintelligibly about choice of law, but unforgiveable when inquiry might have revealed that there was no real conflict.").

***452** II

Because I perceive no unavoidable conflict between Rule 23 and § 901(b), I would decide this case by inquiring "whether application of the [state] rule would have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would be likely to cause a plaintiff to choose the federal court." *Hanna,* 380 U.S. at 468, n. 9, 85 S.Ct. 1136. See *Gasperini,* 518 U.S. at 428, 116 S.Ct. 2211.

Seeking to pretermit that inquiry, **Shady Grove** urges that the class-action bar in § 901(b) must be regarded as "procedural" because it is contained in the CPLR, which "govern[s] the *procedure* in civil judicial proceedings *in all courts of the state.*" Brief for Petitioner 34 (quoting CPLR § 101; emphasis in original). Placement in the CPLR is hardly dispositive. The provision held "substantive" for *Erie* purposes in *Gasperini* is also contained in the CPLR (§ 5501(c)), as are limitations periods, § 201 *et seq.,* prescriptions plainly "substantive" for *Erie* purposes however they may be characterized for other purposes, see *York,* 326 U.S. at 109–112, 65 S.Ct. 1464. See also, *e.g.,* 1 Restatement (Second) of Conflict of Laws § 133, Reporter's Note, p. 369 (1969) (hereinafter Restatement) ("Under the rule of Erie ... the federal courts have classified the burden of persuasion as to contributory negligence as a matter of substantive law that is governed by the rule of the State in which they sit even though the courts of that State have characterized their rule as procedural for choice-of-law purposes."); Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L.J. 333 (1933).

Shady Grove also ranks § 901(b) as "procedural" because "nothing in [the statute] suggests that it is limited to rights of action based on New York state law, as opposed to federal law or the law of other states"; instead it "applies to actions seeking penalties under *any* statute." Brief for Petitioner 35–36. See also *ante* at 1457–1458 (STEVENS, J., concurring in part and concurring in judgment) (Section 901(b) cannot "be ***453** understood as a rule that ... serves the function of defining New York's rights or remedies" because its "text ... expressly and unambiguously applies not only to claims based on New York law but also to claims based on federal law or the law of any other State.").

It is true that § 901(b) is not specifically *limited* to claims arising under New York law. But neither is it expressly *extended* to claims arising under foreign law. The rule prescribes, without elaboration either way, that "an action to recover a penalty ... may not be maintained as a class action." We have often recognized that "general words" appearing in a statute may, in fact, have limited application; "[t]he words 'any person or persons,' " for example, "are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them." *United States v. Palmer,* 3 Wheat. 610, 631, 4 L.Ed. 471 (1818) (opinion for the Court by Marshall, C. J.). See also *Small v. United States,* 544 U.S. 385, 388, 125 S.Ct. 1752, 161 L.Ed.2d 651 (2005) ("In law, a legislature that uses the statutory phrase 'any person' may or may not mean to include 'persons' outside the jurisdiction of the state." (some internal quotation marks omitted)); ****1470** *Flora v. United States,* 362 U.S. 145, 149, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960) (The term " 'any sum' is a catchall [phrase,] ... but to say this is not to define what it catches.").

Moreover, **Shady Grove** overlooks the most likely explanation for the absence of limiting language: New York legislators make law with New York plaintiffs and defendants in mind, *i.e.,* as if New York were the universe. See Baxter, Choice of Law and the Federal System, 16 Stan. L.Rev. 1, 11 (1963) ("[L]awmakers often speak in universal terms but must be understood to speak with reference to their constituents."); cf. *Smith v. United States,* 507 U.S. 197, 204, n. 5, 113 S.Ct. 1178, 122 L.Ed.2d 548 (1993) (presumption against extraterritoriality rooted in part in "the commonsense notion that Congress generally legislates with domestic concerns in mind").

*454 The point was well put by Brainerd Currie in his seminal article on governmental interest analysis in conflict-of-laws cases. The article centers on a now-archaic Massachusetts law that prevented married women from binding themselves by contract as sureties for their husbands. Discussing whether the Massachusetts prescription applied to transactions involving foreign factors (a foreign forum, foreign place of contracting, or foreign parties), Currie observed:

> "When the Massachusetts legislature addresses itself to the problem of married women as sureties, the undeveloped image in its mind is that of *Massachusetts* married women, husbands, creditors, transactions, courts, and judgments. In the history of Anglo–American law the domestic case has been normal, the conflict-of-laws case marginal." Married Women's Contracts: A Study in Conflict–of–Laws Method, 25 U. Chi. L.Rev. 227, 231 (1958) (emphasis added).

Shady Grove's suggestion that States must specifically limit their laws to domestic rights of action if they wish their enactments to apply in federal diversity litigation misses the obvious point: State legislators generally do not focus on an interstate setting when drafting statutes. [12]

*455 **Shady Grove** also observes that a New York court has applied § 901(b) to a federal claim for relief under the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227, see *Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*, 22 App. Div.3d 148, 799 N.Y.S.2d 795 (2005), thus revealing § 901(b)'s "procedural" cast. Brief for Petitioner 36. We note first that the TCPA itself calls for the application of state law. See *Rudgayzer*, 22 App. Div.3d, at 149–150, 799 N.Y.S.2d, at 796–797 (federal action authorized in state court "if otherwise permitted by the laws or rules of the court of [the] State" (quoting 47 U.S.C. § 227(b)(3))). See also *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 342 (2d Cir.2006) (SOTOMAYOR, J.) **1471 ("Congress sought, via the TCPA, to enact the functional equivalent of a state law."). The TCPA, the Supreme Court of Connecticut has recognized, thus "carves out an exception to th[e] general rule" that "when *Erie* ... is reversed ..., a state court hearing a federal case is normally required to apply federal substantive law": "Under § 227(b)(3) ... it is state substantive law that determines, as a preliminary matter, whether a federal action under the act may be brought in state court." *Weber v. U.S. Sterling Securities, Inc.*, 282 Conn. 722, 736, 924 A.2d 816, 826 (2007) (in TCPA action governed by New York substantive law, § 901(b) applied even though the claim was pursued in Connecticut state court).

Moreover, statutes qualify as "substantive" for *Erie* purposes even when they have "procedural" thrusts as well. See, *e.g.*, *Cohen*, 337 U.S, at 555, 69 S.Ct. 1221; cf. *Woods v. Interstate Realty Co.*, 337 U.S. 535, 536–538, and n. 1, 69 S.Ct. 1235, 93 L.Ed. 1524 (1949) (holding diversity case must be dismissed based on state statute that, by its terms, governed only proceedings in state court). Statutes of limitations are, again, exemplary. They supply "substantive" law in diversity suits, see *York*, 326 U.S. at 109–112, 65 S.Ct. 1464, even though, as **Shady Grove** acknowledges, state courts often apply the forum's limitations period as a "procedural" bar to claims arising under the law of another State, see Reply Brief 24, n. 16; Tr. of Oral Arg. 16–17. See also *456 Restatement §§ 142–143 (when adjudicating a foreign cause of action, State may use either its own or the foreign jurisdiction's statute of limitations, whichever is shorter). Similarly, federal courts sitting in diversity give effect to state laws governing the burden of proving contributory negligence, see *Palmer v. Hoffman*, 318 U.S. 109, 117, 63 S.Ct. 477, 87 L.Ed. 645 (1943), yet state courts adjudicating foreign causes of action often apply their own local law to this issue. See Restatement § 133 and Reporter's Note.

In short, **Shady Grove's** effort to characterize § 901(b) as simply "procedural" cannot successfully elide this fundamental norm: When no federal law or rule is dispositive of an issue, and a state statute is outcome affective in the sense our cases on *Erie* (pre and post-*Hanna*) develop, the Rules of Decision Act commands application of the State's law in diversity suits. *Gasperini*, 518 U.S. at 428, 116 S.Ct. 2211; *Hanna*, 380 U.S. at 468, n. 9, 85 S.Ct. 1136; *York*, 326 U.S. at 109, 65 S.Ct. 1464. As this case starkly demonstrates, if federal courts exercising diversity jurisdiction are compelled by Rule 23 to award statutory penalties in class actions while New York courts are bound by § 901(b)'s proscription, "substantial variations between state and federal [money judgments] may be expected." *Gasperini*, 518 U.S. at 430, 116 S.Ct. 2211 (quoting *Hanna*, 380 U.S. at 467–468, 85 S.Ct. 1136 (internal quotation marks omitted)). The "variation" here is indeed "substantial." **Shady Grove** seeks class relief that is *ten thousand times* greater than the individual remedy available to it in state court. As the plurality acknowledges, *ante* at 1448, forum shopping will undoubtedly result if a plaintiff need only file in

federal instead of state court to seek a massive monetary award explicitly barred by state law. See *Gasperini,* 518 U.S. at 431, 116 S.Ct. 2211 ("*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court."). [13] ***457** The "accident of diversity of ****1472** citizenship," *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941), should not subject a defendant to such augmented liability. See *Hanna,* 380 U.S. at 467, 85 S.Ct. 1136 ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.").

It is beyond debate that "a statutory cap on damages would supply substantive law for *Erie* purposes." *Gasperini,* 518 U.S. at 428, 116 S.Ct. 2211. See also *id.* at 439–440, 116 S.Ct. 2211 (STEVENS, J., dissenting) ("A state-law ceiling on allowable damages ... is a substantive rule of decision that federal courts must apply in diversity cases governed by New York law."); *id.* at 464, 116 S.Ct. 2211 (SCALIA, J., dissenting) ("State substantive law controls what injuries are compensable and in what amount."). In *Gasperini,* we determined that New York's standard for measuring the alleged excessiveness of a jury verdict was designed to provide a control analogous to a damages cap. *Id.* at 429, 116 S.Ct. 2211. The statute was framed as "a procedural instruction," we noted, "but the State's objective [wa]s manifestly substantive." *Ibid.*

Gasperini's observations apply with full force in this case. By barring the recovery of statutory damages in a class action, § 901(b) controls a defendant's maximum liability in a suit seeking such a remedy. The remedial provision could have been written as an explicit cap: "In any class action seeking statutory damages, relief is limited to the amount the named plaintiff would have recovered in an individual suit." That New York's Legislature used other words to express the very same meaning should be inconsequential.

We have long recognized the impropriety of displacing, in a diversity action, state-law limitations on state-created remedies. ***458** See *Woods,* 337 U.S. at 538, 69 S.Ct. 1235 (in a diversity case, a plaintiff "barred from recovery in the state court ... should likewise be barred in the federal court"); *York,* 326 U.S. at 108–109, 65 S.Ct. 1464 (federal court sitting in diversity "cannot afford recovery if the right to recover is made unavailable by the State nor can it substantively affect the enforcement of the right as given by the State"). Just as *Erie* precludes a federal court from entering a deficiency judgment when a State has "authoritatively announced that [such] judgments cannot be secured within its borders," *Angel v. Bullington,* 330 U.S. 183, 191, 67 S.Ct. 657, 91 L.Ed. 832 (1947), so too *Erie* should prevent a federal court from awarding statutory penalties aggregated through a class action when New York prohibits this recovery. See also *Ragan,* 337 U.S. at 533, 69 S.Ct. 1233 ("Where local law qualifies or abridges [a claim], the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie* ... is transgressed."). In sum, because "New York substantive law governs [this] claim for relief, New York law ... guide[s] the allowable damages." *Gasperini,* 518 U.S. at 437, 116 S.Ct. 2211. [14]

****1473** III

The Court's erosion of *Erie*'s federalism grounding impels me to point out the large irony in today's judgment. **Shady Grove** is able to pursue its claim in federal court only by virtue of the recent enactment of the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d). In CAFA, Congress opened federal-court doors to state-law-based class actions so long as there is minimal diversity, at least 100 class ***459** members, and at least $5,000,000 in controversy. *Ibid.* By providing a federal forum, Congress sought to check what it considered to be the overreadiness of some state courts to certify class actions. See, *e.g.,* S.Rep. No. 109–14, p. 4 (2005) (CAFA prevents lawyers from "gam[ing] the procedural rules [to] keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes." (internal quotation marks omitted)); *id.* at 22 (disapproving "the 'I never met a class action I didn't like' approach to class certification" that "is prevalent in state courts in some localities"). In other words, Congress envisioned fewer—not more—class actions overall. Congress surely never anticipated that CAFA would make federal courts a mecca for suits of the kind **Shady Grove** has launched: class actions seeking state-created penalties for claims arising under state law—claims that would be barred from class treatment in the State's own courts. Cf. *Woods,* 337 U.S. at 537, 69 S.Ct. 1235 ("[T]he policy of *Erie* ... preclude[s] maintenance in ... federal court ... of suits to which the State ha[s] closed its courts."). [15]

recovery of statutory damages applies in this case, and would affirm the Second Circuit's judgment.

* * *

I would continue to approach *Erie* questions in a manner mindful of the purposes underlying the Rules of Decision Act and the Rules Enabling Act, faithful to precedent, and respectful of important state interests. I would therefore hold that the New York Legislature's limitation on the

All Citations

559 U.S. 393, 130 S.Ct. 1431, 176 L.Ed.2d 311, 78 USLW 4246, 76 Fed.R.Serv.3d 397, 10 Cal. Daily Op. Serv. 4000, 22 Fla. L. Weekly Fed. S 196

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 N.Y. Civ. Prac. Law Ann. § 901 (West 2006) provides:

> "(a) One or more members of a class may sue or be sued as representative parties on behalf of all if:"
>
> "1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;"
>
> "2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;"
>
> "3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;"
>
> "4. the representative parties will fairly and adequately protect the interests of the class; and"
>
> "5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."
>
> "(b) Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."

2 Rule 23(a) provides:

"(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:"

"(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 defenses of the class; and"

"(4) the representative parties will fairly and adequately protect the interests of the class."

Subsection (b) says that "[a] class action may be maintained if Rule 23(a) is satisfied and if" the suit falls into one of three described categories (irrelevant for present purposes).

3 **Shady Grove** had asserted jurisdiction under 28 U.S.C. § 1332(d)(2), which relaxes, for class actions seeking at least $5 million, the rule against aggregating separate claims for calculation of the amount in controversy. See *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 571, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005).

4 Contrary to the dissent's implication, *post* at 1466–1467 we express no view as to whether state laws that set a ceiling on damages recoverable in a single suit, see App. A to Brief for Respondent, are pre-empted. Whether or not those laws conflict with Rule 23, § 901(b) does conflict because it addresses not the remedy, but the procedural right to maintain a class action. As **Allstate** and the dissent note, several federal statutes also limit the recovery available in class actions. See, *e.g.*, 12 U.S.C. § 2605(f)(2)(B); 15 U.S.C. § 1640(a)(2)(B); 29 U.S.C. § 1854(c)(1). But Congress has plenary power to override the Federal Rules, so its enactments, unlike those of the States, prevail even in case of a conflict.

5 But see, *e.g.*, *Asher v. Abbott Labs.*, 290 App. Div.2d 208, 737 N.Y.S.2d 4 (2002) (treble damages under N.Y. Gen. Bus. Law § 340(5) are nonwaivable, wherefore class actions under that law are barred).

6 Our decision in *Walker v. Armco Steel Corp.*, 446 U.S. 740, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980), discussed by the dissent, *post* at 1462–1463, 1466–1467, n. 8, is not to the contrary. There we held that Rule 3 (which provides that a federal civil action is " 'commenced' " by filing a complaint in federal court) did not displace a state law providing that " '[a]n action shall be deemed commenced, *within the meaning of this article [the statute of limitations]*, as to each defendant, at the date of the summons which is served on him ....' " 446 U.S. at 743, n. 4, 100 S.Ct. 1978 (quoting Okla. Stat., Tit. 12, § 97 (1971); alteration in original, emphasis added). Rule 3, we explained, "governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations" or tolling rules, which it did not "purpor[t] to displace." 446 U.S. at 751, 750, 100 S.Ct. 1978. The texts were therefore not in conflict. While our opinion observed that the State's actual-service rule was (in the State's judgment) an "integral part of the several policies served by the statute of limitations," *id.* at 751, 100 S.Ct. 1978, nothing in our decision suggested that a federal court may resolve an obvious conflict between the texts of state and federal rules by resorting to the state law's ostensible objectives.

7 The dissent also suggests that we should read the Federal Rules " 'with sensitivity to important state interests' " and " 'to avoid conflict with important state regulatory policies.' " *Post* at 1463 (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, n. 7, 438, n. 22, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996)). The search for state interests and policies that are "important" is just as standardless as the "important or substantial" criterion we rejected in *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13–14, 61 S.Ct. 422, 85 L.Ed. 479 (1941), to define the state-created rights a Federal Rule may not abridge.

If all the dissent means is that we should read an ambiguous Federal Rule to avoid "substantial variations [in outcomes] between state and federal litigation," *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001) (internal quotation marks omitted), we entirely agree. We should do so not to avoid doubt as to the Rule's validity—since a Federal Rule that fails *Erie* 's forum-shopping test is not *ipso facto* invalid, see *Hanna v. Plumer*, 380 U.S. 460, 469–472, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965)—but because it is reasonable to assume that "Congress is just as concerned as we have been to avoid significant differences between state and federal courts in adjudicating claims," *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 37–38, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988) (SCALIA, J., dissenting). The assumption is irrelevant here, however, because there is only one reasonable reading of Rule 23.

8 The cases chronicled by the dissent, see *post* at 1461–1464, each involved a Federal Rule that we concluded could fairly be read not to "control the issue" addressed by the pertinent state law, thus avoiding a "direct collision" between federal and state law, *Walker*, 446 U.S. at 749, 100 S.Ct. 1978 (internal quotation marks omitted). But here, as in *Hanna, supra* at 470, 85 S.Ct. 1136, a collision is "unavoidable."

9 The concurrence claims that in *Sibbach* "[t]he Court ... had no occasion to consider whether the particular application of the Federal Rules in question would offend the Enabling Act." *Post* at 1454. Had *Sibbach* been applying the concurrence's theory, that is quite true—which demonstrates how inconsistent that theory is with *Sibbach*. For conformity with the Rules Enabling Act was the *very issue Sibbach* decided: The petitioner's position was that Rules 35 and 37 exceeded the Enabling Act's authorization, 312 U.S. at 9, 13, 61 S.Ct. 422; the Court faced and rejected that argument, *id.* at 13–16, 61 S.Ct. 422, and proceeded to reverse the lower court for failing to apply Rule 37 correctly, *id.* at 16, 61 S.Ct. 422. There could not be a clearer rejection of the theory that the concurrence now advocates.

The concurrence responds that the "the specific question of 'the obligation of federal courts to apply the substantive law of a state' " was not before the Court, *post* at 1454 (quoting *Sibbach, supra* at 9, 61 S.Ct. 422). It is clear from the context, however, that this passage referred to the *Erie* prohibition of court-created rules that displace state law. The opinion unquestionably dealt with the Federal Rules' compliance with § 2072(b), and it adopted the standard we apply here to resolve the question, which does not depend on whether individual applications of the Rule abridge or modify state-law rights. See 312 U.S. at 13–14, 61 S.Ct. 422. To the extent *Sibbach* did not address the Federal Rules' validity vis– & Agrave; –vis contrary state law, *Hanna* surely did, see 380 U.S. at 472, 85 S.Ct. 1136, and it made clear that *Sibbach*'s test still controls, see 380 U.S. at 464–465, 470–471, 85 S.Ct. 1136.

10 The concurrence insists that we have misread *Sibbach*, since surely a Federal Rule that "in most cases" regulates procedure does not do so when it displaces one of those "rare" state substantive laws that are disguised as rules of procedure. *Post* at 1455 n. 13. This mistakes what the Federal Rule *regulates* for its incidental *effects*. As we have explained, *supra*, at 1442–1443, most Rules have some effect on litigants' substantive rights or their ability to obtain a remedy, but that does not mean the Rule itself regulates those rights or remedies.

11 The concurrence's approach, however, is itself unfaithful to the statute's terms. Section 2072(b) bans abridgement or modification only of "substantive rights," but the concurrence would prohibit pre-emption of "procedural rules that are intimately bound up in the scope of a substantive right or remedy," *post* at 1458. This 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." *Post* at 1455.

12 The concurrence implies that *Sibbach* has slipped into desuetude, apparently for lack of sufficient citations. See *post* at 1455–1456, n. 14. We are unaware of any rule to the effect that a holding of ours expires if the case setting it forth is not periodically revalidated. In any event, the concurrence's account of our shunning of *Sibbach* is greatly exaggerated. *Hanna* did not merely cite the case, but recognized it as establishing the governing rule. 380 U.S. at 464–465, 470–471, 85 S.Ct. 1136. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445–446, 66 S.Ct. 242, 90 L.Ed. 185 (1946), likewise cited *Sibbach* and applied the same test, examining the Federal Rule, not the state law it displaced. True, *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987), and for that matter *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991), did not cite *Sibbach*. But both cited and followed *Hanna*—which as noted held out *Sibbach* as setting forth the governing rule. See *Burlington Northern, supra* at 5–6, 8, 107 S.Ct. 967; *Business Guides, supra* at 552–554, 111 S.Ct. 922. Thus, while *Sibbach* itself may appear infrequently in the U.S. Reports, its rule—and in particular its focus on the Federal Rule as the proper unit of analysis—is alive and well.

In contrast, *Hanna*'s obscure *obiter dictum* that a court "need not wholly blind itself" to a Federal Rule's effect on a case's outcome, 380 U.S. at 473, 85 S.Ct. 1136—which the concurrence invokes twice, *post* at 1452, 1455–1456, n. 14—has never resurfaced in our opinions in the 45 years since its first unfortunate utterance. Nor does it cast doubt on *Sibbach*'s

straightforward test: As the concurrence notes, *Hanna* cited *Sibbach* for that statement, 380 U.S. at 473, 85 S.Ct. 1136, showing it saw no inconsistency between the two.

13 The concurrence is correct, *post* at 1453, n. 9, that under our disposition any rule that "really regulates procedure," *Sibbach, supra* at 14, 61 S.Ct. 422, will pre-empt a conflicting state rule, however "bound up" the latter is with substantive law. The concurrence is wrong, however, that that result proves our interpretation of § 2072(b) implausible, *post* at 1453, n. 9. The result is troubling only if one stretches the term "substantive rights" in § 2072(b) to mean not only state-law rights themselves, but also any state-law procedures closely connected to them. Neither the text nor our precedent supports that expansive interpretation. The examples the concurrence offers—statutes of limitations, burdens of proof, and standards for appellate review of damages awards—do not make its broad definition of substantive rights more persuasive. They merely illustrate that in rare cases it may be difficult to determine whether a rule "really regulates" procedure or substance. If one concludes the latter, there is no pre-emption of the state rule; the Federal Rule itself is invalid.
The concurrence's concern would make more sense if many Federal Rules that effectively alter state-law rights "bound up with procedures" would survive under *Sibbach*. But as the concurrence concedes, *post* at 1454, n. 10, very few would do so. The possible existence of a few outlier instances does not prove *Sibbach*'s interpretation is absurd. Congress may well have accepted such anomalies as the price of a uniform system of federal procedure.

14 The concurrence argues that its approach is no more "taxing" than ours because few if any Federal Rules that are "facially valid" under the Enabling Act will fail the concurrence's test. *Post* at 1453–1454, and n. 10. But that conclusion will be reached only after federal courts have considered hundreds of state rules applying the concurrence's inscrutable standard.

15 The concurrence insists that the task will be easier if courts can "conside[r] the nature and functions of the state law," *post* at 1454, n. 10, regardless of the law's "form," *post* at 1449 (emphasis deleted), *i.e.*, what the law actually says. We think that 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), *post* at 1457–1460, gives little reason to hope that its approach will lighten the burden for lower courts.

1 See also *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996); E. Chemerinsky, Federal Jurisdiction § 5.3, p. 327 (5th ed.2007) (hereinafter Chemerinsky); 17A J. Moore et al., Moore's Federal Practice § 124.01[1] (3d ed.2009) (hereinafter Moore).

2 The *Erie* choice requires that the court consider "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965); see also *Gasperini*, 518 U.S. at 427–428, 116 S.Ct. 2211 (describing *Erie* inquiry).

3 See Chemerinsky § 5.3, at 321 (observing that courts "have struggled to develop an approach that permits uniform procedural rules to be applied in federal court while still allowing state substantive law to govern").

4 Cf. *Milam v. State Farm Mut. Auto. Ins. Co.*, 972 F.2d 166, 170 (C.A.7 1992) (Posner, J.) (holding that "where a state in furtherance of its substantive policy makes it more difficult to prove a particular type of state-law claim, the rule by which it does this, even if denominated a rule of evidence or cast in evidentiary terms, will be given effect in a diversity suit as an expression of state substantive policy"); Moore § 124.09[2] (listing examples of federal courts that apply state evidentiary rules to diversity suits). Other examples include state-imposed burdens of proof.

5 I thus agree with Justice GINSBURG, *post* at 1461–1463, that a federal rule, like any federal law, must be interpreted in light of many different considerations, including "sensitivity to important state interests," *post* at 1463, and "regulatory policies," *post* at 1460. See *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 37–38, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988) (SCALIA, J., dissenting) ("We should assume ... when it is fair to do so, that Congress is just as concerned as we have been to avoid significant differences between state and federal courts in adjudicating claims .... Thus, in deciding whether a federal ... Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits"). I disagree with Justice GINSBURG, however, about the degree to which the meaning of federal rules may be contorted, absent congressional authorization to do so, to accommodate state policy goals.

6 See also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842, 845, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999) (adopting "limiting construction" of Federal Rule of Civil Procedure 23 that, *inter alia*, "minimizes potential conflict with the Rules Enabling Act"); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612–613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (observing that federal rules "must be interpreted in keeping with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right' ").

7 This understanding of the Enabling Act has been the subject of substantial academic criticism, and rightfully so. See, *e.g.*, Wright § 4509, at 264, 269–270, 272; Ely, The Irrepressible Myth of Erie, 87 Harv. L.Rev. 693, 719 (1974) (hereinafter

Ely); see also R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's, The Federal Courts and the Federal System 593, n. 6 (6th ed.2009) (discussing Ely).

8 Justice SCALIA concedes as much, see *ante* at 1445–1446, but argues that insofar as I allow for the possibility that a federal rule might violate the Enabling Act when it displaces a seemingly procedural state rule, my approach is itself "unfaithful to the statute's terms," which cover "substantive rights" but not "procedural rules," *ante* at 1446, n. 11 (internal quotation marks omitted). This is not an objection to my interpretation of the Enabling Act—that courts must look to whether a federal rule alters substantive rights in a given case—but simply to the way I would apply it, allowing for the possibility that a state rule that regulates something traditionally considered to be procedural might actually define a substantive right. JUSTICE SCALIA's objection, moreover, misses the key point: In some instances, a state rule that appears procedural really is not. A rule about how damages are reviewed on appeal may really be a damages cap. See *Gasperini,* 518 U.S. at 427, 116 S.Ct. 2211. A rule that a plaintiff can bring a claim for only three years may really be a limit on the existence of the right to seek redress. A rule that a claim must be proved beyond a reasonable doubt may really be a definition of the scope of the claim. These are the sorts of rules that one might describe as "procedural," but they nonetheless define substantive rights. Thus, if a federal rule displaced such a state rule, the federal rule would have altered the State's "substantive rights."

9 The plurality's interpretation of the Enabling Act appears to mean that no matter how bound up a state provision is with the State's own rights or remedies, any contrary federal rule that happens to regulate "the manner and the means by which the litigants' rights are enforced," *ante* at 1442 (internal quotation marks omitted), must govern. There are many ways in which seemingly procedural rules may displace a State's formulation of its substantive law. For example, statutes of limitations, although in some sense procedural rules, can also be understood as a temporal limitation on legally created rights; if this Court were to promulgate a federal limitations period, federal courts would still, in some instances, be required to apply state limitations periods. Similarly, if the federal rules altered the burden of proof in a case, this could eviscerate a critical aspect—albeit one that deals with *how* a right is enforced—of a State's framework of rights and remedies. Or if a federal rule about appellate review displaced a state rule about how damages are reviewed on appeal, the federal rule might be pre-empting a state damages cap. Cf. *Gasperini,* 518 U.S. at 427, 116 S.Ct. 2211.
Justice SCALIA responds that some of these federal rules might be invalid under his view of the Enabling Act because they may not "really regulat[e] procedure." *Ante* at 1447, n. 13 (internal quotation marks omitted). This response, of course, highlights how empty the plurality's test really is. See n. 10, *infra.* The response is also limited to those rules that can be described as "regulat[ing]" substance, *ante* at ——; it does not address those federal rules that alter the right at issue in the litigation, see *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13–14, 61 S.Ct. 422, 85 L.Ed. 479 (1941), only when they displace particular state laws. JUSTICE SCALIA speculates that "Congress may well have accepted" the occasional alteration of substantive rights "as the price of a uniform system of federal procedure." *Ante* at 1446–1447, n. 13. Were we forced to speculate about the balance that Congress struck, I might very well agree. But no speculation is necessary because Congress explicitly told us that federal rules "shall not" alter "any" substantive right. § 2072(b).

10 It will be rare that a federal rule that is facially valid under 28 U.S.C. § 2072 will displace a State's definition of its own substantive rights. See Wright § 4509, at 272 (observing that "unusual cases occasionally might arise in which ... because of an unorthodox state rule of law, application of a Civil Rule ... would intrude upon state substantive rights"). JUSTICE SCALIA's interpretation, moreover, is not much more determinative than mine. Although it avoids courts' having to evaluate state law, it tasks them with figuring out whether a federal rule is really "procedural." It is hard to know the answer to that question and especially hard to resolve it without considering the nature and functions of the state law that the federal rule will displace. The plurality's " 'test' is no test at all—in a sense, it is little more than the statement that a matter is procedural if, by revelation, it is procedural." *Id.*, § 4509 at 264.

11 The petitioner in *Sibbach* argued only that federal rules could not validly address subjects involving "important questions of policy," Supp. Brief of Petitioner, O.T.1940, No. 28, p. 7; see also Reply to Brief of Respondent, O.T.1940, No. 28, p. 2 (summarizing that the petitioner argued only that "[t]he right not to be compelled to submit to a physical examination" is "a 'substantive' right forbidden by Congress" to be addressed by the Federal Rules of Civil Procedure, "even though in theory the right is not of the character determinative of litigation"). In the petitioner's own words, "[t]his contention ... [did] not in itself involve the [applicable] law of Illinois," *ibid.*, and the petitioner in her briefing referenced the otherwise applicable state law only "to show that [she] was in a position to make the contention," *ibid.*, that is, to show that the federal court was applying a federal rule and not, under the Rules of Decision Act, applying state law, see *id.* at 3.

12 The plurality defends its view by including a long quote from two paragraphs of *Sibbach. Ante* at 1443–1444. But the quoted passage of *Sibbach* describes only a facial inquiry into whether federal rules may "deal with" particular subject matter. 312 U.S. at 13, 61 S.Ct. 422. The plurality's block quote, moreover, omits half of one of the quoted paragraphs,

in which the Court explained that the term "substantive rights" in the Enabling Act "certainly embraces such rights" as "rights conferred by law to be protected and enforced," such as "the right not to be injured in one's person by another's negligence" and "to redress [such] infraction." *Ibid.* But whether a federal rule, for example, enlarges the right "to redress [an] infraction," will depend on the state law that it displaces.

13 Put another way, even if a federal rule in most cases "really regulates procedure," *Sibbach,* 312 U.S. at 14, 61 S.Ct. 422, it does not "really regulat[e] procedure" when it displaces those rare state rules that, although "procedural" in the ordinary sense of the term, operate to define the rights and remedies available in a case. This is so because what is procedural in one context may be substantive in another. See *Hanna,* 380 U.S. at 471, 85 S.Ct. 1136; *Guaranty Trust Co. v. York,* 326 U.S. 99, 108, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945).

14 Although this Court's decision in *Hanna* cited *Sibbach,* that is of little significance. *Hanna* did not hold that any seemingly procedural federal rule will always govern, even when it alters a substantive state right; nor, as in *Sibbach,* was the argument that I now make before the Court. Indeed, in *Hanna* we cited *Sibbach*'s statement that the Enabling Act prohibits federal rules that alter the rights to be adjudicated by the litigants, 312 U.S. at 13–14, 61 S.Ct. 422, for the proposition that "a court, in measuring a Federal Rule against the standards contained in the Enabling Act ... need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts," 380 U.S. at 473, 85 S.Ct. 1136. And most of our subsequent decisions that have squarely addressed the framework for applying federal rules in diversity cases have not mentioned *Sibbach* at all but cited only *Hanna.* See, *e.g., Burlington Northern R. Co. v. Woods,* 480 U.S. 1, 5, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987).

Justice SCALIA notes that in *Mississippi Publishing Corp. v. Murphree,* 326 U.S. 438, 66 S.Ct. 242, 90 L.Ed. 185 (1946), we used language that supported his view. See *ante* at 1442–1443. But in that case, we contemplated only that the Federal Rule in question might have "incidental effects ... upon the rights of litigants," explaining that "[t]he fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the district court for northern Mississippi" rather than southern Mississippi "will undoubtedly affect those rights." 326 U.S. at 445–446, 66 S.Ct. 242. There was no suggestion that by affecting the method of enforcing the rights in that case, the federal rules could plausibly abridge, enlarge, or modify the rights themselves.

15 Nor do I see how it follows from the dissent's premises that a class cannot be certified. The dissent contends that § 901(b) is a damages "limitation," *post* at 1463, n. 2, 1464, 1464–1465, 1466, 1473, or "proscription," *post* at 1466, n. 6, 1471, whereas Rule 23 "does not command that a particular remedy be available when a party sues in a representative capacity," *post* at 1465, and that consequently both provisions can apply. Yet even if the dissent's premises were correct, Rule 23 would still control the question whether petitioner may certify a class, and § 901(b) would be relevant only to determine whether petitioner, at the conclusion of a class-action lawsuit, may collect statutory damages.

It may be that if the dissent's interpretation of § 901(b) were correct, this class could not (or has not) alleged sufficient damages for the federal court to have jurisdiction, see 28 U.S.C. § 1332(d)(6). But that issue was not raised in respondent's motion to dismiss (from which the case comes to this Court), and it was not squarely presented to the Court. In any event, although the lead plaintiff has "acknowledged that its individual claim" is for less than the required amount in controversy, see 549 F.3d 137, 140 (C.A.2 2008), we do not know what actual damages the entire class can allege. Thus, even if the Court were to adopt all of the dissent's premises, I believe the correct disposition would be to vacate and remand for further consideration of whether the required amount in controversy has or can be met.

16 In its *Erie* analysis, the dissent observes that when sovereigns create laws, the enacting legislatures sometimes assume those laws will apply only within their territory. See *post* at 1469–1471. That is a true fact, but it does not do very much work for the dissent's position. For one thing, as the dissent observes, this *Erie* analysis is relevant only if there is no conflict between Rule 23 and § 901(b), and the court can thus apply both. *Post* at 1469. But because, in my view, Rule 23 applies, the only question is whether it would violate the Enabling Act. See *Hanna,* 380 U.S. at 471, 85 S.Ct. 1136. And that inquiry is different from the Rules of Decision Act, or *Erie,* inquiry. See *id.* at 469–471, 85 S.Ct. 1136.

The dissent's citations, moreover, highlight simply that when interpreting statutes, context matters. Thus, we sometimes presume that laws cover only domestic conduct and sometimes do not, depending upon, *inter alia,* whether it makes sense in a given situation to assume that "the character of an act as lawful or unlawful must be determined wholly by the law of the [place] where the act is done," *American Banana Co. v. United Fruit Co.,* 213 U.S. 347, 356, 29 S.Ct. 511, 53 L.Ed. 826 (1909). But in the context of § 901(b), a presumption against extraterritoriality makes little sense. That presumption applies almost only to laws governing what people can or cannot do. Section 901(b), however, is not directed to the conduct of persons but is instead directed to New York courts. Thus, § 901(b) is, by its own terms, not extraterritorial insofar as it states that it governs *New York* courts. It is possible that the New York Legislature simply did not realize that New York courts hear claims under other sources of law and that other courts hear claims under New

York law, and therefore mistakenly believed that they had written a limit on New York remedies. But because New York set up § 901(b) as a general rule about how its courts operate, my strong presumption is to the contrary.

17 To be sure, one could imagine the converse story, that a legislature would create statutory penalties but dictate that such penalties apply only when necessary to overcome the costs and inconvenience of filing a lawsuit, and thus are not necessary in a class action. But it is hard to see how that narrative applies to New York, given that New York's penalty provisions, on their face, apply to all plaintiffs, be they class or individual, and that § 901(b) addresses penalties that are created under any source of state or federal law.

18 Justice GINSBURG asserts that class certification in this matter would "transform a $500 case into a $5,000,000 award." *Post* at 1460. But in fact, class certification would transform 10,000 $500 cases into one $5,000,000 case. It may be that without class certification, not all of the potential plaintiffs would bring their cases. But that is true of any procedural vehicle; without a lower filing fee, a conveniently located courthouse, easy-to-use federal procedural rules, or many other features of the federal courts, many plaintiffs would not sue.

1 The Rules of Decision Act directs that, "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652.

2 Justice STEVENS stakes out common ground on this point: "[F]ederal rules," he observes, "must be interpreted with some degree of 'sensitivity to important state interests and regulatory policies,' ... and applied to diversity cases against the background of Congress' command that such rules not alter substantive rights and with consideration of 'the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts,' *Hanna* [*v. Plumer*], 380 U.S. [460, 473, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965)]." *Ante* at 1449. (opinion concurring in part and concurring in judgment). See also *ante* at 1450 ("A 'state procedural rule, though undeniably procedural in the ordinary sense of the term' may exist 'to influence substantive outcomes,' ... and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy." (some internal quotation marks omitted)); *ante* at 1450 ("When a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice."). Nevertheless, Justice STEVENS sees no reason to read Rule 23 with restraint in this particular case; the Federal Rule preempts New York's damages limitation, in his view, because § 901(b) is "a procedural rule that is not part of New York's substantive law." *Ante* at 1448. This characterization of § 901(b) does not mirror reality, as I later explain. See *infra* at 1469–1473. But a majority of this Court, it bears emphasis, agrees that Federal Rules should be read with moderation in diversity suits to accommodate important state concerns.

3 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.D.N.Y.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).

4 See, *e.g., In re Automotive Refinishing Paint Antitrust Litigation,* 515 F.Supp.2d 544, 549–551 (E.D.Pa.2007); *Leider v. Ralfe,* 387 F.Supp.2d 283, 289–292 (S.D.N.Y.2005); *Dornberger v. Metropolitan Life Insurance Co.*, 182 F.R.D. 72, 84 (S.D.N.Y.1999). See also *Weber v. U.S. Sterling Securities, Inc.,* 282 Conn. 722, 738–739, 924 A.2d 816, 827–828 (2007) (section 901(b) applied in Connecticut state court to action governed by New York substantive law).

5 **Shady Grove** projects that a dispensation in favor of **Allstate** would require "courts in all diversity class actions ... [to] look to state rules and decisional law rather than to Rule 23 ... in making their class certification decisions." Brief for Petitioner 55. This slippery-slope projection is both familiar and false. Cf. R. Bork, The Tempting of America 169 (1990) ("Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom."). In this case, CPLR § 901(a) lists the state-law prerequisites for class certification, but **Allstate** does not contend that § 901(a) overrides Rule 23. Brief for Respondent 18 ("There is no dispute that the criteria for class certification under state law do not apply in federal court; that is the ground squarely occupied by Rule 23."). Federal courts sitting in diversity have routinely applied Rule 23's certification standards, rather than comparable state provisions. See, *e.g., In re New Motor Vehicles Canadian Export Antitrust Litigation,* 522 F.3d 6, 18–24 (C.A.1 2008); Order and Reasons in *In re Katrina Canal Breaches Consolidated Litigation,* Civ. Action No. 05–4182, 2009 WL 2447846 (E.D.La. Aug. 6, 2009).

6 The Court disputes the strength of the evidence of legislative intent, see *ante* at 1440, but offers no alternative account of § 901(b)'s purpose. Perhaps this silence indicates how very hard it would be to ascribe to § 901(b) *any* purpose bound up with the fairness and efficiency of processing cases. On its face, the proscription is concerned with remedies, *i.e.*, the availability of statutory damages in a lawsuit. Legislative history confirms this objective, but is not essential to revealing it.

7 There is, of course, a difference between "justly administering [a] remedy," *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14, 61 S.Ct. 422, 85 L.Ed. 479 (1941), and prescribing the content of that remedy; if Rule 23 can be read to increase a plaintiff's recovery from $1,000,000 to some greater amount, the Rule has arguably "enlarge[d] ... [a] substantive right" in violation of the Rules Enabling Act. 28 U.S.C. § 2072(b). The plurality appears to acknowledge this point, stating that the Federal Rules we have found to be in compliance with the Act have not "altered ... available remedies." *Ante* at 1443. But the Court's relentless reading of Rule 23 today does exactly that: The Federal Rule, it says, authorizes the recovery of class-size statutory damages even though the New York provision instructs that such penalties shall not be available.

8 The Court states that "[w]e cannot rewrite [a state law] to reflect our perception of legislative purpose." *Ante* at 1440. But we can, of course, *interpret the Federal Rules* in light of a State's regulatory policy to decide whether and to what extent a Rule preempts state law. See *supra* at 1461–1463. Just as we read Federal Rule 3 in *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980), not to govern when a suit commences for purposes of tolling a state statute of limitations (although the Rule indisputably controls when an action commences for federal procedural purposes), so too we could read Rule 23 not to direct when a class action may be maintained for purposes of recovering statutory damages prescribed by state law. On this reading of Rule 23, no rewriting of § 901(b) is necessary to avoid a conflict.

9 The New York Legislature appears to have anticipated this result. In discussing the remedial bar effected by § 901(b), the bill's sponsor explained that a "statutory class action for actual damages would still be permissible." S. Fink, [Sponsor's] Memorandum, Bill Jacket, L. 1975, Ch. 207. See also State Consumer Protection Board Memorandum (May 29, 1975), Bill Jacket, L. 1975, Ch. 207. On this understanding, New York courts routinely authorize class actions when the class waives its right to receive statutory penalties. See, *e.g.*, *Cox v. Microsoft Corp.*, 8 A.D.3d 39, 778 N.Y.S.2d 147 (2004); *Pesantez v. Boyle Env. Servs., Inc.*, 251 A.D.2d 11, 673 N.Y.S.2d 659 (1998); *Ridge Meadows Homeowners' Assn., Inc. v. Tara Development Co.*, 242 A.D.2d 947, 665 N.Y.S.2d 361 (1997); *Super Glue Corp. v. Avis Rent A Car System, Inc.*, 132 A.D.2d 604, 517 N.Y.S.2d 764 (1987); *Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 499 N.Y.S.2d 693 (1986).

10 The plurality notes that "we have rejected every statutory challenge to a Federal Rule that has come before us." *Ante* at 1442. But it omits that we have interpreted Rules with due restraint, including Rule 23, thus diminishing prospects for the success of such challenges. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612–613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *supra* at 1437–1440.

11 States have adopted a variety of formulations to limit the use of class actions to gain certain remedies or to pursue certain claims, as illustrated by the 96 examples listed in **Allstate's** brief. Apps. to Brief for Respondent. The Court's "one-size-fits-all" reading of Rule 23, *ante* at 1437, likely prevents the enforcement of *all* of these statutes in diversity actions—including the numerous state statutory provisions that, like § 901(b), attempt to curb the recovery of statutory damages. See, *e.g.*, Cal. Civ.Code Ann. § 2988.5(a)(2) (West 1993); Colo.Rev.Stat. Ann. § 12–14.5–235(d) (2009); Conn. Gen.Stat. § 36a–683(a) (2009); Haw.Rev.Stat. § 489–7.5(b)(1) (2008); Ind.Code § 24–4.5–5–203(a)(2) (2004); Ky.Rev.Stat. Ann. § 367.983(1)(c) (West 2006); Mass. Gen. Laws, ch. 167B, § 20(a)(2)(B) (2008); Mich. Comp. Laws Ann. § 493.112(3)(c) (West 2005); N.M. Stat. Ann. § 58–16–15(B) (Lexis 2004); Ohio Rev.Code Ann. § 1351.08(A) (West 2004); Okla. Stat., Tit. 14A, § 5–203(1) (2007 Supp.); Wyo. Stat. Ann. § 40–19–119(a)(iii) (2009).

12 **Shady Grove's** argument that § 901(b) is procedural based on its possible application to foreign claims is also out of sync with our *Erie* decisions, many of them involving state statutes of similarly unqualified scope. The New Jersey law at issue in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 544, n. 1, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), for example, required plaintiffs to post a bond as security for costs in "*any* [stockholder's derivative] action." (quoting 1945 N.J. Laws ch. 131 (emphasis added)). See also, *e.g.*, *Walker*, 446 U.S. at 742–743, and n. 4, 100 S.Ct. 1978 (Oklahoma statute deemed "[a]n action" commenced for purposes of the statute of limitations upon service of the summons (quoting Okla. Stat., Tit. 12, § 97 (1971))). Our characterization of a state statute as substantive for *Erie* purposes has never hinged on whether the law applied only to domestic causes of action. To the contrary, we have ranked as substantive a variety of state laws that the state courts apply to federal and out-of-state claims, including statutes of limitations and burden-of-proof prescriptions. See *infra* at 1471.

13 In contrast, many "state rules ostensibly addressed to procedure," *ante* at 1441 (majority opinion)—including pleading standards and rules governing summary judgment, pretrial discovery, and the admissibility of certain evidence—would

not so hugely impact forum choices. It is difficult to imagine a scenario that would promote more forum shopping than one in which the difference between filing in state and federal court is the difference between a potential award of $500 and one of $5,000,000.

14 There is no question that federal courts can "give effect to the substantive thrust of [§ 901(b)] without untoward alteration of the federal scheme for the trial and decision of civil cases." *Gasperini*, 518 U.S. at 426, 116 S.Ct. 2211. There is no risk that individual plaintiffs seeking statutory penalties will flood federal courts with state-law claims that could be managed more efficiently on a class basis; the diversity statute's amount-in-controversy requirement ensures that small state-law disputes remain in state court.

15 It remains open to Congress, of course, to exclude from federal-court jurisdiction under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), claims that could not be maintained as a class action in state court.

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