LOYOLA CONSUMER LAW REVIEW

Write-On Information Packet
Volume 31
2018-2019 Academic Year
LOYOLA CONSUMER L. REV.

WRITE-ON INFORMATION PACKET

2018-2019 Academic Year

The Loyola Consumer Law Review (“CLR”) seeks to fill between 20-30 Staff Editor positions for the 2018-2019 academic year. This memorandum sets forth the write-on procedure for membership on the CLR. It also describes the responsibilities of Staff Editors and the amount of academic credit awarded.

You will have from May 14, 2018 until 5:00 pm CST on Sunday, June 17, 2018, to complete the application. All write-on submissions must be sent to James Orescanin, News Editor, at jorescanin@luc.edu. You will be notified regarding your membership status no later than July 15, 2018, unless grades are delayed beyond that date. You will have until Friday, July 27, 2018, to accept or decline your offer.

Membership is for the 2018-2019 academic year. Staff Editors receive 1 credit hour per semester for membership. This is an ungraded credit, awarded as credit/no credit. There is no class component.

If you have any questions, please feel free to contact Maha Sadek, Editor-in-Chief, at msadek1@luc.edu, or Morgan Schulhof, Executive Editor, at mschulhof@luc.edu. Current CLR members, however, will not be able to give any substantive assistance on the writing competition.

Good luck!

Questions: msadek1@luc.edu or mschulhof@luc.edu
Write-On Submissions: jorescanin@luc.edu
Deadline: 5:00 pm CST on Sunday, June 17, 2018
Decisions Announced: Sunday, July 15, 2018
Accept/Decline By: Friday, July 27, 2018
AN INTRODUCTION TO CLR

The Loyola Consumer Law Review ("CLR"), published three to four times per year, is the only law review of its kind in the country. The CLR is dedicated to examining legal issues as they relate to consumers. Our publication provides a forum for dialogue among practitioners, law professors, and the rest of our broad subscriber base. Because of the diversity of CLR’s subscribers, the editors strive to avoid "legalese" and heavy footnoting while maintaining the highest level of scholarship in the field.

The CLR is devoted to featuring articles regarding the effect of developing legal issues on both consumers themselves and on the practice of law as it relates to consumers. For example, recent issues have included articles on advertising, financing, debt collection, product safety, professional services, insurance, consumer credit, corporate corruption, and consumer privacy. CLR articles may be found in their entirety on Westlaw and Lexis. Many law libraries, law firms, and other organizations also subscribe to the CLR.

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STAFF EDITOR RESPONSIBILITIES

I. Staff Edits

Staff Editors are primarily responsible for conducting citation checks on one to two articles per semester. All citations must be in correct form and substance, in accordance with The Bluebook: A Uniform System of Citation. The Staff Editors will perform the initial edits on the articles. Then, Staff Editors work as needed with Senior Editors and Executive Board members to produce the final draft of each article.

Every Staff Editor must keep in contact with the Senior Editors and Board members, and must keep them informed about the status of each assignment. Staff Editors receive the benefit of putting a law school publication on their resume, as well as developing and honing their writing, grammar, legal analysis, and citation skills. Staff Editors will also have the opportunity to network and develop professional communication skills at events and conferences.

II. Orientation

As with all of Loyola’s journals, CLR members must attend a mandatory one-day orientation prior to the fall semester. Members of CLR’s Executive Board will preside over the orientation. Topics discussed will include the editing and publication process, the student article process, citations, and other topics deemed necessary by the board.

III. Student Article

To receive academic credit, each Staff Editor must produce his or her own student article of publishable quality. To accomplish this, Staff Editors must be responsible, motivated, possess excellent communication skills, and pay great attention to detail.

Student articles are analyses of recent cases, statutes, or developments in the law that have an impact on consumers. Within certain guidelines, the topic may be of the Staff Editor’s choosing. Each year, the CLR publishes a number of these student articles. Publication is a great honor, and an excellent addition to your resume.

A schedule will be provided by the Editorial Board assigning each Staff Editor a particular issue of Volume 31 for which to complete their student article.

IV. Returning the Following Year

Once a Staff Editor produces an article of publishable quality and satisfactorily completes the other duties of Staff Editor, he or she is eligible for Senior Editor position or an Executive Board position on CLR for the following year. Details about this process are released in the spring.
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APPLICATION

I. Qualifications

To qualify for the CLR write-on competition, you must complete your current year in school and have the intent to return for the following full year. All J.D. students who are returning for the full 2018-2019 academic year, i.e. not graduating in December 2018, may apply. You must be a student in good standing, with a minimum GPA of 2.75. Exceptions are made only in extraordinary circumstances.

Additionally, each summer, the CLR offers Staff Editor positions to the top 20% of the incoming second-year full-time class, regardless of whether they participate in the write-on competition. These students will be contacted following the release of grades.

II. Write-On Competition – Procedures

A. Overview

The write-on competition requires applicants to write a brief article on a topic of concern to consumers. You will have from Monday, May 14, 2018 until 5:00 pm CST on Sunday, June 17, 2018, to complete the article. You must email a Word document of your Article to jorescanin@luc.edu by 5:00 pm CST on Sunday, June 17, 2018. No late submissions will be accepted.

Identify your Student Article by placing your Student ID Number (NOT your Exam ID) on the title page and in the header of subsequent pages. Your name should not appear anywhere on your write-on submission.

Please keep a copy of your completed article, along with your notes and outlines, for ninety (90) days after you submit your application. The CLR reserves the right to examine such materials before making a decision on your application.

B. Materials to be Used

When preparing your article, you should confine your research to the sources provided in this packet. You may not read or refer to any other material on the subject of this competition, except those listed in this packet. Besides the sources attached, the only additional materials that you may consult are THE BLUEBOOK, a dictionary, and a writing guide, such as THE CHICAGO MANUAL OF STYLE. Also, to familiarize yourself with the CLR’s style, you may refer to previous CLR issues containing student articles. These are available on the bookshelves in the CLR office, Room 1434, or online at www.luc.edu/law/student/publications/clr. You may not, however, use these additional materials in a substantive way. By limiting the materials you may use, the CLR hopes to encourage analysis over research.
You need not use every source listed in the packet. Determine which sources are most relevant to the arguments you wish to make.

C. Citations

All citations used in your article need to be in the form of footnotes and must conform to The Bluebook citation guidelines. Correct citation format will be a substantial factor considered in your application.

D. Footnotes

Footnotes are for citation and discussion of tangential issues, or for the inclusion of supplemental materials. Only major cases should be named in the text of the article. No citations should appear in the text of the article – only in the footnotes. Consult The Bluebook for the form of citations in law review articles. All citations must conform to The Bluebook: A Uniform System of Citation.

All quotations or ideas taken from any source must be cited in the footnotes. You may also indicate in your footnote citation if your source is itself relying on another source. Again, consult The Bluebook for the form of these citations. Only matters that are entirely your own ideas and your own writing maybe left without citation.

E. Form of the Writing

Articles must be typed on 8-1/2” x 11” plain white paper. The text must be double-spaced with one-inch margins on all four sides using 12-point Times New Roman font. Footnotes must be single-spaced. The article must be between 4-8 pages in length, excluding the title page. No material beyond 8 pages will be considered. Each page after the first must be numbered at the bottom-center of each page.

F. Writing Style

Good writing style is extremely important. Pay particular attention to grammar, word choice, sentence and paragraph structure, and transitions between paragraphs and sections. Make sure your writing is clear and interesting. You may look to recent copies of the CLR to see examples of appropriate CLR style. Copies are available in the CLR office, room 1434, or online at www.luc.edu/law/student/publications/clr.

Clear writing requires clear analysis. Given the limited length of your article, give particular thought to how much space you devote to certain issues, and what may more appropriately belong in a footnote rather than in the text.

G. Evaluation

Your article will be evaluated based on several factors, including: accurate legal analysis, proper citation form, good use of footnotes, clear and concise writing style, correct grammar, and coherent
organization. Additionally, your grade point average may be weighed in as part of the evaluation process.

**F. Confidentiality and Plagiarism**

You must work entirely on your own; the write-on is an individual effort. You may not receive any substantive, editorial, or proofreading assistance, nor may you discuss any aspect of the article with any other person before all applications are submitted.

Plagiarism includes, but is not limited to, failing to attribute language or ideas to their original source, or failing to indicate a quotation of five or more consecutive words. Plagiarism is strictly forbidden and offenders may be subject to discipline by Loyola University Chicago School of Law.

**III. Write-On Competition: Subject and Format**

**A. Explanation of the Problem**

This year’s write-on competition will focus on *class action litigation* and relevant consumer protection concerns. You should read the materials provided for the topic given and analyze the impact of the selected topic on consumers. You should organize your discussion using a traditional “note” format. See a recent copy of the *CLR* for an example of a student article.

Since the *CLR* wishes to emphasize analysis over research when selecting its members, this competition is a closed research assignment. You are to consult only those sources included in this write-on packet. Any deviation from this rule will result in disqualification from the competition. However, you need not reference all of the sources listed below in your article. Only cite to what you think is appropriate, however, consideration will be given to creative and efficient use of most of the sources. The sources below are not arranged in any particular order.

**B. Format of the *CLR* Student Article**

The *CLR* write-on is designed as a note analyzing a current issue impacting consumers. In addition to informing the reader of the various aspects of the issue in question, the *CLR* note should take a position on the effect of the selected topic on consumers. The best submissions will persuasively use the available sources to support the position taken. A typical *CLR* note includes the following sections, although you may use different names for headings and subsections as you see fit:

1. **Introduction**

This is one of the most important parts of the article. It sets the stage for everything that follows. The introduction should define the issue to be discussed and tell the reader why the issue is important. The introduction should also provide the reader with a roadmap describing the topics you will cover, and the basic outline of the article, including the argument you are going to make. Be sure to follow through with any promises you make in the introduction.
II. Background

This will be brief for purposes of the write-on. The background section should provide more than just a historical report. It should involve some analysis, such as explaining the issue of law involved, identifying any underlying trends or significant events, and highlighting the areas that you will be returning to later as you analyze the topic. The background section should set up and lead naturally to a discussion of the issue.

III. Analysis/Impact

In this section, unleash your creative tendencies and argue for your point of view on the issue. Give your own critical analysis of the effect of these laws, regulations, etc. on consumers, and support your arguments with facts and ideas developed in your background section.

IV. Conclusion

Give a brief summary of your conclusions. This section generally should not be more than a paragraph or two.

IV. REMEMBER

- Submissions should be within 4-8 pages, 1-inch margins, 12-point Times New Roman font, including footnotes, but excluding the title page. Footnotes must be single-spaced. Text must be double-spaced. Not all source material need be cited. Number each page at the bottom-center, omitting a page number on the first page.
- All citations must conform to The Bluebook.
- Put your Student ID Number on the title page and in the header for each subsequent page. Do not put your name anywhere on your submission.
- Submissions are due to James Orescanin, News Editor, at jorescanin@luc.edu, by 5:00 pm CST, Sunday, June 17, 2018.
- Any questions may be directed to Maha Sadek, Editor-in-Chief, at msadek1@luc.edu, or Morgan Schulhof, Executive Editor, at mschulhof@luc.edu.

GOOD LUCK!
SOURCES
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WRITE-ON SOURCE LIST

1. Federal Rule of Civil Procedure #23
2. Wal-Mart Stores, Inc. v. Dukes, US Supreme Court
3. Constitutionalizing Class Certification, by Margaret S. Thomas
4. Why Consumers Should Care About the Dismantling of Class-Action Lawsuits, by Maria LaMagna
5. Ridiculous Class-Action Lawsuits are Costing You Tons of Money, by Kathianne Boniello
6. In re Subway Footlong Sandwich Marketing and Sales Practices Litigation, 7th Circuit
7. From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally, by Deobrah R. Hensler
8. In re Sears Roebuck and Co. Front-Loading Washer Products Liability Litigation, 7th Circuit
9. Class Actions Part II: A Respite From the Decline, by Robert H. Klonoff
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), 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 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 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) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

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

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

(4) 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) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court’s approval.

(f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. 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).
otherwise) that the interpretation of the Clean Air Act, 42 U.S.C. § 7401 et seq., adopted by the majority in Massachusetts v. EPA, 549 U.S. 497, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), is correct.

WAL–MART STORES, INC., Petitioner,

v.

DUKES et al.

No. 10–277.

Argued March 29, 2011.

Decided June 20, 2011.

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, 609 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.


1. Federal Civil Procedure ⊲161

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.

2. Federal Civil Procedure ⊲164

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.

3. Federal Civil Procedure ⊲163, 164, 165

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.

4. Federal Civil Procedure ⇑165

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.

5. Federal Civil Procedure ⇑165


6. Federal Civil Procedure ⇑161.1, 163

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.

7. Federal Civil Procedure ⇑174


8. Civil Rights ⇑1118

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.

9. Federal Civil Procedure ⇑184.10

Conceptually, there is wide gap between an individual employee’s claim that he or she has been denied promotion on discriminatory grounds and employer’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.

10. Federal Civil Procedure ⇑184.15

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 de-
cisions 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.

11. Civil Rights ☑=1140

   Federal Civil Procedure ☑=184.10

   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.

12. Declaratory Judgment ☑=305

   Federal Civil Procedure ☑=165

   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.

13. Declaratory Judgment ☑=305

   Federal Civil Procedure ☑=184.10

   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.

14. Declaratory Judgment ☑=305

   Federal Civil Procedure ☑=184.15

   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.

16. Civil Rights 1536, 1560

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.

17. Federal Civil Procedure 184.15


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.

* 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.
(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 appropri-
ately 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. P. 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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For U.S. Supreme Court briefs, See:
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.

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

1. The complaint included seven named plaintiffs, but only three remain part of the certi–

fied class as narrowed by the Court of Appeals.
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 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
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." 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 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

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 impede 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.
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 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 “saw 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).

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 predomi-
nate. 603 F.3d, at 621. Second, it accepted in part Wal–Mart’s argument that since class

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

II

[1–3] 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. Yama-
saki*, 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 representa-
tive must be part of the class and ‘possess the same interest and suffer the same injury’ as the class members.” *East Tex. Motor Freight System, Inc. v. Rodri-
guez*, 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 require-
ments—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 South-

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 members whom it no longer employed had no standing to seek injunctive or declaratory re-

lied, as to them monetary claims must pre-

dominate. 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).
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 requires the plaintiff to demonstrate that the class members “have suffered the same injury,” Falcon, \(\text{supra},\) 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, \(\text{supra},\) 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 rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied,” \(\text{id.,}\) at 161, 102 S.Ct. 2364; see \(\text{id.,}\) 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

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\(^5\) 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).
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).

Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve 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

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 dissi-
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 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.

[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 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 Civil Procedure 702 and our

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 Frame-
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 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).

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 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

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[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 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
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. 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...
together. Merely showing that Wal–
Mart’s policy of discretion has produced an 
overall sex-based disparity does not suf-
fice.

Respondents’ anecdotal evidence suffers 
from the same defects, and in addition is 
too weak to raise any inference that all the 
individual, discretionary personnel deci-
sions are discriminatory. In Teamsters v. 
United States, 431 U.S. 324, 97 S.Ct. 1843, 
52 L.Ed.2d 396 (1977), in addition to sub-
stantial statistical evidence of company-
wide discrimination, the Government (as 
plaintiff) produced about 40 specific ac-
counts of racial discrimination from partic-
ular individuals. See id., at 338, 97 S.Ct. 
1843. That number was significant be-
cause 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 indi-
viduals “spread throughout” the company 
who “for the most part” worked at the 
company’s operational centers that em-
ployed 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 dis-
crimination—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, Mis-
souri, 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 dem-
onstrate that the entire company “operate[s] under a general policy of discrimina-
tion,” Falcon, supra, at 159, n. 15, 102 
S.Ct. 2364, which is what respondents 
must show to certify a companywide class.9

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 com-
monality requirement with Rule 23(b)(3)’s 
inquiry into whether common questions 
“predominate” over individual ones. See 
post, at 2550 – 2552 (GINSBURG, J., con-
curring 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 
or order to determine (as Rule 23(b)(3) re-
quires) whether common questions pre-
dominate, 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 company-
wide discriminatory pay and promotion 
policy, we have concluded that they have

9. The dissent says that we have adopted “a 
rule that a discrimination claim, if accompa-
nied by anecdotes, must supply them in num-
bers proportionate to the size of the class.” 
Post, at 2563, n. 4 (GINSBURG, J., concur-
ing in part and dissenting in part). That is 
not quite accurate. A discrimination claim-

ant is free to supply as few anecdotes as he 
wishes. But when the claim is that a compa-
ny operates under a general policy of discrim-
ination, a few anecdotes selected from liter-
ally millions of employment decisions prove 
nothing at all.
not established the existence of any common question.\textsuperscript{10}

In sum, we agree with Chief Judge Koziński 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 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 \textit{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 \textit{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 \textit{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.” \textit{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 \textit{different} injunction or declaratory judgment against the defendant. Similarly, it does not 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, \textit{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, \textit{Ortiz v. Fibreboard Corp.}, 527 U.S. 815, 841–845, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). As we observed in \textit{Amchem}, “[\textit{c}ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples” of what (b)(2) is meant to capture. 521 U.S., at 614, 117

\textsuperscript{10} For this reason, there is no force to the dissent’s attempt to distinguish \textit{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” \textit{post}, at 2565–2566, n. 7 (quoting \textit{Fal-}con, 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, \textit{post}, at 2565–2566, n. 7), the same employment practices do not
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 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 617, 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 benefiting 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 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

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.
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 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
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 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 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
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 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 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, for Class Certification in No. 3:01–cv–02252–CRB (ND Cal.), Doc. 99, p. 47.

1. The plaintiffs requested Rule 23(b)(3) certification as an alternative, should their request for (b)(2) certification fail. Plaintiffs’ Motion
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." The Rule "does not require that all questions of law or fact raised in the litigation be common," 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.").

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.

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.
They allege that the company “[r]elies[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 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,” “broadcast[ing] . . . into all stores.” Id., at 151–153 (internal quotation marks omitted).

The plaintiffs’ evidence, including class members’ tales of their own experiences, suggests that gender bias suffused Wal–Mart’s company culture. Among illustra-
tions, senior management often refer to female associates as “little Janie 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 150.5 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 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.” Ibid. (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

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.
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" 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. Atanio, 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 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). 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 appli-
tion 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.”

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”).

“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 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

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 prac-

tical 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).
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 discrimina-

* * *

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.
2017

Constitutionalizing Class Certification

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Constitutionalizing Class Certification

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I. INTRODUCTION

Class action litigation is in a period of transition. Many scholars, including myself, have observed the slow demise of class actions in federal court in the wake of the Class Action Fairness Act of 2005 (CAFA), and the Supreme Court decisions that followed. Indeed, some scholars have even begun imagining the shape of mass tort litigation in a “post-class action era.” However, the end of the Supreme Court’s most recent term brought a chorus of relief from the plaintiffs’ bar. This was a Supreme Court term that some had once feared would hasten the end of federal class actions, but the term concluded without any tectonic shifts in the procedural landscape of aggregate litigation. The respite taken by the Supreme Court in reshaping class action doctrine is not a signal of the doctrine’s stability, however. The instability of the class action landscape seems to have instead merely relocated to lower courts for now.

While the Roberts Court created increasingly insurmountable barriers to certification of nationwide classes in federal court, mass tort litigation did not simply vanish into thin air. When federal courts (mostly) closed their doors to nationwide class actions, some of the disputes shifted into federal multidistrict litigation composed of many similar individual suits consolidated for pretrial proceedings. Others fragmented into smaller class actions, some of which stayed in state

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4. Id. (observing that while the Supreme Court awaits a ninth justice to replace Justice Scalia, “[I]t appears that the circuit courts are the effective courts of last resort for federal issues involving class [actions].”)

5. See, e.g., Moller, supra note 2, at 862.

courts. Mark Moller has suggested this unintended result of the Supreme Court’s contraction of nationwide class actions in the post-CAFA era created a kind of “accidental federalism” through the fragmentation and dispersal of mass tort litigation.8

This Article’s focus is on a different kind of federalism in mass torts: the integrity of states as independent systems of adjudication for mass tort litigation. Specifically, it identifies the enormous pressure being placed upon this independence in the fragmented, dispersed pieces of mass tort litigation that happen to land in state court systems in the post-CAFA era. This form of federalism is not accidental or “happenstantial.”9 Rather, it is an essential and fundamental structural feature of our federal constitutional system. The independence of state courts as separate systems of civil adjudication is under pressure from a wave of arguments from defendants seeking to nationalize class action procedure through an aggressive reworking of constitutional due process doctrine that would wipe away state variations in class certification procedures.

A little-noticed battle for the future of complex litigation appears to be underway in state supreme courts. The relocation of class action’s doctrinal battles to state courts is astonishing, as not long ago, state courts seemed to fade away in importance in complex litigation because of CAFA’s reforms: CAFA was designed to facilitate the removal of many class actions from state courts to federal courts, causing the number of class actions in state courts to plummet.10 Once in federal court, a wave of Supreme Court decisions then raised the bar to certifying classes in most mass tort cases.11 Since CAFA facilitated re-

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7. See Moller, supra note 2, at 865–66.
8. Id. at 867.
9. Cf. id. at 882.
moval of more suits into federal court, complex litigation scholars naturally focused on the rapid reshaping of the class action landscape by those federal courts. The resulting post-CAFA decline in the utility of federal class actions as a means of resolving complex mass tort disputes has been well captured by academic commentators. CAFA, combined with the Supreme Court’s tightening of the understanding of the federal procedures for certification, seemed to have narrowed the space in which class actions could operate. This has been the conventional narrative for quite some time, but this narrative captures only part of the picture of what is transpiring.

This conventional post-CAFA mass torts narrative misses the development of the movement in state supreme courts to constitutionalize class certification. State class actions did not entirely vanish. Despite CAFA’s robust sweep of cases into federal court, its plain terms contemplated space for at least some class actions that would continue to be decided by state courts, although that space would be smaller. Within that small space in state courts, monumentally important changes are occurring in the kind of arguments being used to oppose class certification.

The state-by-state battle over class certification procedure is still in its early stages and has largely been overlooked by scholars, who have understandably fixed their gaze on developments in federal court in v. Fibreboard Corp., 527 U.S. 815 (1999), which limited federal courts’ ability to certify nationwide classes to facilitate settlements of mass tort cases. See Thomas, supra note 1, at 1346 & n.37; Anne Bloom, From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis, 39 Loy. L.A. L. Rev. 719, 747 (2006); Samuel Issacharoff, Private Claims, Aggregate Rights, 2008 Sup. Ct. Rev. 183, 208.

12. See, e.g., Moller, supra note 2, 864 (reviewing post-CAFA scholarship).
13. See, e.g., Thomas, supra note 2, 1346 & n.37 (summarizing academic commentary); Sergio Campos, Mass Torts and Due Process, 65 Vand. L. Rev. 1059, 1063 (2012) (“Almost all courts and scholars disfavor the use of class actions in mass tort litigation because the class action device infringes upon each plaintiff’s autonomy over the tort claim.”).
14. See 28 U.S.C. § 1332(d)(2). For example, class actions with fewer than 100 people, or with an aggregate value under $5 million, or lacking minimal diversity were excluded from its jurisdictional ambit. See 28 U.S.C. § 1332(d)(4)(A). Congress also included a “local controversy exception,” exempting from removal classes where two-thirds of the class-members are from the forum state, at least one defendant is also a member of the forum state, the defendant’s conduct in that state formed a significant basis for the claim, and the class is seeking significant relief from that defendant for injuries that occurred in the state. See 28 U.S.C. § 1332(d)(4)(B). Congress also created both a mandatory and permissive “home state” abstention exception, depriving federal courts entirely of jurisdiction, where two-thirds of the proposed class members are from the forum state, and the primary defendants are also citizens of the state, and allowing permissive abstention when more than one-third but less than two-thirds of the class members are from the forum state (and again, the primary defendants are too). 28 U.S.C. § 1332(d)(3).
courts in the post-CAFA era. The conventional narrative focused academic attention on the one-two punch of Congress (enacting CAFA to facilitate more federal removal) and the Supreme Court (issuing a series of important decisions interpreting Federal Rule of Civil Procedure 23 to make class actions less likely to survive). This narrative has helped to mask a seismic shift that is occurring in the manner in which defendants present arguments about certification in state courts, and this shift has profound implications for federal courts, too.

While a long line of Supreme Court decisions has focused on interpreting Federal Rule 23, state courts are not constrained to follow this precedent in their own certification of class actions filed in state court. Instead, defendants are often focusing state certification arguments on the U.S. Constitution. This tactic seeks to limit state procedural choices in certifying class actions, constraining states through an expansive interpretation of the civil defendants’ due process rights. The tactic aims to constitutionalize the class certification process.

Defendants have attacked certification of class actions in state courts with an array of constitutional arguments about the process for certification. These arguments have been percolating through state courts (and sometimes even lower federal courts), without having yet reached the U.S. Supreme Court. Despite, or maybe because of, the Supreme Court’s silence on the matter, they are becoming an increasingly important feature of the class certification landscape.

Many of the constitutional arguments against class certification are already well worn. Almost as long as there have been class actions, defendants have complained that curtailing their right to bring individual defenses would violate due process. Arguments along these lines have long been asserted sporadically in lower courts, sometimes for decades; the arguments have become mainstream, stock arguments—and they now seem to be gaining some traction in some state courts and lower federal courts.

The academic commentary thus far has generally treated the varying constitutional arguments raised by class action defendants in different contexts in state and federal courts as dwelling in distinct

15. See, e.g., Moller, supra note 2, at 867; Glover, supra note 2, at 8–10.
16. See, e.g., W. Elec. Co. v. Stern, 544 F.2d 1196, 1199 (3d Cir. 1976) (discussing the defendant’s constitutional “right to present a full defense”); Joseph v. Gen. Motors Corp. 109 F.R.D. 635 (D. Colo. 1986) (rejecting the defendant’s “contention that certification of a class action in this case would violate its right to due process of law under the Fourteenth Amendment by preventing it from asserting individual defenses”); In re Cadillac V8-6-4 Class Action, 461 A.2d 736 (N.J. 1983) (rejecting the defendant’s “contention that certification of a class action would violate its right to due process of law under the Fourteenth Amendment by preventing it from asserting individual defenses, such as the treatment of the vehicles by each plaintiff and actual reliance on [the defendant]’s representations”).
doctrinal silos. For example, arguments objecting to certifying a class seeking punitive damages have been analyzed with reference to the specialized constitutional doctrine developed for punitive damages in individual litigation.\footnote{See, e.g., Sheila B. Scheuerman, Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Actions, 60 BAYLOR L. REV. 880, 905–08 (2008) (arguing cases reviewing punitive damages in individual litigation should apply to class certification); James M. Underwood, Road to Nowhere or Jurisprudential U-Turn? The Intersection of Punitive Damage Class Actions and the Due Process Clause, 66 WASH. & LEE L. REV. 763, 765 (2009) (evaluating the relationship between due process limits on punitive damages and class certification); Linda S. Mullenix, Nine Lives: The Punitive Damages Class, 58 U. KAN. L. REV. 845, 876 (2010) (discussing the implications of the Supreme Court’s punitive damages constitutional doctrine for punitive damages classes); see also Katherine E. Lamm, Work in Progress: Civil Rights Class Actions after Wal-Mart v. Dukes, 50 HARV. C.R.-C.L. L. REV. 153, 173–74 (2015) (discussing commonality issues related to damages in class certification).} Arguments about individual proof and statistical modeling, by contrast, have been treated as having a different doctrinal pedigree, closely linked to procedural due process.\footnote{See supra note 16.}

This Article offers a fresh perspective by weaving together different threads of constitutional arguments related to class certification to demonstrate their common function in the class certification process. It takes these different doctrinal species of constitutional objections to certification and shows that they have a common purpose in the process. Each of these species attempts to shift certification from a rule-based decision to a constitutional one based on arguments about class members lacking sufficient commonality to allow for class-wide adjudication of defenses. In other words, it constitutionalizes the commonality inquiry. Connecting these different constitutional objections to class certification reveals that collectively they aim to create one homogeneous certification scheme in state and federal court, grounded in a new, defendant-focused interpretation of procedural due process.

This Article concludes that this defendant-centric expansion of procedural due process conflicts with the flexible, pragmatic view at the heart of the Supreme Court’s modern procedural due process jurisprudence, and more importantly, with the fundamental values of federalism at the heart of our civil justice system. It is a direct assault on the independence of state courts as separate, distinct systems.

Constitutionalizing class certification is a powerful reform strategy, in that it would impact not only class actions litigated in federal court, but also nonremovable state class actions being litigated under state rules that differ from Federal Rule of Civil Procedure 23. It is a challenge to the rulemaking processes of all fifty states, as well as the Federal Rules.

This Article has two objectives. It seeks first to create a typology of these emerging constitutional challenges to certification and contextu-
alize them. It argues that these challenges share fundamental similarities in their approach to the class certification process. While due process in class actions has historically focused on the rights of absent members of the plaintiff class, this new species of argument attempts to reframe the constitutional inquiry by focusing on the defendant’s procedural rights. Importantly, the goal of this Article is not to resolve all the debates within all the doctrines in these varying constitutional arguments. Its goal is more modestly to show that they are connected in their functioning within the class certification process, and that connection reveals the strategic purpose and systemic risks.

The collection of constitutional arguments against class certification generally lacks a coherent constitutional foundation at present and challenges fundamental principles of federalism with regard to the separateness of state judicial procedures. Part II introduces the emerging constitutional shift in class certification in lower courts. Part III then turns to the historical understanding of due process in the context of class actions and the scholarly literature on due process in complex litigation. Part IV then reconstructs federalism as a value in the functioning of state courts as independent adjudicatory systems, connecting it to the class certification process. This Article ultimately concludes that the constitutionalization of class certification undermines important federalism values by seeking a national, uniform class certification procedure.

II. THE CONSTITUTIONAL SHIFT IN CLASS CERTIFICATION

There are several different threads of constitutional argumentation that have crystallized in the arguments of defendants opposing class certification. One of them is unique to federal court, focusing on the requirements of Article III of the United States Constitution. This thread, though, has a little-noticed connection to state courts through state standing doctrines. The other threads of argumentation are different, focusing on how one proves liability and damages in a class action—by attacking the commonality of the issues of facts and law that hold a class together in a class action. This latter species emphasizes the Due Process Clause of the Fifth and Fourteenth amendments, with equal relevance in state and federal court. If successful, these arguments taken together have the potential to be near-universal “class action killers.” However, when deconstructed, they are fundamentally part of a process to constitutionalize the procedure to certify a class in any court, state or federal.

A. BP’s Gulf Oil Spill Muddies Article III’s Limits on Class Standing in Federal Court

The constitutional shift in class certification gathered momentum in the late 1990s, but it seems to have recently progressed at a furious
pace. In Amchem Products, Inc. v. Windsor, the Supreme Court announced in dicta that class certification under Federal Rule of Civil Procedure 23 “must be interpreted in keeping with Article III constraints.” This simple assertion has inspired a new line of argumentation in federal class actions, where class members may be damaged unevenly, with some absent class members having little or no harm traceable to the defendant.

Recently, the Deepwater Horizon litigation in the Fifth Circuit put this argument on vivid display. The litigation stemmed from the British Petroleum (BP) oil spill in 2010, which contaminated the Gulf of Mexico with millions of barrels of oil. BP argued that Article III has an implicit requirement of causation (i.e., that damages claimed by class members were specifically caused by the alleged class conduct). BP specifically attacked the constitutionality of settlement payments to class members who could not present individualized proof that BP’s conduct, with regard to the oil spill, caused these claimants’ economic damages. BP’s argument connected the Amchem dicta with the Court’s doctrine of constitutional standing under Article III.

The Fifth Circuit allowed the class to be certified, even though it allegedly included uninjured plaintiffs. BP had agreed to a proposed settlement in April 2012 with a class of individuals and businesses claiming to be damaged by the spill. Instead of ending the litigation, the settlement was the start of a new, complex dispute about the interpretation of the settlement’s terms, who could submit claims under it, and whether the district court’s interpretation of it violated BP’s due process rights.

BP’s position was that the interpretation of the settlement claims administrator (and district court) regarding the proof needed to file a claim wrongly permitted “class members” who suffered no injury whatsoever from the spill to submit claims for payment. According to the defendant, this interpretation had the effect of including uninjured parties within the class. BP claimed this violated Article III’s standing requirement.

After a long and winding procedural history with multiple appeals to different panels of the Fifth Circuit and multiple remands back to the trial court, the Fifth Circuit eventually approved class certifica-

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22. In re Deepwater Horizon, 739 F.3d at 795.
23. Id. at 986.
24. Id. at 796–98.
25. Id. at 796–98.
tion, rejecting BP’s constitutional challenges. In the first of a series of appellate decisions, the circuit found that the named plaintiffs all had standing under Article III because these class representatives’ own injuries were caused by the oil spill. Further, even if one were to consider the absent class members, the court found that the class definition also covered them by requiring all claimants to have “experienced [l]oss of income, earnings or profits . . . as a result of the DEEP-WATER HORIZON INCIDENT.” Importantly, the court concluded the Constitution did not require a strict evidentiary standard that might ferret out parties receiving unwarranted payments. BP thus had no right to proof of injury from all of the claimants once the class was certified for settlement.

A second appellate decision from a different Fifth Circuit panel then approved the district court’s interpretation of the settlement agreement. The Fifth Circuit interpreted the settlement agreement to allow claimants to certify, under penalty of perjury, that their injuries had been caused by the Deepwater Horizon spill in lieu of submitting proof of causation to support their claim. The Fifth Circuit thus understood the settlement to be an express agreement by BP to accept the claimants’ certification statements as sufficient proof that the injuries were traceable to the disaster. The court found this to be a rational business choice in light of “the practical problem [that] mass processing of claims such as these presents.”

The majority’s decision in this case was groundbreaking in that it created space for the absent class members’ standing to derive from the settlement agreement itself in a class action certified for settlement. In a spirited dissent, Judge Clement argued that a settlement class action, where “the certification stage and the proof stage have been combined,” should not be designed in a way that would allow recovery by claimants whose injuries have nothing to do with the defendant’s conduct.

26. Id. at 795, 798.
27. Id. at 802.
28. Id. (alteration in original) (quoting In re Oil Spill by Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2012, 910 F. Supp. 2d 891, 967 (E.D. La. 2012) (appendix), aff’d sub nom. In re Deepwater Horizon, 739 F. 3d 790 (5th Cir. 2014)) (internal quotation marks omitted).
29. Id.
31. Id. at 376.
32. Id. at 377 (“It was a contractual concession by BP to limit the issue of factual causation in the processing of claims.”).
33. Id.
34. Id. at 383, 384 (Clement, J, dissenting) (“But these plaintiffs have no injury traceable to BP’s actions, and would not have standing to maintain a suit individually . . . .”)
BP filed a petition for certiorari, supported by an army of amici. The Supreme Court declined the invitation to take up the dispute. The case was likely too complicated a vehicle to present the issue, given the complexity of the settlement agreement and its procedural posture.

Although the holding with regard to standing deriving from the settlement terms was novel, the Fifth Circuit’s flexible approach in the *In re Deepwater Horizon* case aligned it with a plurality of five circuits permitting a class action to be certified even though all of the class members cannot show individual proof of satisfying Article III’s standing requirement (e.g., either the named class representatives or most of the class members meet Article III standing requirements). In other words, these circuits do not require every member of the class to be able to prove standing. For example, the First Circuit allows a “de minimis” number of uninjured members in a certified class. Like the First Circuit, the Seventh Circuit similarly uses a flexible standard that seeks to avoid too many uninjured class members. The Third Circuit requires only that the named class representatives show Article III standing and does not require absent class members to

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37. *In re Nexium Antitrust Litig.*, 777 F.3d 9, 32 (1st Cir. 2015).

38. Messner v. Northshore Univ. Health System, 669 F.3d 802, 825 (7th Cir. 2012) (holding that determining how many uninjured class members is too many is “a matter of degree, and will turn on the facts as they appear from case to case”); see also Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 677 (7th Cir. 2009) (reasoning that “a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant . . .”).
meet that standard.\textsuperscript{39} The Ninth Circuit is in accord with the Third Circuit, focusing attention on the class representatives.\textsuperscript{40}

By contrast, the Second Circuit requires that a class be defined so that “\textit{anyone} within it would have standing,” though it has no requirement that each member of the class submit evidence of personal standing.\textsuperscript{41} The Eighth Circuit has drawn a bright line, rejecting certification if a class contains uninjured members.\textsuperscript{42}

So far, the Supreme Court has declined to step into this circuit split, leaving the lower courts to work through the defendants’ arguments on Article III class standing without definitive guidance. It appeared to grant certiorari on that question in its last term, in \textit{Tyson Foods, Inc. v. Bouaphakeo}.\textsuperscript{43} However, the defendant-petitioner abandoned that issue in its merits brief,\textsuperscript{44} removing it from the Court’s consideration. In \textit{Spokeo, Inc. v. Robins}, another case decided in the Court’s last term, the Court clarified that a class representative must have standing in the form of a particularized and concrete injury.\textsuperscript{45} The decision offers no guidance on the situation faced by BP, where it was the \textit{absent class members} who allegedly sustained no injury.\textsuperscript{46}

The relationship between absent class members and Article III standing doctrine remains open in the Supreme Court.

The scope of this Article III argument, though, is necessarily limited to proceedings in federal court—and federal courts have generally treated this as a standing problem, not a due process problem. How-

\textsuperscript{39} Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 362 (3d Cir. 2015) ("[T]he 'cases or controversies' requirement is satisfied so long as a class representative has standing, whether in the context of a settlement or litigation class. This rule is compelled by \textit{In re Prudential} and buttressed by a historical review of representative actions.").
\textsuperscript{40} Mazza v. Am. Honda Motor Co., 666 F.3d 581 (9th Cir. 2012); Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1021 (9th Cir. 2011) ("Our law keys on the representative party, not all of the class members, and has done so for many years.").
\textsuperscript{41} Denny v. Deutsche Bank AG, 443 F.3d 253, 263–64 (2d Cir. 2006) (emphasis added).
\textsuperscript{42} Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 778 (8th Cir. 2013) ("In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision."); see also Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 591 (8th Cir. 2009) (citing the \textit{Lujan} injury requirement intrinsic to the "irreducible constitutional minimum of standing").
\textsuperscript{43} 136 S. Ct. 1036, 1048 (2016) ("In its petition for certiorari petitioner framed its second question presented as whether a class may be certified if it contains 'members who were not injured and have no legal right to any damages.'").
\textsuperscript{44} Id. ("[Petitioner] now concedes that the fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured."). (internal quotations omitted).
\textsuperscript{45} Spokeo, Inc v. Robins, 136 S. Ct. 1540, 1547 n.6 (2016).
ever, many states have their own parallel standing doctrine—even though they are not constrained by Article III.47 F. Andrew Hessick’s survey of variations in state standing doctrines reveals that several states have an injury-in-fact test parallel to federal standing doctrine.48 Others use the injury-in-fact test as a default, but subject it to exceptions.49 Still others have developed a standing doctrine with a looser test looking for an alleged violation of the plaintiff’s legal rights.50 For states using some version of the injury-in-fact test inspired by federal doctrine, any federal developments regarding standing have the potential to spill over into state systems through federal opinions treated as persuasive authority, even if not binding on the state courts. Moreover, the causation component in the standing arguments (i.e., that a concrete, particularized injury was caused by the defendant’s conduct) is easily labeled as a form of due process in the briefing. It would thus be a mistake to view the controversy over absent class members’ injuries to have no implications for state courts.

The Article III argument about uninjured class members is also fundamentally an argument about whether the class is sufficiently cohesive in the sense of having enough in common to bind the class together. The argument presents the putative class as including members who are very different from one another: named class members who can offer proof of their injury and its causation, and absent class members who lack such proof. The differences between the allegedly uninjured class members and the class representatives are elevated in this argument to a constitutional distinction depriving some

47. Helen Hershkoff, State Courts and the “Passive Virtues”: Rethinking the Judicial Function, 114 Harv. L. Rev. 1833, 1838 (2001) (noting that many state courts adhere to the model for standing found in Article III); accord id. at 1854 (“The source of standing rules varies from state to state, as does their content.”); F. Andrew Hessick, Cases, Controversies, and Diversity, 109 Nw. U. L. Rev. 57, 66–68 (2014) (discussing the various approaches that the states take in regards to the standing requirement); see also, e.g., Chiatello v. City of San Francisco, 117 Cal. Rptr. 3d 169, 176 (Cal. Ct. App. 2010) (“Standing is a jurisdictional issue that . . . must be established in some appropriate manner.”); ACLU of N.M. v. City of Albuquerque, 188 P.3d 1222, 1227 (N.M. 2008) (“While we recognize that standing in our state courts does not have the constitutional dimensions that are present in federal court, New Mexico’s standing jurisprudence indicates that our state courts have long been guided by the traditional federal standing analysis.”); Soc’y of Plastics Indus. v. County of Suffolk, 573 N.E.2d 1034, 1040 (N.Y. 1991) (“The existence of an injury in fact—an actual legal stake in the matter being adjudicated—ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute ‘in a form traditionally capable of judicial resolution.’”).


49. Id. at 67 & n.65 (identifying Michigan, Minnesota, Mississippi, South Carolina, Texas, and Virginia as examples).

50. Id. at 66–67 (identifying California, Louisiana, and New Hampshire as examples).
class members of standing. The lack of cohesiveness in the class, though, is key: this argument presumes there is a constitutional floor in class cohesion, and once one passes that floor, no class may be certified. The defendants usually argue, as BP did, that any class member unable to show causation is a constitutional defect. This illustrates that the goal of this argument is to litigate causation individually, class member by class member. As we shall see in section II.B, the same focus on cohesiveness underlies another species of argument under the Due Process Clause.

B. Defendant Due Process Rights in Class Actions in State Courts

1. Montana’s Example: Class-Wide Punitive Damages

Meanwhile, a different, more wide-reaching species of constitutional argument appeared recently in a Montana Supreme Court case.51 The case raised a trio of due process arguments in the certification of a class under state class action rules. The most important of these was an argument that the U.S. Constitution forbids certifying class claims if any individual defenses would be eliminated from consideration in the litigation. The defendant sought to establish that due process barred the certification of such class actions in state courts (potentially barring all punitive damages claims from class actions as a constitutional matter).52

In Jacobsen v. Allstate Insurance Co.,53 the class challenged the defendant’s insurance claim settlement practices in the state of Montana. The case was certified as a class action under the Montana’s own class action rule, Montana Rule of Civil Procedure 23. The class argued that Allstate’s claims handling policy intentionally misled claimants by suggesting they would get more money without an attorney, whereas claimants represented by counsel actually received significantly more compensation for their claims.54 The class further claimed the claims handling procedures resulted in unfair settlements.55 The class definition included “all unrepresented individuals who had either third-party claims or first-party claims” under Allstate’s Claim Core Process Redesign policy, implemented in the 1990s

53. 310 P.3d 452.
55. Id.
to reduce total payouts, in part, by persuading claimants not to hire legal counsel.\(^56\)

The state trial court certified the class after narrowing the class definition to include only unrepresented claimants who filed first-party or third-party claims with Allstate in motor-vehicle accidents in excess of the policy deductible, with claims adjusted in Montana under the specific Allstate procedure adopted in the mid-1990s.\(^57\) Although Montana’s Rule 23 tracks Federal Rule of Civil Procedure 23, the state court did not view itself as bound by federal interpretations of Federal Rule of Civil Procedure 23, except as persuasive authority. In other words, the state court read the Supreme Court’s opinion restricting class certification in *Wal-Mart Stores v. Dukes*\(^58\) as a case limited to rule interpretation. Without a constitutional basis, *Dukes*’s interpretation of Rule 23 could not bind the state court.

The Montana Supreme Court approached class certification under the state rule the same way a federal court would: starting with Rule 23(a)’s four requirements (numerosity, commonality, typicality, and adequacy).\(^59\) There was no dispute that the six hundred members of the class were sufficiently numerous.\(^60\) The court also found little reason to doubt typicality or adequacy.\(^61\) The dispute turned on state’s own requirement of “commonality” (i.e., the need for “questions of law or fact common to the class”).\(^62\) The state requirement for commonality uses language that exactly tracks Federal Rule 23.\(^63\)

Although Montana had a history of relying on federal precedent to interpret the state’s own version of Rule 23,\(^64\) the state court declined to decide whether to follow the U.S. Supreme Court’s interpretation of that rule in *Dukes*. It distinguished the Allstate dispute on its facts: unlike Wal-Mart in the *Dukes* case, here Allstate had a company-wide policy guiding its claim settlement, and that policy that was the basis for each class member’s claim, making this a relatively straightforward commonality analysis compared to *Dukes* (where there was no company-wide policy connecting all the class members’ claims).\(^65\)

However, once the court turned its attention to Rule 23(b), the defendant’s constitutional arguments gained some traction. That part of the rule in Montana defines allowable types of class actions. The class

\(^{56}\) Id. at 456, 458.

\(^{57}\) Id. at 457.

\(^{58}\) 564 U.S. 338 (2011)


\(^{60}\) Jacobsen, 310 P.3d at 460.

\(^{61}\) Id. at 470–71.


\(^{63}\) See Fed. R. Civ. P. 23(a)(2).

\(^{64}\) Jacobsen, 310 P.3d at 460–61 (citing Chipman v. Nw. Healthcare Corp., 288 P.3d 193, 208 (Mont. 2012)).

\(^{65}\) Id. at 462–63.
had been certified under Montana's version of Rule 23(b)(2), which mirrors Federal Rule of Civil Procedure 23(b)(2) in permitting classes seeking injunctive relief where relief is proper as to the class as a whole. 66 The state trial court had certified four forms of relief: (1) declaratory relief as to the unlawfulness of the claims handling procedure; (2) injunctive relief requiring Allstate to re-adjust class members' claims; (3) class-wide punitive damages upon a finding of malice; and (4) attorney fees paid to a common fund. 67

The state supreme court reversed the certification of class-wide punitive damages, finding due process implied a right to raise individualized defenses, even though it had already found Allstate subjected the entire class to the same class-wide policy. 68 The state supreme court's solution was to resolve the common issue of the company-wide claims procedure's lawfulness in one class action, after which individual class members could pursue individual compensatory and punitive damages in separate damages trials. The class action would thus survive, but it would decide only one aspect of each class member's claim and require subsequent, individual litigation over damages (including punitive damages). 69

Allstate sought certiorari from the U.S. Supreme Court. 70 Allstate's petition raised due process issues related to the state's certification of the class, including a constitutional right present of individual defenses. 71 The petition was supported by six different amicus curiae briefs. 72 Despite the strong business community sup-

66. See Mont. Code. Ann. § 25-20-23(b)(2) (2015) (defining an allowable class to include situations where "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"); Jacobsen, 310 P.3d at 471–72.
67. Jacobsen, 310 P.3d at 471.
68. Id. at 475 ("Allstate should be able to establish defenses to individual claims to ensure that punitive damages are not awarded to claimants that were not actually damaged by the adjustment of their claims under the [claims handling procedure].").
69. Id. at 464–66.
70. See Petition for a Writ of Certiorari, Jacobsen, 310 P.3d 452 (No. 13-916), 2014 WL 342624. Its certiorari petition was authored by the law firm that had won Wal-Mart Stores v. Dukes several years earlier. Id. at i. (showing brief submitted by Gibson, Dunn & Crutcher). The same law firm also happened to be BP's appellate counsel in the unsuccessful certiorari petition in the Deepwater Horizon litigation. See Petition for a Writ of Certiorari, BP Expl. & Prod. Inc. v. Lake Eugenie Land & Dev., Inc., 135 S. Ct. 754 (2014) (No. 14-123), 2014 WL 3834540.
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port for granting certiorari, the Court declined to take up the due process arguments and refused to review the case.\textsuperscript{73}

2. \textit{Pennsylvania's Example: Wal-Mart Redux}

In Pennsylvania, the state took a different approach to due process arguments recently packaged as a challenge to “trial by formula” in class actions. After the Supreme Court’s decision in \textit{Wal-Mart Stores v. Dukes}\textsuperscript{74} seemingly doomed nationwide class actions in employment litigation, the employee claims against Wal-Mart splintered. Wal-Mart employees around the country filed several smaller class actions against the company alleging various employment violations. In other words, the disputes fractured into many regional cases after the nationwide class failed before the Supreme Court. One of those “son of \textit{Dukes}” actions was \textit{Braun v. Wal-Mart Stores}, a case filed in Pennsylvania state court on behalf of a class of Wal-Mart employees alleging wage and hour violations that ultimately resulted in a judgment of over $187.6 million.\textsuperscript{75}

The employees claimed that Wal-Mart failed to compensate them for rest breaks and off-the-clock work as required by Wal-Mart’s own policies and state law.\textsuperscript{76} The state court certified a class in 2005 consisting of “all current and former hourly employees of Wal-Mart in the Commonwealth of Pennsylvania from March 19, 1998 to the present.”\textsuperscript{77} After a thirty-two-day jury trial, in which Wal-Mart called eighteen fact witnesses and three experts,\textsuperscript{78} Wal-Mart prevailed on claims related to meal periods but lost on rest breaks and off-the-clock work.\textsuperscript{79} The jury awarded $2.5 million for the rest break claims alone.


\textsuperscript{74} 564 U.S. 338 (2011).


\textsuperscript{76} Id. at 885.

\textsuperscript{77} Id. at 886.

\textsuperscript{78} Id.

\textsuperscript{79} Id. at 889.
In posttrial proceedings, the state court added statutory, liquidated damages for each class member, totaling $62.25 million, and $45.7 million in attorney fees, as well as interest and other state statutory penalties. This resulted in a $187.6 million aggregate judgment.

On appeal, the state's intermediate appellate court relied on Pennsylvania law to conclude the liquidated damages required by state statute are not punitive, but rather are compensatory. It affirmed the verdict with minor modifications. Wal-Mart had raised a due process challenge based on the fact that the verdict had been reached by extrapolating damages based on the testimony of six employees who testified. The court flatly rejected the idea that Wal-Mart had a right to question every single member of the class under Pennsylvania's class action procedure.

Wal-Mart then sought and obtained review from the state supreme court on the issue of the statistical extrapolation. It argued that it was entitled to proof from each class member rather than extrapolation. Wal-Mart's principal argument alleged its due process rights were violated when the trial court subjected it to a “trial by formula,” a procedural practice disfavored by the U.S. Supreme Court’s decisions interpreting Federal Rule of Civil Procedure 23 in the Dukes decision. The state supreme court observed that there was no extrapolation used in the trial court as to liability; rather, it was used only for calculating damages to the class as a whole. Here, unlike Dukes, there was evidence of a company-wide policy. Unlike the Montana Supreme Court, which also had a company-wide policy before it, the Pennsylvania Supreme Court rejected the argument that damages must be calculated individually and that tabulating class-wide damages would violate due process. It thus affirmed the decision below.

Wal-Mart petitioned for a writ of certiorari to the United States Supreme Court in the Pennsylvania case. The petition presented a single issue: “Whether the Due Process Clause of the Fourteenth Amendment prohibits a state court from certifying a class action, and

80. Id. at 970.
81. Braun v. Wal-Mart Stores, Inc., 47 A.3d 1174 (Penn. 2012) (granting review as to “whether, in a purported class action tried to verdict, it violates Pennsylvania law (including the Pennsylvania Rules of Civil Procedure) to subject Wal-Mart to a Trial by Formula’ that relieves Plaintiffs of their burden to produce class-wide ‘common’ evidence on key elements of their claims”).
82. Braun v. Wal-Mart Stores, Inc., 106 A.3d 656, 663 (Penn. 2014) (“In this appeal, Wal-Mart asserts that it was subjected to ‘trial by formula,’ a practice disapproved by the United States Supreme Court in Wal-Mart Stores, Inc. v. Dukes . . . and Comcast Corp. v. Behrend . . . ”) (citations omitted).
83. Id. at 665.
84. Id.
85. Id. at 667.
entering a monetary judgment in favor of the class, where the court permits the use of extrapolation to relieve individual class members of their burden of proof and forecloses the defendants from presenting individualized defenses to class members’ claims.86 In 2016, yet again, the Supreme Court denied certiorari.87

While the Supreme Court has ducked the issue several times in the post-Dukes era, lower courts will continue to have to work through these arguments from the defense bar.88 The persistence of these arguments in the lower federal courts and state courts makes it increasingly likely the Supreme Court will eventually have to weigh in on the scope of defendant due process rights with regard to class cohesiveness in class-wide litigation.

C. Weaving Together the Three Categories of Constitutional Challenges to Certification

The examples in this Article have shown there are at least three major categories of constitutional challenges emerging in the class certification process: (1) Article III challenges to the inclusion of non-injured, absent class members; (2) due process challenges to certifying claims for class-wide punitive damages; and (3) due process claims based on a purported right to present every available, individual defense against putative class members (and thus holding each putative class member to individual proof).

Courts and scholars have generally treated these as belonging in separate doctrinal silos. They are, however, closely related in their function in the class certification process. These arguments taken together cannot be fully appreciated from the vantage point of the Federal Rules of Civil Procedure because they transcend the rules.

Article III standing has long been linked to due process by procedural scholars who study class actions. Writing in 1979, Lea Brilmayer connected the similarity in concerns between due process and standing in constitutional litigation.89 More recently, Sergio Campos went

88. See, e.g., Johnson v. Nextel Comm’ns, Inc., 780 F.3d 128, 149 n.25 (2d Cir. 2015) (interpreting the Montana Supreme Court’s decision in Jacobsen to stand for the proposition that “[t]he question of how the Supreme Court’s punitive damages precedent should be applied to class actions has engendered significant debate in the lower federal and state courts and in academic scholarship”).
89. Lea Brilmayer, The Jurisprudence of Article III: Perspectives on the ‘Case or Controversy’ Requirement, 93 Harv. L. Rev. 287, 297–99 (1979) (observing “the fairness problems that would arise if an ideological challenger—a challenger without the traditional personal stake—were permitted to litigate a constitutional claim”); Sergio J. Campos, Class Actions and Justiciability, 66 Fla. L. Rev. 553,
a step further, arguing that “justiciability is a deep due process concern.”

The theoretical linkage in the underpinnings of standing and due process helps explain the fluid slippage between the two in arguments regarding causation in class actions. When a defendant challenges certification because absent class members cannot show an injury caused by the defendant, the border between standing and due process is ephemeral, and the argument flows easily between both constitutional nodes.

Connecting standing to due process concerns in the context of causation and injury opens up a way to transfer some of the force of the defendants’ arguments about uninjured class members to state courts. Indeed, it is a very small logical step to reframe the argument from one about absent class members failing to show a particularized, concrete injury to one about the failure to require a showing that the defendant’s conduct caused unnamed class members alleged injuries, invoking potential due process concerns that apply in state courts.

Framed either way, when used in the class certification context, the point of the argument is to show that some of the class members are so different from other class members as to defeat aggregate litigation. That ultimately comes down to a request to defeat their claims individually for lack of proof. This illustrates how closely related the standing argument is to the other species of due process argument that focus on the need for individual proof in the class certification process. Both the purported right to present every available defense in class actions and the purported right to avoid class-wide punitive damages are grounded in a notion that proof of causation for every absent class member ought to be required.

Collectively, these due process arguments against state class actions add up to more than the sum of their parts: together, they would create massive barriers to the development of state class action procedures independent of the federal courts. The arguments jointly seek to triangulate due process in the bounds of individual litigation, potentially creating a constitutional barrier to any aggregate resolution of claims.

III. THE HISTORICAL CONSTITUTIONAL LIMITS ON AGGREGATION

The U.S. Supreme Court has long recognized that class actions operate in an exceptional procedural space. This exceptional procedural space...
eral space is bounded by stringent limits on who may be bound by a class-wide ruling. In federal courts, the modern version of Rule 23(a) embodies these boundaries by requiring numerosity, commonality, typicality, and adequate representation, all of which the Court has found “effectively limit the class claims to those fairly encompassed by the named plaintiff’s claims.”

These constraints animated the original version of Rule 23 that appeared in 1938 with the first edition of the Federal Rules of Civil Procedure (FRCP), drawn from the former Equity Rule 38, which predated the Federal Rules of Civil Procedure and previously required a question “of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court.” Indeed, the committee that drafted the original version of Rule 23 was of the opinion that such a formulation was “a common test,” pointing out several states also had such tests. In other words, these constraints pre-existed Rule 23 in equity.

While the federal rule gives concrete structure to the special procedural space, the constitutional limits flow principally from two famous, mid-twentieth century cases: Hansberry v. Lee in 1940, and a decade later Mullane v. Central Hannover Bank & Trust Co., both of which predated the 1966 amendment to Rule 23, which gave the rule its modern structure. Indeed, the committee that drafted the 1966 amendment to Rule 23 showed acute awareness of both of these decisions.

Both decisions emphasized the procedural due process rights of absent parties, focusing on claims potentially precluded by a judgment. Crucially, these foundational cases did not involve defendants’ rights.

92. See Dukes, 131 S. Ct. at 2550 (“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 class members.”) (internal quotations omitted).
93. Id. (quoting General Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982)).
94. FED. R. CIV. P. 23(d)(2) advisory committee’s note to 1966 amendment (discussing notice).
Later, the Court added to this foundation in *Phillips Petroleum Co. v. Shutts*, for the first time drawing a distinction between the level of due process concern afforded plaintiffs and defendants in class actions.99

These decisions comprise the foundational “constitutional canon” related to procedural due process for class actions, namely the cases in which the Court squarely confronted an issue of constitutionality related to class actions.100 Finally, *Mathews v. Eldridge*,101 an administrative law decision that on its face does not seem to speak to class actions, has become the modern touchstone of procedural due process in civil litigation generally.102

A. The Constitutional Canon for Class Actions: Flexibility and Pragmatism

*Hansberry v. Lee* is generally understood to be the wellspring of procedural due process in class actions.103 The opinion began with a basic and oft-cited premise, famously pronouncing that “one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”104 The Court nevertheless recognized that class actions are an exception to this maxim, and this exception has an old pedigree. Thus, “there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is res judicata as to members of the class who are not formal parties to the suit.”105 In other words, by the middle of the twentieth century, it was clear that the Constitution allows class actions to bind absent parties if properly certified.

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100. There are, of course, many other important Supreme Court cases about class actions that are not constitutional decisions; rather they are interpretations of Rule 23.
105. *Id.* at 42.
The Court expressly recognized in *Hansberry* that neither states nor federal courts were compelled by the Constitution “to adopt any particular rule for establishing the conclusiveness of judgments in class suits.”

In other words, while due process permitted class actions, it did not require any particular form of them. The rules for class actions were left to the good judgment of the state and federal courts. Indeed, the Court even acknowledged the importance of federalism and variability in that procedure, emphasizing “a proper regard for divergent local institutions and interests.”

Thus, from the Court's earliest analysis of the constitutionality of class actions, flexibility was the essence of the procedural fabric. Divergent local interests were woven into that fabric by design.

In sketching the outer constitutional boundary of that variability in class procedure, the Court held that due process would be violated “only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.” Under the facts of *Hansberry*, such protection was missing because the parties who sought to enforce a covenant could not be in the same class with, and represent, the interests of those resisting performance of the same covenant. Conflicting interest among the putative parties to the agreement created a due process problem to enforcement of the class judgment—one group could not fairly represent the other in the litigation.

Having declared the outer constitutional boundaries of adequate representation in *Hansberry*, the Court clarified the constitutional boundaries of the right to notice a decade later in *Mullane v. Central Hannover Bank & Trust Co.*

*Mullane* did not involve a class action, but rather a different kind of aggregate litigation involving beneficiaries of pooled investment trusts. The issue was whether the accounting settlement would bind absent beneficiaries—alogous to the way a modern class judgment would bind absent class members. Because the action would terminate the potential claims of such beneficiaries, the Court held that due process required reasonable notice and an opportunity to be heard. The Court rejected New York's notice-publication statute, as newspaper publication was unlikely to reach the intended beneficiaries. It famously declared “process which is a mere gesture is not due process.” However, it also rejected the petitioner's request to require notice by personal service to the large

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106. *Id.*
107. *Id.*
108. *Id.* (emphasis added).
109. *Id.* at 44.
111. *Id.* at 310–11.
112. *Id.* at 314.
113. *Id.* at 315.
group of potential beneficiaries.\textsuperscript{114} Instead, due process required consideration of the nature of the class of beneficiaries here, and it was satisfied so long as the form was “reasonably certain to reach most of those interested in objecting.”\textsuperscript{115} In other words, the nature of the class of beneficiaries, the limits of the fund, and the practical challenges of delivering the notice were factors weighed in the constitutional balance, and “perfect” notice by individual, personal service was not the constitutional touchstone. Procedural due process thus was elastic enough to accommodate reasonable efforts, within the constraints of a large class.\textsuperscript{116} No particular type of notice was constitutionally required; rather, a pragmatic, flexible standard applied, even allowing for the risk that it might not be effective at reaching every single beneficiary.\textsuperscript{117}

This pragmatism mirrors the flexible approach announced in \textit{Hansberry}. Indeed, in the latter half of the twentieth century, flexibility was the very hallmark of the constitutional ideal of procedural due process in court proceedings in many different contexts.\textsuperscript{118} Rather than defining the methods for exactly how a state must in all circumstances implement the constitutional standard, \textit{Hansberry} and \textit{Mullane} left it up to the states to find solutions that worked in particular circumstances.

The Supreme Court’s approach to procedural due process was reinforced as recently as 2006 in \textit{Jones v. Flowers}, which involved the right to notice in individual, nonclass litigation.\textsuperscript{119} Arkansas had re-

\begin{itemize}
\item \textsuperscript{114} \textit{Id.} at 318–19.
\item \textsuperscript{115} \textit{Id.} at 319 (emphasis added) (“[N]o [personal] service is required under the circumstances. This type of trust presupposes a large number of small interests. The individual interest does not stand alone[,] but is identical with that of a class. The rights of each in the integrity of the fund[,] and the fidelity of the trustee[,] are shared by many other beneficiaries.”).
\item \textsuperscript{116} \textit{Id.} (“[C]onstitutional law, like other mortal contrivances, has to take some chances . . . .”)
\item \textsuperscript{117} \textit{Id.} (“Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable.”).
\item \textsuperscript{118} \textit{Morrissey v. Brewer}, 408 U.S. 471, 481 (1972) (“Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.”); Cafeteria & Rest. Workers Union Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (“The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”); \textit{accord} \textit{Fed. Commc’ns Comm’n v. WJR}, The Goodwill Station, 337 U.S. 265, 275 (1949) (“[T]he right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations.”); see also \textit{Underwood}, supra note 17, at 797 (discussing the flexibility of due process in the class action context).
\item \textsuperscript{119} \textit{Jones v. Flowers}, 547 U.S. 220 (2006).
\end{itemize}
lied upon the mailing of certified letters that had been returned to the sender “unclaimed” as notice of a tax sale. The case showed that Mullane’s flexibility was still capable of generating an outer boundary: Arkansas officials were aware prior to the tax sale that the letters had not reached the intended homeowner because the letters had been returned to the sender, and failing to take some other action to notify the homeowner was impermissible. However, the key to the opinion is the Court’s recognition that the additional steps turned on what was practicable under the circumstances, and the Court expressly declined to specify what additional steps state officials should have taken. Indeed, the Court expressly embraced variation in state solutions implementing the basic right to notice: “The State can determine how to proceed in response to our conclusion that notice was inadequate here, and the States have taken a variety of approaches to the present question.”

Flexibility and openness to state solutions has been an uninterrupted theme in procedural due process from the mid-twentieth century to the Roberts Court. The flexible constitutional framework spawned by Hansberry and Mullane was also the backdrop against which the 1966 amendments to Rule 23 were drafted, creating the modern federal class action. Indeed, the Supreme Court recognized that Rule 23’s provisions were designed to incorporate the procedural due process standards set forth in this early precedent. In Eisen v. Carlisle & Jaqueline, the Court even interpreted the notice provision in Rule 23(c) as requiring individual notice to class members as an extension of Mullane’s standard.

The Court picked up the flexibility theme again in 1984 in Philips Petroleum Co. v. Shutts, clarifying due process in class actions without diminishing the boundary’s flexibility. Shutts presented two different constitutional issues, both focused on the members of a multistate plaintiff class: whether the Kansas state court had personal jurisdiction over absent, nonresident class members, and whether the state could apply its own substantive law to the claims of absent non-

120. Id. at 224.
121. Id. at 230, 234 (“In response to the returned form suggesting that Jones had not received notice that he was about to lose his property, the State did—nothing . . . . [W]e conclude the State should have taken additional reasonable steps to notify Jones, if practicable to do so.”).
122. Id. at 234.
123. Id. at 234, 238 (noting that “[i]t is not our responsibility to prescribe the form of service that the government should adopt”) (quoting Greene v. Lindsey, 456 US 444, 455 n.9 (1982)) (alteration in original).
124. Id. at 238.
126. Id. at 174.
residents whose claims had no connection to the state. Both constitutional claims were pressed by the defendant on behalf of the class members. None of the class members asserted these constitutional claims for themselves, and they objected to the defendant doing so. The Court allowed the defendant to raise these arguments in the class context because the defendant "has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound." Ultimately, the Court concluded that the class members could subject themselves to Kansas’s jurisdiction by failing to opt out of the class action. Its analysis focused entirely on the burden the assertion of jurisdiction would have on the absent class members, and not on the burden on the defendant. Indeed the Court expressly framed the analysis in terms of the due process rights of absent plaintiffs. Those rights afforded absent plaintiffs notice of the action, an opportunity to be heard and participate in the litigation, and some procedure by which a plaintiff might exclude himself from the action (opt out), all which Kansas provided.

The second constitutional claim involved the Kansas court’s decision to apply Kansas’s own law to all of the class members’ claims, even though 97% of the plaintiffs had no connection to Kansas. Kansas substantive law was in conflict with Texas substantive law on the viability of the claim and damages. Here, the Court found that the plaintiff class members’ “consent” to Kansas law (by failing to opt out

128. Id. at 804.
129. Id. at 805 (“They ... urge that petitioner’s interference is unneeded because the class members have had opportunity to complain about Kansas’ assertion of jurisdiction over their claim, but none have done so.”).
130. Id. at 805 (“The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.”).
131. Id. at 809–11.
132. Id. at 810–11 (“Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection. In most class actions an absent plaintiff is provided at least with an opportunity to ‘opt out’ of the class, and if he takes advantage of that opportunity he is removed from the litigation entirely.”).
133. Id. at 811 (“The Fourteenth Amendment does protect ‘persons,’ not ‘defendants,’ however, so absent plaintiffs as well as absent defendants are entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims. In this case we hold that a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.”).
134. Id. at 812.
135. Id. at 813.
136. Id. at 814–15.
of the class) was not enough. Instead, the Kansas court needed to find that Kansas had a "significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class . . . in order to ensure that the choice of Kansas law is not arbitrary or unfair."138

Much later, the concern over absent parties reemerged in Amchem Products, Inc. v. Windsor, where the Court focused on the procedural fairness of a certification for settlement where the settlement agreement was complex and fraught with conflicts of interest among the plaintiff class members.139 The Court noted that class certification should not "sacrifice[] procedural fairness," but again its focus was on fairness to absent class members.140

These cases taken together illustrate that the constitutional boundaries related to class certification have historically emphasized the due process rights belonging to the absent members of the plaintiff class. Even when those rights are asserted by defendants (who may derive some benefit from the preclusive effect of certification, as in Shutts) the right itself has been a class member's right in the canonical cases.

B. Due Process in Civil Litigation: Mathe ws v. Eldridge and Its Progeny

The historically flexible approach to due process in class actions comports with the Court’s approach to procedural due process in other contexts. In Mathews v. Eldridge,141 the Court created the modern procedural due process doctrine now used in a wide variety of contexts. Mathews involved the constitutional adequacy of the administrative procedures to assess continued eligibility for social security disability benefits.142 A petitioner whose benefits were terminated without a hearing challenged the constitutional validity of the agency’s procedures. The Court recognized that procedural due process constrains "governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."143 However, it rejected the notion that due process is a bright line constraint: "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."144

137. Id. at 820.
138. Id. at 821–22.
140. Id. at 615 (internal citation omitted).
142. Id. at 323–25.
143. Id. at 332.
144. Id. at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).
The Court fashioned a three-factor balancing approach to capture the contextual nature of the doctrine:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.145

Applying these factors to the constitutional inquiry afforded the agency substantial flexibility in fashioning its procedures for benefit determinations.146 The key was that the procedures created “a meaningful opportunity” for affected parties to present their case, even though the procedures might not resemble a court evidentiary hearing.147

The Mathews balancing test was subsequently extended beyond administrative procedures to other contexts, including civil litigation procedures in cases between private parties. In Connecticut v. Doehr,148 the Court relied on the Mathews doctrine to evaluate a constitutional challenge to a state’s prejudgment attachment procedures in civil litigation.149 Acknowledging that such disputes involve two private parties, unlike administrative decisions at issue in Mathews, it adjusted the balancing approach’s third factor by focusing attention on the interest of the party seeking the remedy with “due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.”150

The Court took this balancing framework a step further in Hamdi v. Rumsfeld, a case involving the due process rights of an enemy combatant challenging the grounds for detention using a civil petition for a writ of habeas corpus.151 The Court recognized that the Mathews balancing test was well established as “[t]he ordinary mechanism” applied to analyze procedural due process challenges.152

The Court has not yet applied the Mathews balancing approach to state or federal class action procedures, presumably because it has not yet taken up a defendant’s procedural due process challenge to such procedures. However, the Court’s long commitment to viewing due process through the lens of Mathews in other civil litigation contexts

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145. Id. at 335.
146. Id. at 348 (“The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances.”).
147. Id. at 349.
149. Id. at 10.
150. Id. at 11.
152. Id. at 528–29.
suggests that the approach is the fundamental yardstick by which due process challenges to class certification procedures ought to be measured. Indeed, the flexibility of the Mathews approach seems fully consistent with the pragmatic, flexible spirit of the historical class action canon.

C. The New Frontier: Movement Toward a National, Uniform Class Certification Procedure

The constitutional boundaries comprised of defendant rights in class actions is a new frontier with an inchoate and contested foundation. The historical canonical class action cases involved plaintiff rights (class members). Beyond that, Mathews suggests a fact-specific balancing of interests would be needed, though lower courts have not yet engaged in that task.

Some of the earliest examples of defendants asserting a due process right to present individualized defenses can be found in the late 1970s and early 1980s. These earliest attempts to carve out a particularized due process right for defendants in class actions met with mixed results in the lower courts. These defendant-focused due process rights have no canonical Supreme Court doctrine to recommend them; they are instead attempts to carve out a new right with an array of different justifications.

While the constitutional boundaries protecting members of a plaintiff class have been expressly articulated by the Supreme Court since 1940, the rights of defendants have to be inferred from other sources. Defendants sometimes invoke the obscure case of Lindsey v. Normet for the proposition that the Due Process Clause guarantees them a right “to present every available defense.” In Lindsey, a class of tenants sought to declare an Oregon unlawful detainer statute to be unconstitutional because the state procedure set an unreasonably fast timeframe on the eviction process, requiring that a trial to

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153. See, e.g., W. Elec. Co. v. Stern, 544 F.2d 1196, 1199 (3d Cir. 1976) (discussing the defendant’s constitutional “right to present a full defense”). But see Matter of Cadillac V8-6-4 Class Action, 461 A.2d 736, 749 (N.J. 1983) (rejecting “GM’s contention that certification of a class action would violate its right to due process of law under the Fourteenth Amendment by preventing it from asserting individual defenses, such as the treatment of the vehicles by each plaintiff and actual reliance on GM’s representations”).


evict tenants for unpaid rent must begin just six days after service of the complaint unless the tenant posted security for accruing rent. The tenants (who were the members of the plaintiff class) argued that the Oregon statute violated their due process rights. The Supreme Court observed in dicta that “[d]ue process requires that there be an opportunity to present every available defense.”157 The Court clearly was referring to the class members’ “defense to their own eviction” at the trial in Oregon state court, not the right of the class action defendants in the federal declaratory relief action. In other words, Lindsey was about the class members’ own right to be heard in their individual state eviction proceedings. The right at issue was the individual one of the tenant in their individual actions against their landlords.

The case said nothing whatsoever about the procedural rights of defendants in class actions to present “every available defense.” The case thus offers no support for the proposition that class action defendants are entitled to present every individualized defense in the class action proceeding.

Moreover, in the Supreme Court’s analysis, the right to present a defense was not a right to present any specific substantive defense. The substantive defenses available in the unlawful detainer action were simply not a constitutional matter.158 Moreover, defendants invoking this argument with regard to class certification have yet to contend with the absence of bright-line rules generally in procedural due process doctrine. Extending Mathews, one would expect a court to balance the relevant interests in the increased procedural protection requested by the defendants (i.e., individualized proof in class actions). These interests would include: (1) the defendants’ own interests in the benefit in presenting individualized defenses and (2) the risk of consideration of such individualized defenses in class litigation.159

1. Connecting Punitive Damages Doctrine with Class Certification

The effort to constitutionalize class certification gained significant traction after the Supreme Court’s decision in Philip Morris USA, Inc. v. Williams in 2007, a case involving individual litigation, not a class action.160 In limiting the availability of awards of punitive damages to this individual plaintiff in tobacco personal injury litigation, the Supreme Court focused on the constitutional limits forbidding “grossly

156. Lindsey, 405 U.S. at 63–64.
157. Id. at 66 (quoting American Surety Co. v. Baldwin, 287 U.S. 156, 168, (1932)).
158. Id. at 68 (“The Constitution has not federalized the substantive law of landlord-tenant relations . . . .”).
159. See Doehr, 501 U.S. at 11 (discussing application of the Mathews test in civil litigation between private parties).
“excessive” punitive damages previously articulated in BMW of North America, Inc. v. Gore,161 and State Farm Mutual Automobile Insurance v. Campbell.162 In Williams, the Court held due process forbids using punitive damages to punish a defendant for injuries inflicted upon nonparties.163 In the context of this individual (non-aggregate) litigation, the Court observed that “the Due Process Clause prohibits a State from punishing an individual without first providing that individual with ‘an opportunity to present every available defense.’”164 The Court was specifically concerned with “piling on” punitive damages for the defendant’s conduct directed at nonparties, rather than at the plaintiff.

As the Court explained, “[A] defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant’s statements to the contrary.”165 The holding thus limited punitive damages to the conduct within the four corners of the case at issue. However, in certified class actions, the four corners of the case includes absent class members, once the case is certified. The other alleged victims in a class action are not strangers to the litigation, but are actually members of the class suing the defendant for its class-wide conduct.166 They will be bound by the judgment, and thus in no way ought to be deemed “nonparties” in the sense used by the Williams court.167 Indeed James Underwood has aptly pointed out that the Supreme Court itself has recognized the due process rights of absent class members in class litigation,168 so it is nonsensical to describe them as “strangers” in the sense of Williams.169 Moreover, arguments that putative class actions (which by definition have not yet been certified) involve “strangers” (absent parties not yet repre-

163. Williams, 549 U.S. at 353 (“In our view, the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation.”).
164. Id. (quoting Lindsey v. Normet, 405 U.S. 56, 66 (1972)).
165. Id. at 353–54.
166. See, e.g. Underwood, supra note 17, at 797–98.
167. Id.
168. See discussion of the “due process class action canon” infra section III.A.
169. Underwood, supra note 17, at 797 (“Those who would . . . equate unnamed class members with ‘strangers’ to the litigation—whose harm cannot be used to punish a tortfeasor under Phillip Morris [v. Williams]—are obviously misapplying the Court’s mandate because class members are clearly bound by the results of a properly certified class action and their claims are finally adjudicated on their behalf with the Court’s oversight and permission.”).
sented by the named party) are not necessarily arguments against certi-
fication, if the requirements for certification are met—once the class is
certified, the "stranger" problem vanishes.

Other academic commentators have a range of views on what Wil-
liams means for class actions. Keith Hylton has taken an aggressive
position, arguing that Williams punitive damages holding implies that
all class actions are unconstitutional, reading the case to imply that
aggregate judgments inherently violate due process because "the only
real plaintiffs are the class representatives."\textsuperscript{170} Sheila Scheuerman
staked out a narrower reading, arguing that only some class actions
involving punitive damages are forbidden.\textsuperscript{171} Linda Mullinex focused
on incorporating Williams into the Supreme Court’s interpretation of
Rule 23, concluding that “prevailing class action jurisprudence, inte-
gerated with the Court’s punitive damage jurisprudence, is unlikely to
support certification of a Rule 23(b)(3) punitive damage class.”\textsuperscript{172}
Attorneys Elizabeth Cabraser and Thomas Sobol argued that combining
Rule 23 doctrine with punitive damages doctrine would allow certification
of mandatory classes for punitive damages under Rule 23(b)(1).\textsuperscript{173} By contrast, James Underwood has argued that the Su-
preme Court’s punitive damages cases (including Williams) should be
read as reflecting a concern for redundant punitive awards in multiple,
different cases.\textsuperscript{174} Under this view, certification of punitive dam-
age class actions is beneficial because it avoids the problem of
multiple punitive damages awards against a single defendant.\textsuperscript{175}

This Article does not seek to resolve the scholarly debate, other
than to highlight that the scholars who read Williams as a death-knell
for class certification in mass tort cases involving punitive damages
generally reach that point by combining the Supreme Court’s due pro-
cess analysis regarding punitive damages (in an individual case) with
interpretations of Federal Rule 23. Williams itself focused on individual
litigation, on its face it saying nothing about class actions, so de-
riving its implications in federal class certification logically depends

\textsuperscript{170} Keith N. Hylton, Reflections on Remedies and Philip Morris v. Williams, 27 Rev.
Litig. 9, 29 (2009). \textit{But see} Underwood, note 17, at 158 (disagreeing with Profes-
sor Hylton’s “extreme” reading of Philip Morris v. Williams, arguing this reading
“ignores the reams of published federal court opinions treating class members as
parties to certified class actions”).

\textsuperscript{171} Sheila B. Scheuerman, supra note 17, at 884 (“[W]here harm to the class is indi-
vidualized, punitive damages cannot be pursued as a class-wide remedy.”); accord
Byron G. Stier, Now It’s Personal: Punishment and Mass Tort Litigation After
Philip Morris v Williams, 2 Charleston L. Rev. 433 (2007–08).

\textsuperscript{172} Mullenix, supra note 17, at 850.

\textsuperscript{173} Elizabeth J. Cabraser & Thomas M. Sobol, Equity for the Victims, Equity for the
Transgressor: \textit{The Classwide Treatment of Punitive Damages Claims}, 74 Tul.

\textsuperscript{174} See, \textit{e.g.}, Underwood, supra note 17, 797–98.

\textsuperscript{175} \textit{Id.} at 801.
on how it interacts with Rule 23. This is crucial, as it overlooks the impact of due process arguments in aggregate litigation in state courts.

Technical doctrinal analysis of the interplay between punitive damages and federal class action doctrine makes a valuable contribution in understanding certification procedure in federal court. In another sense, though, this approach misses the forest for the trees: the end game of the defense strategy appears to be the emergence of a transjurisdictional, national doctrine that prevent class certification in any forum, state or federal.

The *Jacobsen* case out of Montana illustrates this drift into state court class action strategy: Allstate tried to decertify the class because there was a claim for punitive damages. Montana’s Supreme Court split the baby, leaving the class certified for purposes of determining the unlawfulness of Allstate’s company-wide policy, while requiring compensatory and punitive damages to be determined on an individual basis later.176 This partial win (allowing individual resolution of damages, as needed) did nothing to ameliorate the defendant who wanted out of the class action altogether. Indeed, all questions presented to the U.S. Supreme Court by the defendant focused on precluding class certification entirely based on due process.177

2. *Constitutionalizing* Wal-Mart Stores v. Dukes

Before the ink was even dry on the Supreme Court’s landmark decision in *Wal-Mart Stores Inc. v. Dukes* in 2011,178 some commentators had already begun to speculate whether it might have a “constitutional overtone,” even though it was decided solely as a matter of interpreting Federal Rule 23.179 This path making Title VII class action involved gender discrimination claims for Wal-Mart employees seeking injunctive relief and financial compensation in the form of backpay.180 The Supreme Court reversed the en banc ruling of the Ninth Circuit which had upheld certification of a nationwide class under Rule 23(b)(2).181 The class was massive, with 1.5 million female Wal-Mart employees as plaintiffs.

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176. See supra discussion section II.B.1.
181. Id.
Under that Rule 23(b)(2), certification may be obtained where “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.” In addition to interpreting that rule, the opinion also interprets the certification requirements for any class action set forth by Rule 23(a), focusing on the requirement in Rule 23(a)(2) that “questions of law or fact [be] common to the class.” The Court interpreted this to mean class members “suffered the same injury.” Moreover, the class-wide “common contention” regarding their injury “must be of such a nature that it is capable of class-wide 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.”

As the Title VII claimants in the Wal-Mart employee class were suing for individual employment decisions, the Court found they needed “some glue holding the alleged reasons for all those decisions together.” Without a company-wide employment policy at issue in the litigation, all they had were individual decisions of store managers for each employee, which made it “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.”

This holding rested on a finding that Wal-Mart permitted discretionary employment decision making and had no company-wide employee evaluation method. The putative class relied on statistics and social science to create an inference of discrimination, in the absence of such a company-wide policy. The Court rejected the statistical methodology offered by the putative class experts as insufficient to prove class-wide discrimination: an inference of the existence of sex-based disparity was deemed insufficient to prove the specific discriminatory “pattern or practice” Title VII claim at issue.

Were a plaintiff to establish such a “pattern or practice” in an employment discrimination case, a defendant would have the right to raise individual affirmative defenses demonstrating other lawful reasons for denying employment opportunities. In other words, if an employee seeking backpay were to prevail in making a prima facie showing of discrimination, the burden shifts to the employer to show a

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183. Dukes, 564 U.S. at 350.
184. Id. at 350 (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 (1982)).
185. Id.
186. Id. at 352 (emphasis omitted).
187. Id. (emphasis in original).
188. Id. at 353–54.
189. Id. at 353.
190. Id. at 355.
191. Id. at 366.
nondiscriminatory reason for the adverse employment action. That conclusion flows from the substantive law of Title VII, not from Rule 23. Based on this substantive law, the Court rejected deciding class-wide backpay using sample sets to test the individual defenses in order to model the percentage of valid claims in the class. Denying class certification thus turned at least in part on the specific statutory defenses available under Title VII, which Rule 23 could not accommodate on a class-wide basis.

The decision thus turned on the nature of Rule 23 when combined with Title VII’s substantive law. It was fundamentally an interpretation of the commonality requirement of Rule 23(a) (and the relief available in classes certified under Rule 23(b)(2)) in a particular statutory context. There was thus no constitutional foundation for the decision that would transcend its substantive law or Rule 23.

Although Dukes’s holding involved the need to interpret Rule 23, Justice Scalia considered taking the Dukes opinion out of the realm of the federal rules and into the realm of due process protection for defendants in a later case. However, he did so without the support of any other justices in Philip Morris USA, Inc. v. Scott, a tobacco case that came out of a Louisiana state court, in which the defendant sought certiorari the same term Dukes was decided.

The case emerged after the Fifth Circuit decertified a nationwide class of smokers in Castano v. American Tobacco, causing smaller state court class actions to proliferate. One case of these spin-off cases in Louisiana resulted in a victory for the plaintiff class bringing a novel “addiction as injury” claim regarding nicotine in cigarettes. The class received a $241.5 million fund for a ten-year, court-supervised smoking cessation program. When the defendants were unable to obtain reversal on appeal in state court, they petitioned for certiorari to the U.S. Supreme Court and sought to stay the judgment. The defendants sought review of the alleged violations of their right to due process based on the manner in which the class trial had been conducted in state court. The defendants argued that (1)

192. Id.
193. See id. (citing Int’l Brotherhood of Teamsters v. United States, 431 U.S. 324, 361 (1977)).
194. Id.
they were denied the right to cross-examine adverse witnesses; (2) they were barred from presenting relevant defenses; and (3) the respondents secured a judgment without proving the essential elements of their claim.200

The state proceeding was noteworthy because in calculating the money needed to fund the smoking-cessation program, the trial court had broad discretion under state law to make such awards,201 and the judge assumed 100% of smokers in the state would use the program. Even the class’s own expert predicted a utilization rate of just 5% (creating a liability of just under $12 million).202

In the fraud claim, the trial court had decided that individual reliance was not an issue in the trial; the jury in the first phase had already found liability for distorting the body of public knowledge, creating a common injury for the class as a whole.203 It thus concluded that there was no reason to allow individual defenses as to reliance in the next phase of the trial.204

In September 2010, Justice Scalia issued the defendants’ requested stay,205 hinting that he thought that the certiorari petition was likely to be granted in order to review the due process issues raised by the case. In the stay, Justice Scalia intimated that due process may have been violated by the elimination of a requirement for plaintiffs to prove (and an opportunity for defendants to contest) that individual plaintiffs believed and relied upon the tobacco manufacturers’ alleged misrepresentations.206 Justice Scalia’s stay order suggested that bypassing individual reliance to decide fraud on a class-wide basis could potentially violate the U.S. Constitution.207 His stay order thus indicated that not only was it likely that certiorari would be granted but also that the state court’s judgment would be reversed.208

Commentators expected certiorari to be granted, and some even boldly predicted that the Court might instead simply vacate the Louisiana decision and remand the case to Louisiana to reconsider in light of the Supreme Court’s decision in Wal-Mart Stores v. Dukes.209 To the surprise of many, in June 2011, the Supreme Court denied certio-

202. Application for Stay at 35, Scott, 131 S. Ct. 1. The defendants had agreed that the program would cost $153 per participant, but they disputed the utilization rate. See id.
203. Scott, 949 So. 2d at 1273.
204. Id. at 1271–72.
205. Scott, 131 S. Ct. 1 (J. Scalia, in chambers).
206. Id. at 4.
207. Id.
208. Id.
The Court was thus unwilling to use the case as a vehicle to constitutionalize class certification, at least at that moment.

The state court developments discussed in section II.B in Montana and Pennsylvania are the direct descendants of the effort to constitutionalize *Dukes* through the *Scott* case. Having failed in *Scott*, the defense bar continues to push the argument in state supreme courts, perhaps increasing the likelihood that the Supreme Court may someday take up the argument. In *Jacobsen*, the case out of Montana, Allstate’s unsuccessful certiorari petition explicitly asked the Supreme Court to declare *Dukes*’s holding with regard to Federal Rule of Civil Procedure 23(b)(2) to be a constitutional holding binding on the states. Indeed, it pointed out the different approaches of states on the requirements for certifying the type of classes governed by Rule 23(b)(2).

After *Williams* and *Dukes*, arguments have proliferated in the lower courts asserting a due process right to individual defenses and individualized proof in class actions—these arguments routinely encompass liability, compensatory damages, and punitive damages. Some lower courts have recently agreed with the defendants, recognizing a constitutional right to present individual defenses. Other state and federal courts that have considered the question have disagreed with the aggressive expansion of due process to encompass a right to present individual defenses in class actions. The defendants’ arguments thus have met mixed results in the lower courts.

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212. *Id.* at 25 (discussing the approaches of Montana, New Mexico, and Ohio’s courts in certifying class actions).

213. Equal Emp’t Opportunity Comm’n v. Performance Food Grp., Inc. 16 F. Supp. 3d 576, 580–81 (D. Md. 2014) (“The Court finds the EEOC class-wide award approach not only unworkable, but also violative of the rights of PFG and, potentially, the rights of those individuals on whose behalf the EEOC has made a claim.”); *Makaeff* v. Trump Univ., L.L.C., 309 F.R.D. 631, 642–44 (S.D. Cal. 2015) (finding that in order to comply with due process, the defenses must be able to present all individual defenses it might have in the damages phase of the class action). *Accord McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231–33 (2d Cir. 2008) (holding that aggregate litigation of liability for the class followed by individualized distribution violates due process); *Carrera v. Bayer Corp.*, 727 F. 3d 300, 307 (3d Cir. 2013) (“A defendant has a . . . due process right to challenge the proof used to demonstrate class membership . . . .”); *Rollins, Inc. v. Butland*, 951 So. 2d 860, 874 (Fla. Dist. Ct. App. 2006) (“Although a trial court confronting a massive class action may find it tempting to allow proof of ‘patterns’ and ‘common schemes’ to paper over the dissimilarities attendant to individual claims, considerations of administrative convenience do not trump the class action.”).

214. *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197–98 (1st Cir. 2009) (“Challenges that such aggregate proof affects substantive law and
Despite the mixed results, the due process arguments have become a common theme in challenges to class certification: defendants regularly claim their due process rights will be violated if they cannot “present every available defense,”\textsuperscript{215} which they assert can only be done individually.

D. Scholarly Critiques of the New Due Process Constraints in Class Actions

Expanding defendant procedural due process rights to restrict class certification has generally not been well received by most academic commentators. Alexandra Lahav has observed that under the “traditional conception of due process,” the right embodied “the process and rights traditionally available in Anglo-American law.”\textsuperscript{216} If this is the foundation, then then the history of Anglo-American understandings of the right must be the starting point.

Carefully tracing the procedural due process rights of civil defendants from the Framing period forward to the twenty-first century,

\textsuperscript{215} See Chorba & Evanson, supra note 155, at 749 & n.74.

Mark Moller observes the Framing generation of lawyers inherited a common law tradition regarding evidence and proof that was quite restrictive and frequently barred juries from considering probative evidence.217 This tradition also “heavily regulated, and rationed, parties’ proof opportunities by policing parties’ burdens of proof . . .,”218 and “there was simply no absolute right to present any particular quantum of evidence.”219 Rather, courts had broad discretion to control the submission of evidence.220 Thus, due process under the Fifth Amendment would not have protected a defendant’s right to “every available defense” in the traditional understanding at the time of the Bill of Rights’ adoption.

According to Moller’s historical research, due process instead was understood by the Framing generation to mean “a right to a hearing before an independent judiciary prior to the deprivation of rights.”221 He describes due process as focused (since the time of the Magna Carta) on “the institution that must do the depriving” of those rights (namely “a deliberative, independent judiciary”).222 Under this view, due process was a structural buffer to protect against “legislative interference in courts’ traditional discretion to determine ‘the effect of evidence.’”223 Moller presents a persuasive case for the conclusion that the Framing generation understood the term in the narrow sense as had long been understood by English lawyers.224

Based on an analysis of both modern procedural due process doctrine and history, he concludes these class action due process claims “are losers”225 because they are founded on long-repudiated views of due process. He demonstrates that the history of these modern defense arguments against class certification are firmly rooted in the due process notions popularized at the turn of the twentieth century in the Lochner era.226 He connects the emergence of a right to present “all facts” to the Lochner Court’s expansive view of both procedural and substantive due process, a view that collapsed with the New Deal Court.227 Moller argues that the economic substantive due process

218. Id. at 344.
219. Id. at 348.
220. Id. at 320, 348.
221. Id. at 336.
222. Id. at 337.
223. Id. at 366.
224. See id. at 363 (discussing the writing of John Adams and Alexander Hamilton).
225. Id. at 324.
226. Id. at 322 (referring to Lochner v. New York, 198 U.S. 45 (1905)).
227. Id. at 322. Moller points out that by the end of the nineteenth century, the understanding of due process had shifted to focus on the outcome rather than the institution, focusing on the “truth-seeking value of robust adversarial presentation of evidence.” Id. at 368. As the Lochner-era shifted to focus upon “unaccept-
concerns of the *Lochner* era were deeply connected with the emergence of a procedural focus on a full and fair defense.\(^\text{228}\)

As the *Lochner*-era collapsed into the New Deal era in the early twentieth century, Moller opines that *Hansberry v. Lee* marked the end of the pre-New Deal view of procedural due process, reducing due process in the class action to adequate representation, free of intraclass conflicts of interest.\(^\text{229}\) He points out the Court ignored arguments before it about the failure to present all the facts related to the enforceability of a racial covenant, which Hansberry’s attorneys had presented in the *Lochner*-era mode: Hansberry should not be deprived of his property without a chance to present all facts relevant to his defense of that property.\(^\text{230}\) The Court ignored that argument, focusing entirely on the structural defect in class representation.\(^\text{231}\)

By the middle of the twentieth century, the Court shifted to balancing concerns with efficiency against the risk of erroneous deprivation, anticipating the modern *Mathews v. Eldridge* approach.\(^\text{232}\) All of this leads to a conclusion that the modern constitutionalization of certification has no viable support in constitutional history without reviving *Lochner*-era understandings of due process.

Jill Wieber Lens makes an important contribution to the historical rebuttal of the purported right to “every available individual defense” by showing that the judicial understanding of procedural due process at the time of the Fourteenth Amendment’s ratification would not have supported the modern defense arguments about due process.\(^\text{233}\) She observes that punitive damages were already an established part of American tort law, and nineteenth century courts required no specific procedures regarding such damages or their defenses.\(^\text{234}\)

\(^\text{228. Id. at 373–76.}^\)

\(^\text{229. Id. at 379.}^\)

\(^\text{230. Id. at 380.}^\)

\(^\text{231. Id. at 381–82.}^\)

\(^\text{232. Id. at 382; see Mathews v. Eldridge, 424 U.S. 319 (1976).}^\)


\(^\text{234. Id. at 137 & n.151 (“In 1868, when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts. It is just as clear that no particular procedures were deemed necessary to circumscribe a jury’s discretion regarding the award of such damages, or their amount.”) (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 26–27 (1991)) (Scalia, J., concurring); see also Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 Chi.-Kent L. Rev. 163, 204–06 (2003) (recognizing the existence of punitive damages in the nineteenth century).}^\)
Lens argues that the historical values underlying procedural due process also fail to support the constitutionalization of class certification and attacks on punitive damages. She describes a “process-based theory of due process,” that at best protects the right of a defendant to “participate meaningfully.”235 She points out that both Walmart and Philip Morris had these rights in the relevant litigation that came before the Supreme Court. She argues that this meaningful participation turned not on the “subjective desires” of these defendants to present any particular proof, but on the ability to present defenses responsive to the tried, aggregate claims.236

Lens also identifies an “outcome-based theory” of procedural due process that “requires procedures necessary to achieve substantively accurate outcomes.”237 She contends that any alleged increase in accuracy through individual proceedings would be “inconsequential,” when compared to the extensive costs of non-aggregate litigation.238

This balancing under her outcome-based theory reflects the balancing test in Mathews, which balanced the value in additional procedural protections against their cost to assess procedural due process.239 As discussed in section III.B, the Mathews decision reflected the same flexible pragmatism at the heart of the mid-twentieth century canonical class action decisions.240 Under Mathews, there is no bright-line right to any particular procedure ensuring absolute accuracy; instead, “[d]ue process is flexible and calls for such procedural protections as the particular situation demands.”241 This was a fundamental shift away from the traditional view of due process (based on history) toward a cost-benefit approach weighing the risk that a procedure may produce errors in outcome against the benefit that increased procedural safeguards might produce for the parties or the government.242

In the era of the canonical due process cases, Lahav points out that the class action device generally fared well in this balancing ap-
She reads *Wal-Mart v. Dukes* as a retreat away from this balancing approach toward bright-line procedural rules. However, she suggests that the balancing framework could have equally emphasized the benefits of aggregate litigation. The cost-benefit balancing model of due process thus does not offer much of a foundation for the modern constitutional arguments against certification.

Lahav identifies one theory of due process that could support the expansion of procedural due process sought by class action defendants: a “dignitary theory” based on the value of individual participation in the judicial process. This theory was birthed by scholars, not courts. She sees the “threads of the dignitary theory” woven into defense arguments asserting a due process right to present individual defenses in class actions, even though courts have not picked up on these threads. It is crucial to note this is a theory in search of doctrine, as this theory of due process has not been reified by precedent. This is, at best, an argument for a version of right that does not yet exist in the Supreme Court’s due process decisions. It would require jettisoning both *Mathews’s* cost-benefit balance and traditional views of due process.

Finally, Lahav also identifies an “equality” view of due process based on a notion that the doctrine should equalize the litigation opportunities for individuals and the outcomes of people with similar situations. Here, the purported right to individual defenses gains no traction. Lahav argues that class actions equalize adversarial litigants with respect to resources by allowing class members to band together against a better-funded opponent, and also by ensuring like outcomes among class members.

These academic criticisms of the defendant-centric view of due process in class certification collectively erode the constitutional grounding for the purported right, absent a major shift in due process doctrine from the Court. Lower federal courts that have recognized these rights to prevent class certification appear to have been unaware of the missing doctrinal foundation for these rights, at least as a matter of federal procedural due process doctrine.

There is another very important reason to be dubious of the reworking of due process doctrine to attack class certification that has not yet been explored in the scholarly critiques—federalism. The im-

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243. *Id.* at 551 (discussing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985), in which the Court weighed the value of the benefits of class litigation against the economic cost of individual litigation).

244. *Id.* at 553.

245. *Id.*

246. *Id.* at 554.

247. *Id.* at 555.

248. *Id.* at 555–56.

249. *Id.* at 556–57.
portance of federalism in procedure has generally been ignored by the scholarship examining the due process doctrine in this context. Part III fills that gap, layering on the constitutional value of federalism as an independent concern that ought to prevent the Supreme Court from reworking due process to tinker with the class certification process.

IV. RECONSTRUCTING FEDERALISM IN THE CLASS ACTION LANDSCAPE

Thomas Main wisely pointed out in 2003 that “[c]enturies of legal history confirm that flexible and discretionary rules and standards of any form tend to rigidify over the course of time.” He made this observation at the dawn of the twenty-first century, in the context of the changing interpretation of the Federal Rules of Civil Procedure generally. Indeed, he showed that the Supreme Court’s increasingly technical, narrow, obstacle-strewn interpretations of Rule 23 “constrain[ed] judicial inventiveness” in mass tort litigation. His observation, however, has implications far beyond Rule 23.

Procedural due process in the latter half of the twentieth century evolved into a constitutional doctrine that embraced pragmatic solutions to unique factual circumstances, giving states broad latitude to craft local solutions. The potential expansion of procedural due process to bar class certification in state courts at issue here would ossify that procedural fabric through bright-line constitutional rules setting forth mandatory certification procedures for class actions—exactly the sort of rigid specificity the Court rejected in *Hansberry*, *Mullane*, *Flowers*, and *Mathews*.

The ossification Main described in the interpretation trends for the Federal Rules of Civil Procedure is threatening to jump out of the space of rule interpretation, into procedural due process doctrine, where it would affect the states. The post-*Dukes* challenges to state class certification seek to impose hard restrictions upon the states’ ability to certify class actions by constitutionalizing limitations on certification. Recognizing the procedural due process right to present all available individual defenses would hamstring the states’ ability to have their own class action certification rules differing from the most restrictive readings of Rule 23 by constitutionalizing those readings.

By constitutionalizing class certification objections, the defense bar is essentially arguing that there can only be “one procedure” to certify

251. See id.
252. Id. at 489–90, 508 (“[M]ore and longer procedural rules will never anticipate all of the eccentricities that fate or human ingenuity are ‘virile enough to devise.’”).
253. See supra section III.A (discussing *Mullane* and *Hansberry*).
a class, and that procedure must ensure individualized defenses to both liability and damages: every available, individual defense. Under this view, the states would not be laboratories of procedural innovation; they would instead become exact mirrors of federal procedure. The defense bar’s attempts to constitutionalize class certification standards would suffocate the experimentation and divergence practiced by state courts. If they were successful, these arguments would eventually create a homogeneous, national class certification procedure.

To the extent that *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 254 declared that class actions are mere joinder devices, then the corollary under the *Erie* doctrine must be that state courts should be free to follow their own state procedures in permitting or forbidding joinder. Moreover, the rules of evidence (which differ in state and federal courts) have long countenanced presumptions prohibiting the presentation of probative evidence and restrictions on the form in which that evidence might be. Those rules are not “unconstitutional” for disallowing defendants to bring forth any and all evidence they wish to bring.

All of this leads to questions about whether that procedural variance is valuable: why does it exist and how does it connect to federalism. Section III.A will turn to the value of state procedural autonomy in aggregate litigation; section III.B will then examine how this procedural autonomy connects to the states courts’ constitutional function as independent adjudicatory systems.

### A. The Value of Federalism in Aggregate Litigation

The Supreme Court has identified several justifications for its fidelity to federalism in other contexts. For example, it recognized the democratic advantages of local control, where state governments are in a position to be more responsive to their citizens’ needs and “increase [the] opportunity for citizen involvement in democratic processes.” 255 Additionally, the Court invoked the Jeffersonian view of states as experimental actors capable of innovative policy approaches that can be implemented on a small scale to test their efficacy without posing a risk that those efforts will have a significant impact beyond that state’s borders if the experiment fails. 256 The Court also has perceived federalism’s decentralization as promoting

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256. *Gregory*, 501 U.S. at 458 (“This federalist structure . . . allows for more innovation and experimentation in government.”).
fundamental liberties by avoiding the concentration of power in any one governmental actor.257

All of these federalism theories value states' autonomy because of the way that the exercise of that autonomy improves the process of governance. In this sense, the theories are neutral: they do not favor any particular type of policy making decisions within states, but rather they focus on the procedural benefits of having decentralized policy making generally. This means that states could be more generous in permitting class certification or more restrictive in prohibiting it—fidelity to federalism does not dictate an outcome, only a process of decision-making diffusion. Policy variations are, in fact, systemically desirable, reflecting experiments that may yet succeed or fail. These variations can also represent regional differences in values and social goals, bearing the imprint of local democratic processes.

This is not to say that there is no outer boundary to due process in state class actions. Indeed, *Hansberry* and *Mullane* both struck down state rules that violated procedural due process. We know that the notice boundary remains viable after *Jones*. *Shutts* also shed valuable light where that outer boundary line is located, outside the notice context.258 The Court reversed Kansas’s decision to apply its own law to a certified multi-state class, most of whose members lacked any discernible connection to Kansas. In applying *Allstate v. Hague*, the Court identified a flexible constitutional standard: the choice of law could not be “totally arbitrary or . . . fundamentally unfair.”259 In the context of choice of law, this meant that where the court deciding the class action had no connection to the suit, it could not apply its own law without violating the Constitution.260 Nor could it create a “common question” to certify a class by arbitrarily applying the law of the forum.261 The Constitution thus prohibited only a procedural choice that was “arbitrary or unfair” (based on unfair surprise).

Translating this to the certification problems currently plaguing lower courts, state class action procedures would undoubtedly violate due process if they were arbitrary and unfair. With the exception of *Philip Morris USA, Inc. v. Scott*, which involved a novel tort, all of the other cases discussed above in which certification was upheld, involved areas of law where class action procedure had long used statistical modeling and extrapolation. As Moller points out, evidentiary restrictions have been inherent in state and federal practice since the

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259. Id. at 818; see id. at 837 (Stevens, J., concurring).
260. Id. at 837 (Stevens, J., concurring).
261. Id. at 821.
Framing.262 Defendants have a right to expect courts to follow their own states’ laws in single-state classes; they do not have a right to rewrite those rules to put on individualized defenses in class actions where such devices traditionally allow class-wide or aggregate evidence.

B. The State Courts as Independent Systems in “Our Federalism”

Against this historical system of procedural diffusion in the United States, the defendant due process arguments in class actions call for a form of procedural “uniformism.”263 However, the uniformism being sought by defendants with regard to class certification is a most pernicious kind with regard to constitutional structure: it would eliminate state courts’ ability to function as separate, distinct procedural bodies in complex litigation.

The independence of state courts in deciding questions of state law is a bedrock principle of American federalism. As the Supreme Court famously pronounced in Younger v. Harris:

[A] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as “Our Federalism,” and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of “Our Federalism.”264

Younger’s expression of “Our Federalism” has particular salience for the mass tort litigation in state court because it captures the crucial balancing of “the legitimate interests of both State and National Governments [sic].”265 These state interests have been overlooked so far in the policy debates about class action procedures.

The bedrock principle focusing on state functions and interests infuses a wide-swath federal abstention doctrine.266 It also manifests in the venerable doctrine that forbids the Supreme Court from reviewing state court decisions resting on adequate state law grounds independent of federal questions.267 Indeed, this prohibition is so powerful

262. Moller, supra note 217, at 322.
265. Id.
266. Id. at 45–48.
267. Coleman v. Thompson, 501 U.S. 722, 729 (1991) (“This Court will not review a question of federal law decided by a state court if the decision of that court rests
that where a state court might have based a decision on a violation of the federal Constitution, or on an independent, adequate state law ground, the Court still must reject jurisdiction of the case so long as the independent state law ground is valid.\textsuperscript{268} This form of constitutional avoidance in the Supreme Court’s appellate jurisdiction emphasizes deference to state courts as independent adjudicatory systems. Similarly, the \textit{Ashwander} constitutional avoidance canon reflects systemic respect for the independence of state courts in declining to pass on constitutional questions if some other non-constitutional ground can dispose of the case.\textsuperscript{269} While none of these doctrines would prevent the Supreme Court from reviewing the constitutionality of class certification where no other ground could justify the state court result, the panoply of protective doctrine comprising “Our Federalism” has an important signaling function: the independence of state courts as separate adjudicatory bodies is structurally important and valuable.

As separate adjudicatory bodies, it is axiomatic that “[s]tates retain the authority under the Constitution to prescribe the rules and procedures that govern actions in their own tribunals.”\textsuperscript{270} In the class action context, where state claims are typically being adjudicated in state court, this means the states themselves define the features of aggregate litigation, and the procedural framework for it. Deviating from this default role ought to require a heavy showing by the defendants that the state procedure is arbitrary or unfair in the sense of \textit{All-state}, or incompatible with the pragmatic, flexible traditional view of procedural due process in the sense of \textit{Hansberry} or \textit{Mullane},\textsuperscript{271} or necessitated through the cost-benefit balance of \textit{Mathews}.\textsuperscript{272} This preserves an opportunity to notice, an opportunity to be heard and participate, and application of rules that are not arbitrary. It does not, however, require the states to entertain any particular form of evidence, proof, or damages model.

\textsuperscript{268} \textit{Klinger v. Missouri}, 80 U.S. (13 Wall.) 257, 263 (1871).
\textsuperscript{269} \textit{Ashwander v. Tenn. Valley Auth.}, 297 U.S. 288, 347 (Brandeis, J., concurring).
\textsuperscript{270} \textit{Felder v. Casey}, 487 U.S. 131, 137 (1988). Federal imposition of uniform procedures upon the states in civil litigation is normally possible only in very narrow circumstances under the so-called “reverse \textit{Erie}” doctrine where those procedures are integral to a federal statutory right being adjudicated. \textit{See} Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359, 362–63 (1952) (holding that the right to jury trial was so substantial a part of the Federal Employers’ Liability Act that the state court could not apply its own procedure to have a judge determine the question of fraudulent release); accord Byrd v. Blue Ridge Rural Elec. Co-op., Inc., 356 U.S. 525, 536 (interpreting \textit{Dice} narrowly while recognizing that “[a] state may, of course distribute the functions of its judicial machinery as it sees fit”).
\textsuperscript{271} \textit{See supra} section III.A.
\textsuperscript{272} \textit{See} note 232 and accompanying text.
A nationalized, homogenous class certification process based on the narrowest understanding of Federal Rule 23 is fundamentally at odds with this constitutional division of function. The aggressive expansion of procedural due process to accomplish that nationalization of procedure should thus be viewed with severe skepticism.

The flexible, pragmatic view of procedural due process that flows from Hansberry and Mullane through Mathews comports with “Our Federalism.” Indeed, the values align with precision, by allowing states to adapt to changing factual, social, and economic inputs to develop procedural approaches that strike the right cost-benefit balance for local circumstances. That alignment is worth preserving in our constitutional structure.

V. CONCLUSION

Arguments attempting to constitutionalize class certification continue to develop in the lower federal courts and in the states. The U.S. Supreme Court has not yet taken up the call to create due process rights belonging to class action defendants in a way that would constrain state aggregate litigation procedures. The issue will almost certainly merit the Court’s attention at some point soon.

Ultimately, the arguments favoring the due process right have little basis in precedent, history, or policy. The burden falls heavily on those advocating for procedural uniformism in class actions to justify the proposed intrusion into normal distributions of power among state and federal courts. Importantly, their arguments undermine fundamental federalism values regarding the integrity of state court systems as independent judicial systems with their own unique procedure. In so doing, they destroy the historical alignment between “Our Federalism” and procedural due process. At present, justification for such a realignment is lacking. Hopefully this Article may open the door to more fruitful discussion among scholars and courts about the interplay between federalism and arguments to constitutionalize class certification.
CFPB Director Richard Cordray called the Senate vote 'a major setback.'

Consumers may have a harder time suing financial companies they feel have wronged them.

The Senate voted Tuesday night to overturn a rule the Consumer Financial Protection Bureau worked on for more than five years. The final version of the rule banned companies from putting “mandatory arbitration clauses” in their contracts, language that prohibits consumers from bringing class-action lawsuits against them. It applies to institutions that sell financial products, including bank accounts and credit cards.
Consumer advocates say it's good news for companies like Wells Fargo WTC, +6.89% or Equifax EFX, +1.92% which have both had class-action lawsuits filed against them, and bad news for their customers.

“By forcing consumers into secret arbitration, corporations have long enjoyed an advantage in the process, and victims have often been precluded from sharing their stories with the press or law enforcement,” said Vanita Gupta, the president and CEO of the Leadership Conference on Civil and Human Rights, a group of advocacy organizations based in Washington, D.C.

The House voted in July against the rule. Now that Senate has done the same, the resolution goes to President Donald Trump, who is expected to sign it into law, and companies will maintain the ability to put arbitration clauses in their contracts.

The Senate vote was “a giant setback for every consumer in this country,” said the CFPB's Director Richard Cordray. “It preserves a two-tiered justice system where banks can have their day in court but deny their customers the same right.”

Here's what consumers should know:

**What is the forced arbitration rule?**

Many consumer advocates, in addition to the CFPB, favored the bureau's rule.

Mandatory arbitration clauses typically say that companies or customers must resolve disputes through privately appointed individuals known as arbitrators, but not through the court system, allowing companies to save time and money and avoid negative publicity. When consumers sign forced arbitration clauses, which they may not realize are included in contracts, they waive their right to participate in a class-action lawsuit against companies.

**Why are class-action suits important?**

Cordray had argued that class-action suits are one of the few courses of action consumers can take against companies, particularly when the arguments are over relatively small amounts of money.

Only about 2% of consumers with credit cards said they would consult an attorney or consider formal legal action to resolve a small-dollar dispute, according to the CFPB. Separately, 89% of consumers said they wanted the right to participate in class-action suits against their banks, when the Philadelphia-based nonprofit Pew Charitable Trusts surveyed about 1,000 consumers in 2016.

**Why did lawmakers vote for mandatory arbitration?**

Those who opposed the rule, including a group of Republican senators led by Mike Crapo, a senator from Idaho who is the chairman of the U.S. Senate Committee on Banking, Housing and Urban Affairs, said the CFPB is too powerful. He
had also criticized the CFPB's research process in creating the rule.

The Senate's vote against the CFPB's rule “is a win for consumers,” said Rob Nichols, the president and CEO of the trade group American Bankers Association. “As we and others made clear in our multiple comments to the CFPB, the rule was always going to harm consumers and not help them.”

But Elizabeth Warren, a Democrat from Massachusetts who is a proponent of the CFPB, has said the rule would have allowed “working families to hold big banks accountable when they're cheated.”

Warren sent letters to the CEOs of major financial firms this year to question their silence on the rule. “If your lobbyists are taking such strong positions against the rule, is there a reason both you and your bank have been unwilling to take a public position?” she wrote.

How did the CFPB rule impact the Equifax fallout?

Mandatory arbitration became relevant during the recent controversy over credit agency Equifax, which experienced a data breach that impacted more than 145 million U.S. adults' personal data. Consumers noticed that when they signed up for Equifax's monitoring services after the breach, the company originally had a forced arbitration clause in its contract.

After consumers and advocates raised alarm, the company removed that language. It was “a prime example of why we need the CFPB rule,” said George Slover, senior policy counsel at Consumers Union, a consumer advocacy group based in Yonkers, N.Y.

Will it impact class-action suits against Wells Fargo?

Consumer advocates also often cite the controversy around Wells Fargo opening bank accounts in customers' names as an argument in favor of a forced arbitration rule. In the aftermath, consumers joined class-action lawsuits against the bank, and wouldn't be able to if they were prohibited by a contract.

But those against the rule said the CFPB was too slow to identify the problems at Wells Fargo, turning that case into evidence of the CFPB's ineffectiveness. The CFPB did not immediately respond to MarketWatch's question about whether the Senate's vote will impact existing class-action suits against companies.
But Lisa Gilbert, the vice president of legislative affairs at Public Citizen, a nonprofit based in Washington, D.C., said the Senate vote shouldn’t impact cases that are already ongoing. However, there will “certainly” be more forced arbitration clauses in contracts in the future, and fewer cases brought against companies, she said.

**What can consumers do now?**

“Senate Republicans voted to give companies like Wells Fargo and Equifax a get-out-of-jail-free card,” said Karl Frisch, the executive director of Allied Progress, a consumer watchdog organization based in Washington, D.C. “This repeal will hurt millions of consumers.”

Consumers can still submit complaints to the CFPB about company practices they believe are unfair, on the CFPB's website. “I urge President Trump to stand with consumers and veto this resolution,” Cordray said.

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Ridiculous class-action lawsuits are costing you tons of money

By Kathianne Boniello

January 6, 2018 | 7:48pm | Updated

Mad because there's too much empty space in that bottle of Advil? Sue them!

Is there more than just vitamins in your Vitamin Water? Drag 'em to the courthouse!

Actually — someone probably has sued that big company that committed a petty wrong against you, without you knowing it. New York lawyers rake in millions by suing on behalf of people who have no idea their interests are represented in court.

New Yorkers pay the price for class action lawsuit frivolity — through "higher auto insurance rates, higher health care costs and higher taxes," says a report by the Empire Center for Public Policy.

About 177,000 lawyers actively practice in the state — one lawyer for every 112 residents. That's more lawyers per capita than any other state, the Empire Center says.
All those lawyers need to make a living — and New York’s distorted tort system gives them plenty of opportunity by letting them file lots of lawsuits, the December report says.

One lawyer thriving in the system is Manhattan attorney C.K. Lee, whose law firm, Lee Litigation Group, has brought more than 1,000 class-action cases in Manhattan and Brooklyn federal courts since 2009.

Lee’s cases include claims such as generic CVS brand candy boxes with too much air inside or air fresheners that only “mask” bad smells. In 2015, Lee represented a Queens woman who sued a Canadian company over “highly sexually charged” advertising for their women’s tights.

Kushyfoot used phrases like, “That’s the spot!” and “Oooh, yes!” to show consumers their tights would feel like a massage, but the product is “just socks,” Lee lamented to The Post at the time. He dropped the case six months later.

The same year, Lee claimed consumers were duped by oversized Advil bottles, even though pill counts are prominently listed on the packages. The Brooklyn federal judge who tossed the case said Lee’s claim “does not pass the laugh test.”

But Lee and other consumer lawyers keep at it. Like cooks who throw spaghetti at the wall, Lee files the same kinds of lawsuits over and over until he finds the ones that stick.

In July, he sued Pret a Manger sandwich shops — because some of its sandwiches are wrapped in a “cardboard shroud prevent[ing] consumers from seeing that the wraps’ packaging contains air in the middle.”

Pret asked a judge to toss the case in November, saying Lee’s plaintiffs bought just three wraps that don’t represent Pret’s entire menu.

The sandwiches are handmade in each store, and any extra air in the packages would be caused by human error, not deceptive marketing, the company said.

Lee’s clients’ “overreaching” allegations against Pret are “claims for products they have not purchased, alleging damages they did not suffer, seeking injunctive relief to which they are not entitled, and purportedly on behalf of a class of consumers who could not have had the exact same experience they had due to the nature of Pret’s handmade wraps,” the company said.

Like most such suits, this case likely won’t go to trial.

“Lawyers know that if they file 10 cut-and-paste complaints, five may settle because many businesses are eager to avoid litigation expenses and liability risk,” the Empire Center says. “In many instances, the lawyers get paid by the defendant to ‘go away’ while consumers get little or nothing.”

‘What class actions do is create a whole bunch of Davids fighting against the Goliaths together.’

When lawyers do get a case that sticks, they can make big money.

Lawyers representing the Center for Science in the Public Interest sued Coca Cola in Brooklyn federal court because bottles of its Vitamin Water touted its allegedly healthy benefits but didn’t state clearly the sugar content — 32 grams in a typical 20-ounce, 120-calorie bottle.

Coke changed the labels. Consumers got no money when the case settled in October 2015 — but the lawyers got $2.73 million in fees and expenses.

New York is “a favorite jurisdiction” for food marketing suits with copycat themes, the Empire Center notes. Lawsuits have griped that there’s too much air in packaging, or that “all natural” claims on packs of corn chips or oatmeal are deceptive even though the products’ ingredients are clearly listed.
Between 2015 and 2016, federal class-action suits in New York about food marketing accounted for nearly a fifth of such cases nationwide, said Cary Silverman, a Washington, D.C. attorney who co-wrote the Empire Center report.

“Consumers need to know that these are not raising serious health issues,” Silverman said. “They’re suggesting that consumers are going to be misled by things that any normal New Yorker who goes into the grocery store who picks something up and looks at the label knows very well what they’re getting.”

Cases that do not quickly settle with a private payout can drag on for years. When they finally end, the result can sometimes be “designed to benefit the class action lawyers instead of the consumers,” said Fordham Law school Professor Howard Erichson.

Class action lawsuits can do much good, Erichson believes. “What class actions do is create a whole bunch of Davids fighting against the Goliaths together,” he said.

One class action that brought real results was against German automaker Volkswagen. In 2014, US scientists discovered software in Volkswagen diesel cars that cheated US emissions tests.

Last year, the company agreed in a California federal court to a $10 billion settlement. As part of the deal, Volkswagen agreed to buy back or fix cars with the bad software, and to end leases on defective cars with no penalty to consumers. But the lawyers made out too — they raked in $175 million in costs and fees.

Washington, DC, lawyer Ted Frank has set up a consumer group aimed at watchdogging the lawyers who say they look out for consumers.

Last month, Frank’s group — the Center for Class Action Fairness — objected to a $115 million settlement involving health insurer Anthem Inc.

In 2015, hackers stole the personal information of about 79 million people from Anthem. The settlement will pay for two years of credit monitoring for everyone whose data was stolen, if they apply for the service. As of last month, less than 900,000 people signed up.

But consumers will get little else. The $115 million deal includes $23 million in administrative costs and $41 million in lawyer fees — leaving consumers with the equivalent of less than $1 apiece, Frank’s group says.

It was Frank’s objection to a proposed settlement in Wisconsin federal court that helped scuttle a proposed $525,000 payout for lawyers suing Subway.

The suit was spawned after an Australian kid snapped a shot of his Subway footlong sub next to a ruler, and found it came up an inch short. The 2013 viral pic prompted attorneys across America to claim consumers were being cheated.

A shortened Subway “footlong” is simply the result of bread baking up thicker in the oven, not less food, courts found.

“In their haste to file suit … the lawyers neglected to consider whether the claims had any merit. They did not,” Judge Lynn Adelman wrote in an August ruling tossing the planned settlement, which would have paid consumers nothing.

The case is an example of lawsuits “being constructed by lawyers, often making up an injury that no one actually thought existed,” Frank said.

And in Los Angeles Superior Court, a case accusing Ticketmaster of inflated, deceptive fees dragged on for 13 years, netted lawyers nearly $15 million — and compensated suffering consumers with vouchers for shows like Yacht Rock Revival — “the smoothest hits of the 70s and 80s with the original artists” — or Appetite for Destruction, a Guns ‘N’ Roses tribute band.

“The list of the free concerts is like a parody,” Frank quipped of the settlement.
“The idea of a class action is to somehow protect the consumer and to make injured parties whole,” said Adam Morey of the Lawsuit Reform Alliance of New York. “That’s not happening if the majority of the money goes to the lawyers.”
Reed’s final argument, that Freedom Mortgage perpetuated a hostile work environment, simply rehashes his claim for race-based termination. The claim is predicated on the assertion that the company employed different attendance policies for African-American and white workers, that African-American workers were disproportionately monitored and disciplined under those policies, and that his termination was the result of the discriminatory application of those policies, all creating a hostile work environment. This claim fails for the same reason as the wrongful termination claim, namely that Reed’s lawyer failed to gather evidence demonstrating that the company treated similarly situated non-African-American employees more favorably than African-American employees. We have considered the remaining arguments and find them without merit.

AFFIRMED.

IN RE: SUBWAY FOOTLONG SANDWICH MARKETING AND SALES PRACTICES LITIGATION.

Appeal of: Theodore Frank, Objector.

No. 16-1652

United States Court of Appeals, Seventh Circuit.

Argued September 8, 2016
Decided August 25, 2017

Background: Consumers brought putative class actions against sandwich restaurant chain owner, which were consolidated by Judicial Panel on Multidistrict Litigation, alleging restaurant engaged in deceptive marketing and sales practices by advertising sandwiches as “footlongs” when some sandwiches were slightly shorter than advertised lengths. The United States District Court for the Eastern District of Wisconsin, Lynn Adelman, J., 316 F.R.D. 240, approved settlement agreement that awarded injunctive relief to the class and $520,000 to class counsel. Class member who unsuccessfully objected to settlement appealed.

Holdings: The Court of Appeals, Sykes, Circuit Judge, held that:
(1) member had standing to appeal, and
(2) class should not have been certified and settlement should not have been approved.

Reversed and remanded.

1. Federal Courts ⊕3255

As a class member bound by class settlement, nonnamed class member had standing to appeal the class certification and settlement that awarded injunctive relief to the class and $520,000 for attorney fees in multidistrict litigation concerning sandwich restaurant chain’s deceptive marketing and sales practice by advertising sandwiches as “footlongs” when some sandwiches were slightly shorter than 12 inches. Fed. R. Civ. P. 23(b)(2).

2. Federal Civil Procedure ⊕161.1

Especially in the class settlement context, district judge must give the requirements for class certification undiluted, even heightened, attention.

3. Compromise and Settlement ⊕56.1

Judges must exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions.
4. Compromise and Settlement \(\Rightarrow 56.1, 58\)

Class settlements tend to yield benefits for stakeholders other than the class, which is why objectors play an essential role in judicial review of proposed settlements of class actions and why judges must be both vigilant and realistic in that review. Fed. R. Civ. P. 23(a)(4), 23(e)(2).

5. Compromise and Settlement \(\Rightarrow 59\)

If class settlement does not provide effectual relief to the class and its principal effect is to induce the defendants to pay the class's lawyers enough to make them go away, then the class representatives have failed in their duty to fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4).

6. Compromise and Settlement \(\Rightarrow 56.1\)

No class action settlement that yields zero benefits for the class should be approved, and a class action that seeks only worthless benefits for the class should be dismissed out of hand.

7. Compromise and Settlement \(\Rightarrow 64\)

Federal Civil Procedure \(\Rightarrow 182.5\)

Settlement of class action regarding sandwich restaurant chain's allegedly deceptive marketing and sales practices in advertising sandwiches as "footlongs" when some sandwiches were slightly shorter 12 inches, yielded fees for class counsel and zero benefits for the class, and therefore class should not have been certified and settlement should not have been approved; procedures required by settlement, which awarded only injunctive relief to the class, did not benefit the class in any meaningful way, as settlement acknowledged that uniformity in bread length was impossible due to natural variability of bread-baking process, and contempt as a remedy to enforce such worthless settlement was itself worthless.

Appeal from the United States District Court for the Eastern District of Wisconsin. MDL No. 13-02439—Lynn Adelman, Judge.


Theodore H. Frank, Attorney, COMPETITIVE ENTERPRISE INSTITUTE, Washington, DC, Pro Se.


Howard L. Teplinsky, Attorney, BEERMAN SWERDLOVE LLP, Chicago, IL, for Defendants–Appellees Subway Sandwich Shops, Incorporated, John Does, and ABC Corporations.

Before FLAUM, ROVNER, and SYKES, Circuit Judges.

SYKES, Circuit Judge.

In January 2013 an Australian teenager measured his Subway Footlong sandwich and discovered that it was only 11 inches long. He photographed the sandwich alongside a tape measure and posted the photo on his Facebook page. It went viral. Class-action litigation soon followed. Plaintiffs’ lawyers across the United States sued Subway for damages and injunctive relief under state consumer-protection laws, seeking class certification under Rule 23 of the Federal Rules of Civil Procedure.
The suits were combined in a multidistrict litigation in the Eastern District of Wisconsin.

In their haste to file suit, however, the lawyers neglected to consider whether the claims had any merit. They did not. Early discovery established that Subway’s unbaked bread sticks are uniform, and the baked rolls rarely fall short of 12 inches. The minor variations that do occur are wholly attributable to the natural variability in the baking process and cannot be prevented. That much is common sense, and modest initial discovery confirmed it.

As important, no customer is shorted any food even if a sandwich roll fails to bake to a full 12 inches. Subway sandwiches are made to order in front of the customer; meat and cheese ingredients are standardized, and “sandwich artists” add toppings in whatever quantity the customer desires.

With no compensable injury, the plaintiffs’ lawyers shifted their focus from a damages class under Rule 23(b)(3) to a class claim for injunctive relief under Rule 23(b)(2). The parties thereafter reached a settlement. For a period of four years, Subway agreed to implement certain measures to ensure, to the extent practicable, that all Footlong sandwiches are at least 12 inches long. The settlement acknowledged, however, that even with these measures in place, some sandwich rolls will inevitably fall short due to the natural variability in the baking process. The parties also agreed to cap the fees of class counsel at $525,000. The district court preliminarily approved the settlement.

Theodore Frank objected. A class member and professional objector to hollow class-action settlements, see, e.g., In re Walgreen Co. Stockholder Litig., 832 F.3d 718 (7th Cir. 2016), Frank argued that the settlement enriched only the lawyers and provided no meaningful benefits to the class. The judge was not persuaded. He certified the proposed class and approved the settlement. Frank appealed.

We reverse. A class action that “seeks only worthless benefits for the class” and “yields [only] fees for class counsel” is “no better than a racket” and “should be dismissed out of hand.” Id. at 724. That’s an apt description of this case.

I. Background

In January 2013 Matt Corby, an Australian teenager, purchased a Subway Footlong sandwich and, for reasons unknown, decided to measure it. The sandwich was only 11 inches long. He took a photo of the sandwich next to a tape measure and posted the photo on his Facebook page. Thus a minor social-media sensation was born. A few media outlets and some Subway customers were inspired to conduct their own sandwich-measuring experiments. See, e.g., Kaylee Osowski, Some Subway “Footlong” subs don’t measure up, N.Y. Post (Jan. 17, 2013), http://nypost.com/2013/01/17/some-subway-footlong-subs-dont-measure-up.

Subway immediately issued a press release announcing that it had “redoubled” its efforts “to ensure consistency and correct length in every sandwich.” The franchisor assured its customers that its “commitment remains steadfast” to ensure that every Footlong sandwich sold at each of its restaurants “worldwide” is at least 12 inches long.

Within days of Corby’s post, the American class-action bar rushed to court. Plaintiffs’ lawyers sued Subway seeking damages and injunctive relief under the consumer-protection laws of various states.1 Subway moved to transfer the

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1. Doctor’s Associates, Inc., the franchisor for Subway restaurants, is the actual defendant in the suits. For ease of reference, we’ll refer to the defendant as Subway.
cases to a single district court for a multi-
district litigation. The cases—nine in to-
tal—were eventually consolidated in the
Eastern District of Wisconsin.

In the meantime, the parties agreed to
conduct limited informal discovery in antic-
ipation of mediation. The early discovery
revealed that the claims were factually de-
cicient. For starters, the vast majority of
Subway Footlong sandwiches are, as the
name implies, at least 12 inches long. The
few that do not measure up generally fall
short by only about a quarter-inch, and the
shortfalls are the inevitable consequence of
natural—and unpreventable—vagaries in
the baking process. Additionally, all of
Subway’s raw dough sticks weigh exactly
the same, so the rare sandwich roll that
fails to bake to a full 12 inches actually
contains no less bread than any other.
What’s more, Subway standardizes the
amount of meat and cheese in each sand-
wich, and sandwich makers prepare each
one to order right in front of the customer,
adding toppings on request. So the length
of the bread has no effect on the quantity
of food each customer receives.

This early discovery, limited though it
was, extinguished any hope of certifying a
damages class under Rule 23(b)(3). The
overwhelming majority of Subway’s sand-
wiches lived up to their advertised length,
so individual hearings would be needed to
identify which purchasers actually received
undersized sandwiches. But sandwich
measuring by Subway customers had been
a fleeting social-media meme; most people
consumed their sandwiches without first
measuring them. Proof of injury was nigh
impossible because no customer whose
sandwich roll actually failed to measure up
received any less food because of the
shortfall. In addition, the element of mate-
riality—a requirement for a damages claim
under most state consumer-protection stat-
utes—was an insurmountable obstacle to
class certification. Individualized hearings
would be necessary to identify which cus-
tomers, if any, deemed the minor variation
in bread length material to the decision to
purchase.

Rather than drop the suits as meritless,
class counsel re-focused their efforts on
certifying an injunction class under Rule
23(b)(2) and eventually filed a consolidated
class complaint seeking only injunctive re-
lief. Following mediation, the parties
agreed in principle to a settlement in
which Subway committed to institute a
number of practices designed to ensure, to
the extent practicable, that its sandwich
rolls measure at least 12 inches long and to
keep those practices in place for four
years.

More specifically, Subway agreed that
(1) franchisees would “use a tool” for
measuring sandwich rolls; (2) corporate
quality-control inspectors would measure a
sampling of baked bread during each regu-
larly scheduled compliance inspection; (3)
the inspectors would check bread ovens
during each compliance inspection “to en-
sure that they are in proper working order
and within operating specifications”; and
(4) Subway’s website and each franchised
restaurant would post a notice explaining
that the natural variability in the bread-
baking process will sometimes result in
sandwich rolls that are shorter than the
advertised length. The settlement also ex-
plicitly acknowledged that “because of the
inherent variability in food production and
the bread baking process,” Subway could
not guarantee that each sandwich roll will
“always be exactly 12 inches or greater in
length after baking.”

Having agreed in substance to the terms
of a settlement, the parties spent the next
year or so dickering over fees for class
counsel and incentive awards for the
named plaintiffs. They eventually agreed
to cap attorney’s fees at $525,000 and in-
centive awards at $1,000 for each named plaintiff. The district judge preliminarily approved the settlement and scheduled a fairness hearing. Class counsel filed a motion seeking $520,000 in attorney's fees and a $500 incentive award for each of ten named plaintiffs.

Frank objected to the settlement and class certification. He argued that the proposed injunction didn't benefit the class in any meaningful way and so the settlement was worthless. The judge was unmoved. He approved the settlement and certified a class of “all persons in the United States who purchased a 6-inch or Footlong sandwich at a Subway restaurant between January 1, 2003[,] and ... October 2, 2015.” The judge also accepted class counsel’s request for $520,000 in fees as reasonable and approved the proposal for a $500 incentive award for each class representative. Final judgment was entered in accordance with these rulings. Frank appealed.

II. Discussion

A. Standing

[1] The first issue on appeal concerns Frank’s standing. The plaintiffs and Subway insist that he lacks standing to appeal because he doesn’t have any interest in the amount of attorney’s fees awarded as part of the settlement. Because the settlement provides only injunctive relief to the class—not monetary relief—any reduction in attorney’s fees will return to Subway and not to class members like Frank. See Pearson v. NBTY, Inc., 772 F.3d 778, 786 (7th Cir. 2014) (“If the class cannot benefit from the reduction in the award of attorneys’ fees, then the objector, as a member of the class, would not have standing to object, for he would have no stake in the outcome of the dispute.”).

But Frank’s appeal does not take aim at the judge’s ruling on class counsel’s motion for attorney’s fees. He challenges the certification of the class and the approval of the settlement. True, a decision to reverse the judgment will unwind the award of attorney’s fees, and neither Frank nor any other class member will benefit from reducing the fees of class counsel to zero. But as a class member who is bound by the settlement, Frank clearly has standing to appeal. Devlin v. Scardelletti, 536 U.S. 1, 10, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002). He properly objected at the fairness hearing and may “appeal the approval of a settlement ... that will ultimately bind [him].” Id.

B. Class Certification and Settlement Approval

[2, 3] Although the standard of review is deferential—the decision to certify a class and approve a class settlement is committed to the discretion of the district judge—our duty in this context is “far from pro forma.” Pearson, 772 F.3d at 780. We have explained that a district judge in this situation is akin to “a fiduciary of the class” and “is subject therefore to the high duty of care that the law requires of fiduciaries.” Id. (quoting Reynolds v. Beneficial Nat’l Bank, 288 F.3d 277, 280 (7th Cir. 2002)). Indeed, and especially in the settlement context, the judge must give the requirements for class certification “undiluted, even heightened, attention.” Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). The judge is called to “exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions.” Synfuel Techs., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 652 (7th Cir. 2006) (quoting Reynolds, 288 F.3d at 279).

[4] Rule 23(a) requires that the class representatives “fairly and adequately protect the interests of the class,” Fed. R. Civ. P. 23(a)(4), and a class-action settlement
may not be approved unless it is "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2). Underpinning both requirements is a concern for the unnamed class members whose interests the named plaintiffs represent and the settlement is meant to serve. We have remarked on the tendency of class settlements to yield benefits for stakeholders other than the class: Class counsel “support the settlement to get fees; the defendants support it to evade liability; the court can't vindicate the class's rights because the friendly presentation means that it lacks essential information.” Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1352 (7th Cir. 1996). That is why “objectors play an essential role in judicial review of proposed settlements of class actions and why judges must be both vigilant and realistic in that review.” Pearson, 772 F.3d at 787.

[5, 6] We put the point more bluntly in another appeal by Frank as the objector: A class settlement that results in fees for class counsel but yields no meaningful relief for the class “is no better than a racket.” In re Walgreen, 832 F.3d at 724. If the class settlement does not provide “effectual relief” to the class and its “principal effect” is to “induce the defendants to pay the class's lawyers enough to make them go away,” then the class representatives have failed in their duty under Rule 23 to “fairly and adequately protect the interests of the class.” In re Aqua Dots Prods. Liab. Litig., 654 F.3d 748, 752–53 (7th Cir. 2011) (quoting Fed. R. Civ. P. 23(a)(4)). And if the class representatives have agreed to a settlement that provides meaningless relief to the putative class, the district court should refuse to certify or, alternatively, decertify the class. “No class action settlement that yields zero benefits for the class should be approved, and a class action that seeks only worthless benefits for the class should be dismissed out of hand.” In re Walgreen, 832 F.3d at 724.

[7] The plaintiffs and Subway defend this settlement by insisting that it actually provides meaningful benefits to the class because Subway has bound itself, for a period of four years, to a set of procedures designed to achieve better bread-length uniformity. A simple comparison of the state of affairs before and after the settlement exposes the cynicism in this argument.

Before the settlement, class members could be fairly certain that a Subway Footlong sandwich would be at least 12 inches long. They could rest assured that because all loaves are baked from the same quantity of dough, each sandwich contained the same amount of bread even if an occasional loaf failed to bake to the full 12 inches in length. And if a loaf happened to bake up slightly shorter than 12 inches, customers could be assured of receiving the same quantity of meat and cheese as any other customer; no class member, regardless of bread length, was cheated on the amount of ham or turkey, provolone or pepper jack. As for other sandwich ingredients, class members could be as profligate or as temperate as they pleased: Subway’s “sandwich artists” add toppings at the customer’s request. In sum, before the settlement there was a small chance that Subway would sell a class member a sandwich that was slightly shorter than advertised, but that sandwich would provide no less food than any other.

After the settlement—despite the new measuring tools, protocols, and inspections—there’s still the same small chance that Subway will sell a class member a sandwich that is slightly shorter than advertised. Indeed, the settlement explicitly acknowledges that “because of the inherent variability in food production and the bread baking process, [Subway] will never
be able to guarantee that each loaf of bread will always be exactly 12 inches or greater in length after baking.” It’s safe to assume that Subway customers know this as a matter of common sense, but the settlement requires Subway to include a disclaimer on its website and in a poster prominently displayed at each restaurant: “Due to natural variations in the bread baking process, the size and shape of bread may vary.” And after the settlement, just as before, the rare sandwich that falls short of the full 12 inches will still provide the customer the same amount of food as any other. The injunctive relief approved by the district judge is utterly worthless. The settlement enriches only class counsel and, to a lesser degree, the class representatives.

The plaintiffs and Subway observe that the class can return to court with a motion for contempt sanctions in the event of any violation of the injunction. They rely on Eubank v. Pella Corp., 753 F.3d 718 (7th Cir. 2014), as support for this point, but that case doesn’t help them. In Eubank the defendant window manufacturer had offered extended warranties to purchasers before the class litigation; under the proposed settlement, the manufacturer could not revoke the extended warranties. That, we said, “confer[red] a bit of extra value” on the class members. Id. at 725.

Here, the procedures required by the settlement do not benefit the class in any meaningful way. The settlement acknowledges as much when it says that uniformity in bread length is impossible due to the natural variability of the bread-baking process. Contempt as a remedy to enforce a worthless settlement is itself worthless. Zero plus zero equals zero.

Because the settlement yields fees for class counsel and “zero benefits for the class,” the class should not have been certified and the settlement should not have been approved. In re Walgreen, 832 F.3d at 724. Because these consolidated class actions “seek[ ] only worthless benefits for the class,” they should have been “dismissed out of hand.” Id.

REVERSED AND REMANDED.

Mary R. RICHARDS, Plaintiff-Appellant,

v.

U.S. STEEL, Defendant-Appellee.

No. 16-2436

United States Court of Appeals,
Seventh Circuit.

Argued December 9, 2016
Decided August 28, 2017


Holding: The Court of Appeals, Chang, District Judge, sitting by designation, held that employer was not liable for intentional infliction of emotional distress.

Affirmed.

1. Federal Courts ☐3604(4), 3675

Appellate court reviews a district court’s grant of summary judgment de novo, construing all facts and reasonable
From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally

Deborah R. Hensler

I. INTRODUCTION

In recent years, as the U.S. Supreme Court has steadily closed the courthouse doors to class actions in the United States, an increasing number of foreign jurisdictions have adopted some form of representative group proceeding along the lines of a modern class action. Perhaps not surprisingly given the roots of the American class action in England’s medieval group litigation, outside the United States, class action procedures were adopted in the common-law jurisdictions of Australia and Canada before most civil law jurisdictions followed suit (Quebec, the Francophone Canadian province that is governed by civil law, is the exception to this generalization: it adopted a class action

1. Judge John W. Ford Professor of Dispute Resolution, Stanford Law School. This essay draws on my contributions to the co-edited book, CLASS ACTIONS IN CONTEXT: HOW CULTURE, ECONOMICS AND POLITICS SHAPE COLLECTIVE LITIGATION (Deborah Hensler, Christopher Hodges & Ianika Tzankova eds., 2016) [hereinafter CLASS ACTIONS IN CONTEXT].

2. See generally Robert H. Klonoff, The Decline of Class Actions, 90 WASH. U. L. REV. 729 (2013); Robert G. Bone, Walking the Class Action Maze: Toward a More Functional Rule 23, 46 U. MICH. J.L. REFORM 1097 (2013). Cases interpreting FED. R. CIV. P. 23 certification requirements in a more restrictive fashion than previous holdings or otherwise restricting plaintiffs’ ability to proceed in a class form include Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (vacating certification of a class of female employees, applying a heightened commonality standard); Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (vacating certification of an anti-trust class, on the grounds that the damage model did not fit the class definition); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (upholding the validity of an arbitration clause denying consumers’ right to proceed in class form); and Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (holding that prohibiting class members from proceeding in a collective arbitration procedure when such a prohibition effectively denies plaintiffs the ability to vindicate their rights is not sufficient to void the arbitration provision). Arguably, in more recent cases, a majority of Supreme Court justices have rejected efforts to further restrict rights of plaintiffs to proceed in class form. E.g., Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014) (maintaining “fraud on the market” as a substitution for individual reliance in securities litigation, thereby allowing plaintiffs to offer proof of commonality); Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016) (holding that representative plaintiff’s rejection of an offer of settlement does not automatically moot the litigation).

3. See generally STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) (describing the modern class action’s relationship with medieval group litigation).
procedure in 1978). Australia and Canada will both celebrate the twenty-fifth anniversary of their class action procedures in 2017, twenty-five years after the 1966 birth of the modern U.S. class action. However, the spread of class action procedures globally began in earnest in the 2000s. Today, at least thirty-five jurisdictions in addition to Australia, Canada, and the United States, including twenty-one of the twenty-five largest economies in the world, permit class actions for some or all legal claims (See Table 1). These procedures are authorized by statute, rule, or, in some instances, by constitutions or judicial decisions. The procedures differ in many respects; their common feature is that they allow one or a few persons or entities to represent a large number of similarly situated claimants in a legal action seeking a substantive remedy. This procedural form differs sharply from traditional court-based dispute resolution, involving one or a few claimants suing one or a few defendants for relief. It also differs from traditional joinder, in which multiple parties are before the court. Typically, in a representative class action, save for the class representative, the class members are “absent parties.”

In this essay, I discuss the possible reasons for this remarkable diffusion of a “legal transplant,” identify the key features of the procedures that influence the extent and nature of their application, discuss alternatives to class actions such as aggregated group proceedings and administrative compensation schemes, and consider the implications for the future of the global expansion of collective litigation.

5. See generally CLASS ACTIONS IN CONTEXT, supra note 1. There is no official compendium of jurisdictions with class actions. With colleagues in Europe, I have been monitoring the spread of class actions over the last decade.
Table 1

COUNTRIES THAT HAVE ADOPTED A CLASS ACTION FOR ONE OR MORE TYPES OF LEGAL CLAIMS

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II. WHAT EXPLAINS THE SPREAD OF CLASS ACTIONS?

Because the modern class action was first adopted in the United States and because most jurisdictions that have adopted the class action in the last decade refer to the “American class action” as a model, if not to emulate then to avoid, it is reasonable to view class actions outside the United States as “legal transplants.” There is rich literature on the global diffusion of ideas and practices generally, and the diffusion of legal policies and practices in particular. Scholars have proposed a variety of explanations for such diffusion, including coercion by external forces, simple emulation, rational policy making, and competition. No one has yet undertaken a systematic analysis of the causes for the spread of class actions, but it appears to be the result of a mix of factors including some but not all of the above.

Imperialists took their legal norms and practices to the nations they conquered, often adapting them so as to serve their own interests. There is no example, however, of a country that has adopted a class action procedure as a result of coercion by external forces; to the extent that external forces have been at work, it has been to oppose the adoption of a class action in a new jurisdiction. There is some evidence of simple emulation in the timing of class action adoption: once one country in a region has adopted a class action, it appears to be more likely that others will follow. For example, an early wave of adoption of class actions in Northern Europe was only recently followed by a similar wave in Western Europe, and the pattern is now extending itself in Central and Eastern Europe and in Asia. It is not clear that all these waves of adoption were responsive to particular policy challenges. However, these patterns might be explained by rational decision-making in which a country facing a problem for which a class action might offer a solution

7. See generally ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974); MICHELE GRAZIADEI, Comparative Law as the Study of Transplants and Receptions, in THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., 2006); Frank Dobbin, Beth Simmons & Geoffrey Garrett, The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?, 33 ANN. REV. OF SOC. 449 (2007). Although Watson is often cited as the first to propose the term “legal transplant,” he objected to its use to describe the spread of legal concepts that spread gradually, rather than as a result of an abrupt decision.

looks to its neighbors for an example of successful policy adoption and implementation. The rise of mass claims, which by their nature require a collective approach to resolution, is likely an example of the sort of challenge that inspires problem-solving efforts.9 The regional spread of class actions might also be explained by competition, however; when the Netherlands adopted a creative approach to settling mass claims collectively and advertised itself as the preferred forum for such settlements, it led to discussions in the United Kingdom about assuring that its courts did not lose “business” to the Dutch.10 Not as frequently discussed in the legal transplant literature is the role of legal education. The rise of LLM programs in American law schools targeting international students has inadvertently provided the opportunity for thousands of foreign legal practitioners to learn about the U.S. class action.11 Promoting the adoption of a new high-profile procedure upon their return to their home jurisdictions may convey special status and lead to new professional opportunities for these (mostly young) practitioners.12

The role of mass claims in propelling the adoption of class actions should not be underestimated. In the United States, courts frequently manage mass claims by informal and formal aggregation (e.g. the federal multi-district litigation procedure authorized by 28 U.S.C. § 1407 and its state look-alikes)13 rather than class actions, particularly in personal injury and property damage litigation that cannot meet the predominance requirement for certification of damage class actions under FED. R. CIV. P. 23(b)(3). Most other jurisdictions do not have formal procedures for aggregating individual claims (other than the class action), and the case management demands of both informal and formal claim aggregation are discomforting to judges.14

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9. On the rise of mass claims, see Deborah Hensler, Justice for the Masses? Aggregate Litigation & its Alternatives, 143 DAEDULUS 73, 73–82 (2014) [hereinafter Hensler, Justice for the Masses], see also Deborah Hensler, How Economic Globalisation is Helping to Construct a Private Transnational Legal Order, in THE LAW OF THE FUTURE AND THE FUTURE OF THE LAW (Sam Muller et al. eds., 2011).
11. Id. at 242.
12. For discussion of how diffusion of legal practices internationally may convey power and social status to practitioners, see Yves Dezalay & Bryant G. Garth, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1st ed. 1996).
13. Hensler, Justice for the Masses, supra note 9, at 73–82.
Today, in most democratic industrialized countries when serious injuries or substantial financial losses give rise to mass claims, litigation ensues. In most jurisdictions, class actions were adopted chiefly to facilitate resolving such claims. However, facilitating meritorious claims that would not otherwise be litigated because the amounts at issue are too small has contributed to the adoption of class actions in some jurisdictions. Canada and Australia are two jurisdictions whose class action jurisprudence highlights access to justice concerns; access to justice for small value consumer claims also helped propel the adoption of the European Principles on Collective Redress. In contrast, opposition to the adoption of class action procedures in many jurisdictions is grounded on beliefs that providing such a procedure will encourage a “flood of frivolous litigation,” often perceived as comprising small value claims.

Another possible objective of class actions, private enforcement of public regulations (the so-called “private attorney general” theory) is more contentious. The notion of using private litigation to supplement legal enforcement by government agencies is familiar to common law jurists and legal practitioners and to scholars trained in the economic analysis of law, which highlights the deterrence function of civil litigation. But it is anathema to many in civil law jurisdictions that have a long tradition of reliance on public institutions to ensure legal compliance. In recognition of this, during years of European Union controversy over the adoption of class actions, representative collective procedures were christened “collective redress” mechanisms, and the

15. For a discussion of the cultural phenomena of mass claiming, see Byron Stier & Iania Tzankova, The Culture of Collective Litigation: A Comparative Analysis, in CLASS ACTIONS IN CONTEXT, supra note 1.

16. See e.g., Iania Tzankova & Daan Lunsingh Scheurleer, The Netherlands, in THE GLOBALIZATION OF CLASS ACTIONS (Deborah R. Hensler, Christopher Hodges, & Magdalena Tulibacka eds., 2009); see also CLASS ACTIONS IN CONTEXT, supra note 1, at 391–93.


20. See CLASS ACTIONS IN CONTEXT, supra note 1, at 271–72 (briefly discussing deterrence theory as it applies to the private enforcement objective of class actions, including citations to key literature and court decisions). Although scholars and lobbyists argue over the appropriate boundary to set between public and private enforcement, qualitative case studies of litigation arising after mass injuries or losses occur indicate that responses are almost always a mix of public and private action. Id. at 259–78 (highlighting the interaction of public and private enforcement observed in qualitative case studies of litigation in multiple jurisdictions).
European Commission’s Principles on Collective Redress caution against (but do not entirely prohibit) using private class actions for regulatory enforcement.²¹

III. VARIATIONS IN CLASS ACTION DESIGN

Not all class actions are created equal. The key features of class action design differ significantly, reflecting both the differences in policy objectives discussed above and differences in jurisdictions’ legal history and culture. Moreover, the legal regimes in which class actions operate also differ in important respects. Together these differences in procedural features and legal regimes shape the implementation of class actions and their outcomes.

Four differentiating features of class actions have proved most important: substantive scope, rules on standing of class representatives, whether class members need to proactively join or proactively exclude themselves from the collective litigation (“opt-in” versus “opt-out”) and availability of monetary remedies.

Logically, when authority to proceed in class form is trans-substantive or authorized for many different types of legal claims it is more likely that class actions will be filed in court. Alternatively, when the use of class actions is limited to a single area of law, the procedure will only be used for claims grounded on that law. Australia, Canada, and the United States are examples of jurisdictions with trans-substantive class action procedural rules; Israel’s procedure is not formally trans-substantive but its use is authorized for a wide range of case types. Belgium, Chile, France, and Japan are examples of jurisdictions that have adopted class actions for consumer claims. England recently adopted a class action procedure for anti-competition (antitrust) claims. Taiwan authorizes class actions for shareholder claims.²² There is some evidence that once a legislature (or the judiciary) authorizes a class action for one type of claim, the procedure may later be used for other types of claims. Israel’s and France’s current class action regimes reflect

²¹. European Commissions Principles on Collective Redress, supra note 6. The European Commission engaged in long years of controversy over the question of whether to adopt a directive mandating the adoption of a class action procedure by member states, during which the Commission (and lobbyists) produced multiple reports and tentative recommendations. Unable to reach consensus, in June 2013 the Commission issued a set of recommended principles for designing collective litigation mechanisms throughout the EU. See id.

²². Germany’s group litigation procedure (the KapMuG), which is not a class action, is authorized for shareholder claims.
this sort of historical expansion. The Netherlands’ unique collective settlement procedure (the WCAM) was adopted to provide a mechanism for resolving product liability claims arising out of health injuries associated with the DES drug but was rapidly adopted for use in shareholder cases.

Table 2

Key Design Features of Class Actions

<table>
<thead>
<tr>
<th></th>
<th>Facilitate Class Actions</th>
<th>Restrict Class Actions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Scope</strong></td>
<td>Trans-substantive</td>
<td>One or a few areas of law</td>
</tr>
<tr>
<td><strong>Standing</strong></td>
<td>Representative Class Member</td>
<td>Authorized organizations or public officials</td>
</tr>
<tr>
<td><strong>Becoming a Class Member</strong></td>
<td>Opt-out</td>
<td>Opt-in</td>
</tr>
<tr>
<td><strong>Remedies</strong></td>
<td>Monetary damages as well as injunctive or declaratory relief</td>
<td>Injunctive or declaratory relief only</td>
</tr>
</tbody>
</table>

Procedures for determining whether it is appropriate for a substantively eligible complaint to proceed in class form differ among jurisdictions. Canada and the United States have formal certification procedures, which in the United States have become so strict in recent years that the certification process may turn into a mini-trial of the merits. Australia does not require that a judge certify a complaint before it can proceed in class form, but if a defendant challenges class treatment it will set off a judicial inquiry into whether the characteristics of the case —numerous plaintiffs, common issues, etc.—are such that class treatment is appropriate. In civil law jurisdictions, perhaps because of

23. Deborah Hensler, The Globalization of Class Actions: An Overview, in THE GLOBALIZATION OF CLASS ACTIONS, supra note 16 (reporting features of different countries’ class-action regimes) [hereinafter Hensler, Overview].
26. Vince Morabito, Australia, in THE GLOBALIZATION OF CLASS ACTIONS, supra note 16.
the recency of adoption of class action procedures, the rules for
determining whether a case should proceed in class form seem sketchier.

All of the common-law jurisdictions that have adopted class actions
to date permit class members (individuals or entities such as businesses)
to offer themselves as representatives of the class, subject to a judge’s
determination that the representative’s claims are typical of other class
members and that they can adequately represent the class members’
interests. In jurisdictions that require certification, adequacy of
representation is frequently interpreted as referring to the availability
of financial resources to prosecute the claim—a substantial issue when
the class is suing a well-resourced domestic or multinational corporation—
and the engagement of legal counsel with expertise in class litigation.
However, a court’s inquiry into adequacy may also raise the question of
whether the class members’ interests are sufficiently homogeneous that
the proposed class representative can represent them without a conflict.
In Amchem Products Inc. v. Windsor the U.S. Supreme Court ruled that a
class of asbestos exposed victims were situated so differently that they
could not be adequately represented by the proposed representative.27
The holding seemed to sound the death knell for all personal injury class
actions going forward, but by suggesting that creating separately
represented “sub-classes” might solve the problem of adverse interests
within a class, the court left a door open that some class actions have
been able to march through.28

Civil law jurisdictions that have adopted class action procedures
have generally limited standing to represent the class either to public
officials or quasi-public agencies (the approach of Brazil, Denmark, and
Taiwan) or to pre-existing associations or special purpose foundations
(the approach of Belgium, France, the Netherlands, and Japan).29 The
theory behind these choices seems to be that class members represented
by private lawyers are more likely to be susceptible to principal-agent
conflicts, leading to settlements of claims that will advantage the
representative plaintiff over the class or the class counsel over class
members (or both). However, experience shows that public officials are
susceptible to political pressures to bring or reject bringing class

28. See In re NFL Players Concussion Injury Litig., 821 F.3d 410, 421 (2016) (upholding class
certification and approval of a settlement of NFL Players’ personal injury litigation).
29. See generally, Hensler, Overview, supra note 23 (reporting features of different countries’
class-action regimes). Chile is an example of a jurisdiction that confers standing on both a public
agency and individual class members.
actions,\textsuperscript{30} and that non-profit associations and special purpose foundations are subject to conflicts of interest as well.\textsuperscript{31} In brief, agency problems are inherent in all forms of collective litigation.\textsuperscript{32}

Common law and civil law jurisdictions also differ with regard to preference for “opt-out” versus “opt-in” class action procedures. Australia, Canada, Israel, and the United States all have opt-out procedures for civil damages class actions, while most of western and northern European jurisdictions have adopted opt-in procedures, and the European Commission’s recommended principles for so-called collective redress mechanisms sternly admonish member states to eschew opt-out procedures.\textsuperscript{33} Notwithstanding this advice, some civil law jurisdictions such as Spain—a relatively early adopter—and Lithuania and Poland—more recent adopters—have chosen the opt-out approach. The Netherlands’ unique collective settlement mechanism (WCAM)—which is available only to claimants and defendants who have agreed to settle before approaching the court—is also an opt-out mechanism. The principled argument against opt-out class actions is that claimants run the risk of losing their right to bring a claim if they are unaware that they have been included in a certified class that has disposed of all class members’ claims. Requirements to provide extensive notice, both on an individual and mass basis, are intended to mitigate this problem,\textsuperscript{34} but as a practical matter there will always be a possibility that some class members are swept into an opt-out class action without realizing that this has occurred. Notwithstanding the importance of these normative and practical concerns, in reality opposition to opt-out class actions is driven

\textsuperscript{30} See Agustin Barroilhet, Self-Interested Gatekeeping? Clashes Between Public and Private Enforcers in two Chilean Class Actions, in CLASS ACTIONS IN CONTEXT, supra note 1; see also Kuo-Chang Huang, Using Associations as a Vehicle for Class Action: The Case of Taiwan, in CLASS ACTIONS IN CONTEXT, supra note 1.


\textsuperscript{32} See also Janika Tzankova, Collective Redress in Vie d’Or: A Reflection on a European Cultural Phenomenon, in CLASS ACTIONS IN CONTEXT, supra note 1, at 117–36

\textsuperscript{33} While agency issues may also arise in litigation between single represented parties, there is good reason to believe that the potential for conflict between class counsel and the class they represent is greater, because of the difficulty absent parties face in monitoring their representatives.

\textsuperscript{34} On the relationship of due process to notice in class actions in U.S. law, see Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).
largely by interest group politics: sophisticated parties understand that opt-out classes are likely to be larger than opt-in classes because (as demonstrated by empirical studies) individuals are less likely to proactively take steps to join an activity than to passively allow themselves to be included in the activity. As a result, opt-out class actions give the class (and class counsel) more leverage against defendants.

Finally, all jurisdictions that provide for collective litigation offer injunctive or declaratory relief as a remedy, but many restrict class members’ ability to collect money damages. The rationale for the restriction on money damages relates to the rationale for opt-in provisions: if money is at stake, class members arguably have a greater stake in pursuing an individual claim. The politics of the debate over remedies also matches the politics of the debate over opt-out versus opt-in: if those who have suffered a loss as a result of a defendant’s legal violation can band together to pursue a remedy, they are more likely to be successful; hence, permission to proceed collectively increases the likelihood that defendants will be called to account for bad behavior. Moreover, when there is an expectation of money damages, entrepreneurial lawyers, membership organizations, and special purpose foundations are all more likely to believe it is worthwhile to invest resources in pursuing legal claims.

Allowing money damages in class actions creates challenges when the class is large and when losses vary among class members. Even when common issues of law and fact justify collective treatment, allocating damages obtained at trial or in settlement to individual class

35. Health and education policy researchers have conducted systematic research on differences in participation rates using active (i.e. opt-in) versus passive (i.e. opt-out) consent. Generally, researchers find higher participation rates under passive consent conditions albeit little differences in the characteristics of the participant groups. See, e.g. Suzanne Spence et al. Does the use of passive or active consent affect consent or completion rates, or dietary data quality? Repeat cross-sectional survey among school children aged 11–12 years, 2015 BMJ OPEN (Jan. 13, 2015), http://bmjopen.bmj.com/content/5/1/e006457.info.

36. See generally Hensler, Overview, supra note 23.

37. This understanding produced the drive in the United States to include arbitration provisions prohibiting any form of collective proceeding in a wide range of consumer, employment, and other business contracts. In the past decade, the U.S. Supreme Court has upheld such contractual provisions. See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (upholding the validity of an arbitration clause denying consumers’ right to proceed in class form); see also Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (holding that prohibiting class members from proceeding in a collective arbitration procedure when such a prohibition effectively denies plaintiffs the ability to vindicate their rights is not sufficient to void the arbitration provision). In Europe, including mandatory arbitration clauses in form contracts is considered a violation of the European Convention on Human Rights.
members may impose logistical challenges. Precise eligibility and loss determination rules must be designed and communicated to class members and systems devised for delivering payments. In some circumstances in the United States, plaintiff and defense counsel have collaborated on designing special purpose facilities for delivering compensation to mass tort claimants.38

However, in consumer class actions and other financial damage class actions, it appears more common for the parties or lawyers to contract with for-profit claims administration companies to administer class settlements. Civil law judges have little experience addressing the distribution of monetary compensation, which may contribute to wariness in civil law jurisdictions about permitting class actions for money damages. Ironically, the politics in Europe that have promoted the use of class actions for “collective redress” rather than regulatory enforcement may promote the development of effective approaches to delivering compensation to claimants in mass litigation, which might in turn encourage more jurisdictions to expand class action remedies to include money damages.

Taken together, broad authorization for class actions, rules granting standing to class members, opt-out provisions, and availability of money damages all make it more likely that class action procedures will actually be used in the jurisdictions that have adopted them, rather than remain simply “law on the books.” At least as important as each of these features, however, is the legal financing regime within which the class action procedure must operate.39 Class actions, like all complex lawsuits, are expensive. Without adequate resources, class representatives, whether individuals or associations (and even whether private or public), cannot effectively prosecute class actions and are therefore unlikely to even attempt to use the procedure.

United States legal financing rules are the most favorable to class litigation: lawyers are permitted to bring class actions on a speculative basis, meaning that they can invest their own resources and if successful


39. For comparative information on fee regimes, see NEW TRENDS IN FINANCING CIVIL LITIGATION IN EUROPE (Mark Tuil & Louis Visscher eds., 2010) and THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE (Christopher Hodges, Stefan Vogener & Magdalena Tulibacka eds., 2010).
earn a premium on their investment. Moreover, under the “American fee rule” that specifies that each side will bear its own litigation costs, neither the class nor class counsel faces the threat of adverse costs. Under equitable fee doctrine, if the class prevails all of the class members will pay a share of attorney fees and expenses proportionate to the damages they obtain, eliminating the potential for free-riding. Bringing a class action is still a high-stakes investment for lawyers, since if defendants prevail the class counsel will receive nothing to cover his or her time or expenses. Furthermore, the class counsel is not permitted to set his or her own fee, because in class actions, unlike ordinary civil litigation, the judge decides what the prevailing class counsel will receive. Nonetheless, an experienced class action litigator can expect to achieve financial success by carefully selecting and prosecuting class actions.

This is less true in other jurisdictions. In most Canadian provinces, class counsel may charge contingent fees (although judges provide some oversight of fee arrangements), but class members do face adverse costs. In a few Canadian provinces, including Ontario and Quebec, public funds have been established to take on the risk of adverse costs. The funds are replenished by charging successful class members a small fraction of the total award or settlement for the class.

In Australia, lawyers are allowed to represent a class representative on a “no win, no pay” basis but are barred from charging fees based on the amount obtained for the class and the class representative faces adverse costs if the defendant prevails. Successful class counsel may receive an “upcharge” on their hourly fees but that is limited to twenty-five percent. The class representative is legally responsible for the full adverse costs if defendants prevail and class members other than the representative have no obligation to contribute to paying class counsel if the class prevails, creating an obvious “free-rider” problem. In most

41. FED. R. CIV. P. 23(h). Depending on fee doctrine within the federal circuit, in federal courts class counsel fees will either be awarded on a percentage-of-fund basis or on a “lodestar” basis (hours x hourly rate x multiplier). Across all federal class action settlements in recent years, class counsel fees averaged about twenty-two percent of negotiated settlement funds, with the percent declining as the size of the fund increased. See Theodore Eisenberg & Geoffrey P. Miller, Attorneys’ Fees and Expenses in Class Action Settlements: 1993-2008, 7 J. OF EMPIRICAL LEGAL STUD. 248 (2010) and Brian Fitzpatrick, An Empirical Study of Class Action Settlements and their Fee Awards, 7 J. OF EMPIRICAL LEGAL STUD. 811 (2010).
42. Hensler, Overview, supra note 23, at 23–24.
43. Id. at 24.
44. Id.
civil law jurisdictions, there is no provision for “no win, no pay” legal representation of the class; class counsel must charge on an hourly basis (although in some jurisdictions “success fees” are permitted on top of hourly charges), the class representative faces adverse costs and there is no scheme for avoiding free-rider problems.\footnote{Id. at 22–23.}

As a result of legal financing regimes, the prospects for class actions in many jurisdictions seem grim, however friendly to claimants the class action procedures themselves may appear. The reality, however, is considerably more propitious: in response to restrictions on fees and to adverse cost rules, third-party funders have appeared, first in Australia and now in Europe, Canada, and even the United States (where such financing seems least necessary). These third-party funders take different forms and apply different protocols, but in class actions the general approach is for third-parties to contract with individual class members to pay lawyer fees (while the litigation is ongoing) and take on the risk of adverse costs.\footnote{In the United States, third-party funders have generally asserted they will not fund class actions, perhaps in an effort to insure their preferred commercial corporate clients that the funders are not a threat. See Hensler, Third-Party Financing, supra note 8, at 505. However, over time this negative perspective on funding class actions may erode.} In return, the class members agree to pay the funders a hefty share of any damages they obtain; as the funders are not themselves lawyers, they are not barred from charging such contingent fees and in most jurisdictions to date their charges have not been regulated. Third-party financers are themselves funded by hedge funds, high-value individuals, and others looking for attractive investment opportunities that are not correlated with trends in the capital markets. Third-party funding works well in opt-in class action regimes where class members must identify themselves in order to join the litigation and in regimes where standing is limited to pre-existing associations (for which third-party funding may operate like a line of credit) and special purpose foundations that are legally authorized to enter into such financing agreements. In formally opt-out regimes where class members have standing to represent the class, the practical effect of third-party funding is to convert the class action to an opt-in procedure.\footnote{In Australia, third-party funding was challenged on the basis that it turned what was intended as an opt-out regime into an opt-in regime. However, the high court upheld the practice on the grounds that it provided access to the court in situations where opt-out class actions were financially too risky. Campbell’s Cash and Carry Pty Ltd v. Fostif Pty Ltd (2006) HCA 41(Austl.); Fostif Pty Ltd v. Campbell’s Cash and Carry Pty Ltd (2005) NSWCA 83(Austl.); Multiplex Funds Management Limited Pty Ltd v. P. Dawson Nominees Pty Ltd (2007) FCAFC 2000 (Austl.).}

Another “work-around” that has emerged in jurisdictions with
restrictive class action procedures or legal financing regimes—and also in some jurisdictions that forbid class actions altogether—is for a collection agent to offer to purchase the claims of individual claimants. Once claims are assigned to it, the agent can appear in court as a single plaintiff. Funding for entities that have adopted this litigation model is also being provided by third-party funders that invest in class actions.\(^{48}\)

Other aspects of legal regimes also may hinder or hamper the use of class action procedures. The availability of damages beyond mere compensation—for example, punitive damages or disgorgement of profits or statutory damages that allow a multiplier of actual damages such as “treble damages” under United States anti-trust doctrine—increase the incentive to file class actions. The potential in the United States for a jury trial—however remote—may also increase the incentive to file a class action where the likelihood of a favorable jury verdict seems great.

IV. ALTERNATIVES TO CLASS ACTIONS: GROUP PROCEEDINGS AND ADMINISTRATIVE SCHEMES

In the United States mass claims that arise out of the same facts and law are usually collected and transferred to a single court and judge for pre-trial management purposes under the federal multi-district litigation statute (MDL).\(^{49}\) Once the transferee judge has ruled on significant substantive motions, including motions to dismiss, motions for summary judgment, and motions for class certification, as well as admissibility of expert evidence and key documents, the litigation usually settles.\(^{50}\) The

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48. See Online Platform Launched for European Customer Claims against Volkswagen, (April 24, 2016), http://www.hausfeld.com/news/eu/online-platform-launched-for-european-customer-claims-against-volkswagen. Michael Hausfeld, a leading American class action lawyer, has successfully used this strategy for anti-competition (anti-trust) litigation in Europe. His firm is acting for those who assign their claims to the advertised collecting entity; funding to Hausfeld is provided by Burford Capital, a leading third-party litigation funder headquartered in New York.


50. See, e.g. Martin Redish & Julie Karaba, One Size Doesn’t Fit All: Multidistrict Litigation, Due Process and the Dangers of Procedural Collectivism, 95 B.U. L. Rev 109, 128–29 (2015). Under the provisions of 28 U.S.C. § 1407 and the U.S. Supreme Court’s holding in Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998), cases that are not settled either individually or as a result of an aggregate resolution must be returned to the district courts in which they were filed for final resolution.
Group Litigation Order (GLO) in England plays a similar role in that jurisdiction.\(^51\)

The United States MDL provides an alternative scheme for aggregating mass claims when class certification is deemed inappropriate. Since its inception in 1968, the number and scope of MDLs has grown,\(^52\) perhaps in part in response to restrictions on certifying class actions for mass injury claims imposed by the U.S. Supreme Court. In Germany, steadfast opposition to the adoption of a class action procedure to address mass claims led to the adoption of the Capital Market Investors Model Proceeding” (Kapitalanlegermusterverfahrensgesetz, popularly known as the KapMuG).\(^53\) Shareholders’ lawsuits arising out of the same facts and law can be entered in a register in a single court. A single “model” case is then selected for the court to investigate and decide. As that case works its way through the judicial process, action in all other cases on the register is stayed and the limitation period is tolled. The liability decision in the model case binds all cases on the register but remedies must be pursued subsequently on an individual basis. Unlike the United States MDL and the English GLO, both of which were intended to streamline pre-trial preparation of similar cases, the German procedure focuses on deciding the model case, a process that under German’s civil law encompasses multiple decision-making stages, all directed by the judge. (Under the KapMuG, the case may also move frequently between the trial and appellate courts as key trial court decisions are appealed to the higher court.) In practice, the MDL, GLO and KapMuG share the tactic of selecting one or a few cases for trial (called “bellwether cases”

\(^51\) CHRISTOPHER HODGES, MULTI-PARTY ACTIONS 29–46 (2001).

\(^52\) According to John Rabiej of the Duke Law School Center for Judicial Studies, “In 2014, there [were] 117,647 non-asbestos cases in MDLs representing 36% of the total U.S. pending civil caseload. Excluding prisoner and social security actions from the U.S. pending civil caseload, which typically (though not always) take little time of article III judges, the 117,647 non-asbestos cases in MDLs represent about 45% of the U.S. totals.” Letter from John Rabiej, Duke Law School Center for Judicial Studies, to Deborah Hensler, Stanford Law School (August 29, 2014) (emphasis in original) (on file with author). The proportion of pending cases that are part of a consolidated proceeding may somewhat overestimate the importance of MDL litigation since MDL litigation typically lasts for a longer time than ordinary civil litigation. The rate of MDL denials has increased recently. Whether this portends a sea change in the judiciary’s willingness to aggregate multi-district cases or is merely a random deviation remains to be seen. Amanda Bronstad, Multidistrict Litigation Panels Increasing Denials Reflect Heightened Scrutiny, NAT’L L.J. (July 18, 2016). http://www.nationallawjournal.com/id=1202762777589/Multidistrict-Litigation-Panels-Increasing-Denials-Reflect-Heightened-Scrutiny?slreturn=20160901165935.

\(^53\) For a description of the history and implementation of the KapMuG scheme, see Axel Halfmeier, Litigation Without End? The Deutsche Telekom Case and the German Approach to Private Enforcement of Securities Law, in CLASS ACTIONS IN CONTEXT, supra note 1, at 279–98.
in the United States) and using the outcomes in those trials either to determine or influence the outcomes in all other cases in the group.

An alternative to class actions and group proceedings in many jurisdictions is to create publicly or privately subsidized administrative compensation schemes for mass claims. Japan has a long tradition of establishing administrative compensation schemes for mass catastrophic injuries. 54 Several European countries have compensated asbestos disease victims through administrative schemes. 55 The United States also has a long tradition of establishing special administrative compensation funds for victims of disease and government mistreatment, 56 including coal miners suffering from black lung disease 57 and victims of radioactive weapons’ testing. 58

In some recent instances in Europe, corporations have funded administrative compensation schemes at the direction of regulatory authorities. For example, in 2015, the Belgian financial market regulator ordered financial institutions that had sold interest rate swaps to small and medium-sized enterprises (SMEs) that suffered financial losses as a result of these purchases to establish a program to compensate the SMEs “as a commercial gesture.” 59 In the Netherlands, where the financial regulator lacks the authority to issue an order compelling financial institutions to establish such a compensation scheme, it instead recommended to the Ministry of Finance that a “committee of


59. Correspondence with Prof. Stefaan Voet, Katholick University of Leuven (Belgium), October 4, 2016 (on file with author). Interest-rate swaps are tradeable derivative instruments that allow borrowers and lenders to exchange fixed-rate interest obligations for floating interest rate obligations. Depending on fluctuations in interest rates either the borrower or lender may benefit from the exchange (“swap”). Like most financial instruments traded on the market, these derivatives carry substantial risks. When small and medium-sized business enterprises got into trouble as a result of purchasing interest rate swaps from financial institutions, questions were raised in Belgium, the Netherlands and the U.K. about whether the transactions violated legal rules.
independent experts” be established to design a scheme and order the financial institutions to implement it.\textsuperscript{60} In another example, the European Commission accepted the offer of Deutsche Bahn (DB)—the German national railway company—to settle a competition (anti-trust) action brought by the Commission by changing DB’s pricing structure and reducing prices on railroads that were negatively affected by DB’s allegedly anti-competitive behavior. Commentators have referred to this as an example of “regulatory redress”—i.e. compensation ordered by public regulators in lieu of or in addition to other sanctions.\textsuperscript{61}

Although promoted as more efficient (and perhaps fairer) approaches to delivering compensation to victims of external forces and events, a consistent pattern of complaints across administrative programs established to assist different sorts of victims in different countries suggests that in practice such programs often struggle to serve the purposes for which they are intended. Often the number of eligible recipients who come forward as well as their needs exceed estimates (frequently developed in the absence of comprehensive data on how many people were injured and to what degree). Programs subsidized by government are frequently underfunded and funding problems can increase as programs drag on beyond the expected date of termination. Programs initially funded by private entities may appeal for government assistance when the initial appropriation to support the fund runs out.\textsuperscript{62}

The widely-perceived success of the 9/11 compensation program,\textsuperscript{60, 61, 62}
established and subsidized by the U.S. federal government to compensate families of the victims of the terrorist attacks, seems to have renewed interest in administrative compensation schemes as an alternative to litigation for mass claims. Kenneth Feinberg, the Special Master who designed and managed the 9/11 compensation program, has since been called upon by corporate defendants to design programs offering compensation to victims of the British Petroleum Oil Spill in the Gulf of Mexico and the General Motors ignition switch defect.63 The attractiveness of this new breed of no-fault systems in which corporations without conceding legal liability offer compensation to victims in an effort to limit the corporation’s ultimate financial responsibility as well as reputational loss appears to be growing. When news of Volkswagen’s scheme to fool emissions control equipment into thinking their diesel-powered cars complied with air quality standards burst on the scene, Volkswagen of America announced that it had hired Feinberg to manage a compensation facility along the lines of the BP claims facility that he administered for the British petroleum corporation.64 No doubt reflecting the fact that such schemes are only attractive to corporations when the threat of private litigation or public enforcement is real, Volkswagen’s German parent company asserted that it has no plans to offer German consumers similar access to compensation.

A third alternative to class actions that has been promoted in Europe in an effort to divert political attention from litigation solutions is alternative dispute resolution outside court systems. Although the European Commission to date has been unable to reach consensus on a mandate for member states to adopt class action procedures, in May 2013 the Commission issued a mandate directing member states to establish by July 2015 alternative dispute resolution procedures for resolving


consumer disputes outside their court systems. The lengthy directive (which was accompanied by a directive to establish on-line dispute resolution mechanisms for cross-border online purchases) spelled out in great detail the issues member states need to consider in designing procedures to assure their fairness to consumers and traders. Among the advocates for the consumer ADR directive were corporate lobbyists who hoped that the mandate would impede the development of a European Commission directive for member states to adopt class action procedures for economic disputes.

Studies published in the run-up to the adoption of the consumer ADR directive uncovered a host of existing out-of-court dispute resolution mechanisms in European countries, operated by private businesses, trade associations, and public entities. As is true also in the United States, assembling data to assess the performance of these mechanisms was difficult, perhaps contributing to the provisions in the European Commission’s consumer ADR directive mandating the collection and publication of performance statistics. Missing from the published research is any discussion of the existing mechanisms’ ability to deal with mass claims that arise within relatively short time periods (as in the Volkswagen debacle). Anecdotal evidence from the United States suggests that like courts, out-of-court dispute resolution mechanisms struggle to dispose of such claims expeditiously, for much the same reasons as challenge court dispute resolution systems.

66. Interestingly, in the light of the U.S. Supreme Court jurisprudence upholding mandatory pre-dispute arbitration clauses in adhesive contracts—including clauses that bar claimants from proceeding collectively in any forum—the European Commission’s directive specifies that an “agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialized and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.” Directive 2013/11/EU, of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending regulation (EC) No 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L 165) 63, 74–75.
67. CHRISTOPHER HODGES ET. AL., CONSUMER ADR IN EUROPE (2012).
68. 2013 O.J. (L 165) at 77.
69. See, e.g., DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 339–98 (2000) (describing the inability of corporate complaint resolution mechanisms to address customers’ complaints about property damage due to faulty construction products when the mechanisms received massive numbers of such complaints).
V. CONSEQUENCES

Given the sharp and protracted controversy that has accompanied the introduction of class actions in virtually all jurisdictions, and the important concerns that have been raised about potential uses and abuses of collective litigation, one might expect that jurisdictions would be carefully tallying the frequency and circumstances in which class actions are filed and collecting systematic information about class action outcomes. Alas, that is not the case. To my knowledge, no jurisdiction publishes official statistics on the number of complaints filed in which plaintiffs seek to proceed collectively. No one knows how many class actions are filed annually in federal or state courts in the United States, much less the characteristics or outcomes of these cases. Professors Vince Morabito and Alon Klement have compiled comprehensive databases on the number class filings in Australia and Israel.

70. Stefaan Voet, Deborah Hensler & Vince Morabito, Class Actions Across the Atlantic: From Guarded Interest to European Policy, in process (on file with author).

71. One might imagine a jurisdiction deciding to adopt a class action on a “trial” basis and commission research to study objective and subjective outcomes. This type of research was commissioned by state and federal courts in the United States to assess the consequences of alternative dispute resolution procedures, and by Congress in 1990 to assess the outcomes of the Civil Justice Reform Act of 1990 (a package of civil procedure reforms intended to expedite civil litigation and reduce its expense). For a review of empirical research on alternative dispute resolution programs, see Deborah Hensler, Our Courts, Ourselves: How ADR is Transforming the U.S. Court System, 108 PENN STATE L. REV. 165 (2003). On research commissioned by Congress to evaluate the consequences of the Civil Justice Reform Act, see JAMES KAKALIK ET AL., AN EVALUATION OF CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1990). However, investing in serious research on civil procedure reform seems to have gone out of favor in the United States.

72. On the lack of empirical data on U.S. class actions and reasons for this lack, see Deborah Hensler, Happy 50th Anniversary, Rule 23! Shouldn’t We Know You Better After All This Time?, U. PENN. L. REV. (forthcoming).


respectively, which permit observation of trends in filings and provide
some additional data on the characteristics of their cases and outcomes.
Professors Theodore Eisenberg and Geoffrey Miller75 and Brian Fitzpatrick76 have compiled comprehensive databases on federal class
action settlements and attorney fee awards that permit analysis of the
relationship between negotiated settlement amounts and fee awards and
differences in settlements and fees across different case types. Several
private entities monitor filings of shareholder (securities) class actions in
Australia, Canada and the United States. But some private databases are
unrepresentative or incomplete and because the data do not have a
government imprimatur they are subject to challenge, particularly when
relied on in heated debates over adopting or amending collective
procedures.

Morabito found that from 1992 (when Australia’s federal class action
statute became effective) to 2014, 329 class actions were filed, an
average of fifteen per year. Annual filings diminished in the second half
of this period, by comparison to the earlier period, and the composition
of the class action caseload shifted, so that in the more recent period
shareholder suits predominated. The shift to shareholder suits likely
reflects the increasing importance of third-party funding in Australia’s
class action practice. Class action filings appear to represent less than 1
percent of all federal civil filings in Australia.77

Klement found that from 2008 (when Israel’s comprehensive class
action statute became effective) to 2012 (the most recent year for which
he compiled data), annual class action filings rose steadily, peaking at
820. A total of 2,004 class action lawsuits were filed from 2007–2012.
Consumer cases accounted for about three-quarters of the Israeli class
action caseload.78

Surprisingly, the per capita rate of class action filings appeared
higher in Israel than in the United States.79 A decade ago, I estimated the
number of class actions filed in the federal and state courts in the United

75. Theodore Eisenberg & Geoffrey P. Miller, Attorneys’ Fees and Expenses in Class Action
76. Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and their Fee
Awards, 7 J. OF EMPIRICAL LEGAL STUD. 811 (2010).
77. Hensler, Enforce Marketplace Regulations, supra note 8, at 251, 253 (summarizing
Morabito 2010 and Morabito 2014, supra note 59). Contrary to claims by the U.S. Chamber of
Commerce, there is no evidence that third-party funding has increased the frequency of ordinary or
class action lawsuits. Hensler, Third-Party Financing, supra note 8, at 499, 524.
78. Hensler, Enforce Marketplace Regulations, supra note 8, at 252–53 (summarizing
Klement 2014, supra note 60).
79. Id. at 252.
States by piecing together incomplete data; according to that estimate, about 6,500 class action complaints were then being filed, about one percent of the total civil damage caseload in state and federal courts.80

Data from civil law jurisdictions regarding cases filed under their more recently enacted class action and group proceedings statutes are sparse. Tzankova and associates report that there have been between 300 and 400 cases filed under the Netherland’s collective litigation statute (which does not provide monetary remedies) since its inception in 1995, and 9 petitions for approval of collective settlements negotiated under its collective settlement statute (WCAM) (which does provide money damages) since it was enacted in 2005.81 Halfmeier reports that there have been about twenty five cases filed using the German KapMuG procedure since it was adopted in 2005, most of which are still in process.82

Taken together these data suggest that in common law jurisdictions class actions are used sparingly (relative to the size of national caseloads of civil damage litigation) and tend to rise and fall in response to broader economic trends, as well as with precedential decisions. There is no evidence of class actions overwhelming any country’s civil justice system. The small numbers of class actions and other collective proceedings filed in civil law jurisdictions likely reflect the combined effects of recent adoption and financial disincentives to bring such cases. As time goes on, those jurisdictions might or might not experience a rising tide of collective lawsuits.

Mere numbers of class actions filed by jurisdiction do not of course suffice to evaluate the merits and demerits of collective litigation, nor whether some forms of collective procedure are more effective at delivering compensation, produce fairer outcomes for claimants and

80. Id. (summarizing Deborah Hensler, Using Class Actions to Enforce Consumer Law, in Deborah Hensler, HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW, (Geraint Howells et. al. eds., 2010). The appendix to Hensler, Third-Party Financing, supra note 8, explains how I constructed this estimate. Recent research suggests that only a fraction of U.S. class action filings in the United States are ever certified as class actions, indicating that the number of cases that are disposed of in class form is far smaller than the total number of class complaints filed. Reviewing data for different types of caseloads, I found certification rates ranging from about thirteen percent for class complaints arising from tort and contract law to fifty percent for securities class action complaints. Hensler, Enforce Marketplace Regulations, supra note 8, Table 4., I have not been able to find comprehensive data on Canadian class actions either in the federal or provincial systems.

81. Correspondence with Prof. Ianika Tzankova, Tilburg University (Netherlands), October 2016 (on file with author).

82. Correspondence with Prof. Axel Halfmeier, Leuphana University (Germany) October 2016 (on file with author).
defendants or—in jurisdictions that perceive private litigation as properly supplementing regulatory enforcement—contribute positively to regulating the behavior of market actors. The globalization of class actions has produced a “natural experiment” of the type that law and economic scholars frequently rely on to assess the outcomes of alternative legal policies. Unfortunately, we have yet to see such research on the consequences of adopting class action procedures either here in the United States or in other parts of the world.
held in the Disputed Claims Reserve therefor shall be distributed . . . to the
Claim Holder in a manner consistent with distributions to similarly situated Allowed
Claims.” In light of these provisions and our conclusions about the post-petition
transfer and the SEG 1 reserve funds, the
Section 7.20(b) Disputed Claims Reserve
should be liquidated and the funds dis-
bursed to SEG 1 Objectors who would
have received these funds but for the prop-
erty-of-the-estate dispute.

For the reasons we have explained, we
AFFIRM the district court's judgment as
to Counts I and V of the trustee’s operative
Second Amended Complaint. We RE-
VERSE with respect to Count III and
REMAND with instructions to enter judg-
ment for FCStone on that count and for
further proceedings consistent with this
opinion.

1. Federal Civil Procedure \(\Rightarrow\) 2737.13

In determining attorney fee award in
class action, district court should compare
attorney fees to what is actually recovered
by class and presume that fees that exceed
recovery to class are unreasonable.

2. Sales \(\Rightarrow\) 2473

Application of multiplier was not war-
ranted in calculating attorney fee award
for class counsel following settlement of
breach of warranty class action against
washing machine manufacturer, despite
counsel’s contentions that case was unusu-
ally complex and had served public inter-
est, and that attorneys had obtained espe-
cially favorable settlement for class, where
pre-multiplier figure sought by class coun-
sel was $2.7 million, class members were to
receive no more than $900,000 from settle-
ment, and case was not very complex for
most part.

Appeals from the United States District
Court for the Northern District of Illinois,
Eastern Division. Nos. 06 C 7023, 07 C
412, 08 C 1832, Mary M. Rowland, United States
Magistrate Judge, 2016 WL 4765679,
awarded attorney fees to class counsel, and
manufacturer appealed.

Holding: The Court of Appeals, Posner,
Circuit Judge, held that application of mul-
tiplier was not warranted in calculating
attorney fee award.

Reversed and remanded.
Before POSNER, RIPPLE, and HAMILTON, Circuit Judges.

POSNER, Circuit Judge.

Sears, the principal defendant/appellant in this class action suit, challenges the district court's decision to award the plaintiffs' attorneys (class counsel) 1.75 times the fees they originally had charged for their work on the case. The judge's reasoning was that the case was unusually complex and had served the public interest and that the attorneys had obtained an especially favorable settlement for the class, even though the fees they sought—$4.8 million with the 1.75 multiplier, versus $2.7 million without—greatly exceeded the likely award of damages to the class.

The suit was based on two defects in washing machines sold by Sears (and Whirlpool, but to simplify the opinion we'll confine discussion to Sears): a control unit defect and a problem of mold. The case moved slowly but in 2013 two plaintiff classes were certified, one ultimately consisting of owners of machines manufactured between 2004 and 2006 that had been affected by the control unit defect, the other of owners of machines affected by the mold. Sears settled with both classes; its appeal is limited to challenging the district court's decision to award the plaintiffs' attorneys (class counsel) 1.75 times the fees they originally had charged for their work on the case. The judge's reasoning was that the case was unusually complex and had served the public interest and that the attorneys had obtained an especially favorable settlement for the class, even though the fees they sought—$4.8 million with the 1.75 multiplier, versus $2.7 million without—greatly exceeded the likely award of damages to the class.

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Class counsel agreed to seek no more than $6 million in attorneys' fees. They claimed to have incurred $3.16 million in fees but asked the court to multiply this figure by 1.9 to account for what they claimed to be their extraordinary effort in the case. They subsequently increased their base fee estimate to $3.25 million, having discovered additional billable time, but at the same time reduced their multiplier request from 1.9 to 1.85. Under either calculation class counsel were seeking approximately $6 million. The district court, however, concluded that they were entitled to a base fee of only $2,726,191, which the court multiplied by 1.75, making the total fee award $4,770,834.

Class counsel defend the large fee award on the basis of "the novelty/complexity of the legal issues involved, the degree of success obtained, the public interest advanced by the litigation, the fact that fees were contingent on the outcome of the case, and to a lesser extent the preclusion of certain class counsel from working on other cases." Although the district court rejected the last two factors, it deemed the first three (novelty/complexity, degree of success, and public interest) adequate to warrant the 1.75 multiplier. That was questionable, because novelty and complexity influence the base fee—the more novel and complex a case, the more hours will be billed and the higher the hourly billing rates will be. See Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 553, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010). The district court, comparing the hourly rates sought by class counsel with the complexity of their work, concluded that for the most part the case wasn't very complex—it was just about whether or not Sears had sold defective washing machines. This con-
clusion leaves us puzzled about the court's decision nevertheless to allow a multiplier.

What is true is that the average multiplier in this circuit when the court awards a multiplier has been 1.85, making the judge's 1.75 multiplier in line with past practice, though in the nation as a whole that average falls to .88 in cases in which the class receives less than $1.1 million in compensation, Theodore Eisenberg & Geoffrey P. Miller, "Attorney Fees and Expenses in Class Action Settlements: 1993–2008," 7 J. Empirical Legal Studies 248, 272, 273–74 (2010), as may turn out to be the case here.

[1, 2] In two class action cases, Pearson v. NBTY, Inc., 772 F.3d 778, 780–81 (7th Cir. 2014) and Redman v. RadioShack Corp., 768 F.3d 622, 630–31 (7th Cir. 2014), we've said that a district court should compare attorney fees to what is actually recovered by the class and presume that fees that exceed the recovery to the class are unreasonable. See Pearson, 772 F.3d at 782. The presumption is not irrebuttable, however, and in this case the extensive time and effort that class counsel had devoted to a difficult case against a powerful corporation entitled them to a fee in excess of the benefits to the class. But they failed to prove that a reasonable fee would exceed $2.7 million—the pre-multiplier figure sought by class counsel and already thrice the damages awarded the class. We therefore reverse the judgment of the district court and remand with directions to award $2.7 million—no more, no less—in fees to the class counsel.

* Judge Richard Posner voted to deny the petition for rehearing before his retirement on

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**UNITED STATES of America,**

Plaintiff-Appellee,

v.

Michele DICOSOLA, Defendant-Appellant.

No. 16-3497

United States Court of Appeals,

Seventh Circuit.

Argued May 24, 2017

Decided August 14, 2017

Rehearing Denied September 22, 2017*

**Background:** Defendant was convicted in the United States District Court for the Northern District of Illinois, No. 1:12-cr-00446-1, Harry D. Leinenweber, J., of bank fraud, making false statements to a bank, wire fraud affecting a financial institution, and filing false statements against the United States. Defendant appealed.

**Holdings:** The Court of Appeals, Manion, Circuit Judge, held that:

1. evidence supported defendant’s conviction of bank fraud;
2. loan officer’s erroneous, off-hand remark that defendant received “cash back” from fraudulently obtained loan was harmless;
3. evidence was sufficient to support defendant’s conviction of tax fraud; and
4. evidence was sufficient to support district court’s restitution order.

Affirmed.

1. **Banks and Banking ⊛509.25**

Evidence that defendant knew that tax returns he presented to two banks in seeking mortgage were not the returns that he had filed was sufficient to support defendant’s conviction of bank fraud. 18 U.S.C.A. § 1344.

September 2, 2017.
CLASS ACTIONS PART II:
A RESPITE FROM THE DECLINE

ROBERT H. KLONOFF*

In a 2013 article, I explained that the Supreme Court and federal circuits had cut back significantly on plaintiffs' ability to bring class actions. As I explain in this article, that trend has subsided. First, the Supreme Court has denied certiorari in several high-profile cases. Second, the Court's most recent class action rulings have been narrow and fact specific. Third, the federal circuits have generally rejected defendants' broad interpretations of Supreme Court precedents and arguments for further restrictions on class certification. One explanation for this new trend is that defendants have been overly aggressive in their arguments, losing credibility and causing courts to push back. Another is that courts are retreating from the view that pressure on defendants to settle is itself a reason to curtail class actions. It remains to be seen, however, whether this trend is the new normal, or merely a respite from the decline of class actions.

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* Copyright © 2017, by Robert H. Klonoff, Jordan D. Schnitzer Professor of Law, Lewis & Clark Law School; Dean of Lewis & Clark Law School, 2007–2014. The author served as a member of the U.S. Judicial Conference Advisory Committee on Civil Rules from 2011–2017. He previously served as an Associate Reporter for the American Law Institute's project, Principles of the Law of Aggregate Litigation (West 2010). The author writes only in his personal capacity and not as a former member of the Advisory Committee on Civil Rules. The author wishes to thank Professors Simona Grossi, Mary Kay Kane, and Rick Marcus, attorneys Jocelyn Larkin, Joe Sellers, and Elizabeth Cabraser, and various attendees at the N.Y.U. Conference, Rule 23@50, for their insightful comments. He also thanks his research assistants (Evan Christopher, Max Goins, Christina Helregel, Ben Pepper, Elisabeth Rennick, and Daniel Walker) for their able assistance.
INTRODUCTION

In my 2013 article, The Decline of Class Actions, I explained that the Supreme Court and the federal circuits have made it increasingly difficult for plaintiffs to litigate class actions. I did not declare the class action device dead, but I did express concern that it had been severely weakened.

As I noted in Decline, the Supreme Court had in the past several years issued a number of seminal decisions, including Wal-Mart Stores, Inc. v. Dukes, AT&T Mobility LLC v. Concepcion, and American Express Co. v. Italian Colors Restaurant. Federal circuit courts had also introduced new limits on class actions, including cases imposing rigid standards for numerosity, frontloading of merits evidence, class definition, and many other topics. A recurring theme of both the Supreme Court and circuit cases was that class certification creates irresistible (and improper) pressure on defendants to settle even baseless claims.

Reviewing the landscape four years later, I believe it is unlikely—that the Supreme Court or the circuits will overrule the seminal decisions discussed in Decline. The plaintiffs’ bar, however, has been hoping that, even if those key precedents are not overruled, at least the case law will not get more onerous. And indeed, four years after my pessimistic article, the plaintiffs’ bar has reason for optimism. For lawyers, as for physicians, “the first goal . . . is to stop the bleeding.” In the class action field, that is now happening.

One obvious development is the February 13, 2016 death of Justice Scalia, the author of several of the Supreme Court’s restrictive class action opinions, including Dukes, Concepcion, and Italian Colors. The impact of Justice Scalia’s death has been significant, par-

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2 564 U.S. 338, 350 (2011) (setting a high hurdle for establishing commonality under Rule 23(a)(2)).
4 133 S. Ct. 2304, 2312 (2013) (upholding class action waiver clause).
5 See Decline, supra note 1, at 745–823 (outlining these limits).
6 See, e.g., Concepcion, 563 U.S. at 350 (class actions entail “the risk of ‘in terrorem’ settlements”); In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008) (class actions “may . . . create unwarranted pressure to settle nonmeritorious claims on the part of defendants”) (citation omitted); In re Rhone–Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (class actions may lead to “blackmail settlements” induced by “intense pressure to settle” (citations omitted)); Decline, supra note 1, at 741 & n.68, 753, 818.
ticularly during the months before Justice Gorsuch was seated. In addition, there can be little doubt that eight years of judicial appointments by President Obama have shifted the political balance in the circuits.

Nonetheless, personnel changes at the Supreme Court and the circuits are only part of the explanation. Many of the key Supreme Court developments discussed herein pre-date Justice Scalia’s death, and some of the recent circuit decisions refusing to cut back on class actions were written by Republican-appointed judges.

In this article, I focus on three important developments:

First, in the past few years, the Supreme Court has denied certiorari in a host of high-profile class actions, notwithstanding urgent pleas by the business community that review by the Court was essential.

Second, in the past few years, the Supreme Court has taken a measured (and, in some instances, decidedly pro-plaintiff) approach to class actions. In Amgen Inc. v. Connecticut Retirement Plans & Trust Funds, the Court reined in the growing circuit trend to require substantial merits determinations at the class certification stage. And in three closely watched class action cases in the 2015 Term, Tyson Foods, Inc. v. Bouaphakeo, Campbell-Ewald Co. v. Gomez, and Spokeo, Inc. v. Robins, the Supreme Court issued rulings that rejected broad theories urged by the defendants.

Third, in the past few years, the circuits have frequently rejected defendants’ interpretations of Supreme Court cases and other arguments that would have imposed strict, new limits on class certification.

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8 For instance, only days after Justice Scalia’s death, Dow Chemical withdrew a petition for certiorari in a case challenging a verdict of more than a billion dollars, choosing instead to settle the case for $835 million. Dow stated that it was doing so because Justice Scalia’s death had significantly reduced the odds that certiorari would be granted. See, e.g., Jef Feeley & Greg Stohr, Scalia’s Death Prompts Dow to Settle Suits for $835 Million, BLOOMBERG NEWS (Feb. 26, 2016), https://bol.bna.com/scalias-death-prompts-dow-to-settle-suits-for-835-million/.

9 See, e.g., Jeremy W. Peters, Building Legacy, Obama Reshapes Appellate Bench, N.Y. TIMES (Sept. 13, 2014), http://www.nytimes.com/2014/09/14/us/politics/building-legacy-obama-reshapes-appellate-bench.html?_r=0 (“For the first time in more than a decade, judges appointed by Democratic presidents considerably outnumber judges appointed by Republican presidents.”).

10 133 S. Ct. 1184, 1191 (2013).


12 136 S. Ct. 663, 666 (2016) (rejecting defendant’s use of Rule 68 “pick-off” strategy to moot claims of class representatives).

13 136 S. Ct. 1540, 1545 (2016) (rejecting defendant’s argument that risk of future harm cannot satisfy concreteness requirement for Article III standing in class action context).
As I explain below, one explanation for these developments is that courts have reacted negatively to overly aggressive advocacy by defendants. Another is that courts are simply taking a break from their strident approach, which has already resulted in significant cutbacks in class actions. Furthermore, I believe that courts have backed away from the oft-cited view that the pressure to settle is itself a reason to curtail class actions. While that theme still appears as a consideration in whether to grant review under Rule 23(f), it has all but disappeared as a rationale for restricting class actions. Instead, courts have adopted a more measured—and, in my view, more justified—approach: looking at each case based on its particular facts and circumstances.

It remains to be seen whether these developments represent the new normal, or instead are only a pause before the decline of class actions continues. Given the election of Donald Trump as President, and the likelihood that he will appoint jurists who may embrace further limits on class actions, there is reason for concern about the future.

Supreme Court Justice Neil Gorsuch, who was confirmed on April 7, 2017, is likely to take a conservative position on class actions similar to that of Justice Scalia, although perhaps without the same degree of zeal. Justice Gorsuch himself has stated that he is neither pro- nor anti-class action, but there is no shortage of articles attempting to predict his stance on class action issues. At bottom, he is unlikely to favor expanding class actions in a particular case absent a compelling basis in Rule 23. And he has shown that he is willing to

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import restrictive Rule 23(b)(3) concepts into Rule 23(b)(2). At the same time, it is not clear that Justice Gorsuch will have the same anti-class action agenda exhibited by Justice Scalia. In addition to the impact of Justice Gorsuch’s appointment and the likelihood of further vacancies on the Supreme Court over the next four years, there are currently 144 vacancies on the lower federal courts, with many more vacancies likely over the next four years. With a string of conservative appointments at all levels of the federal bench, it is impossible to say how long the current reprieve will last. But even if it is only temporary, it is a welcome change from years of court decisions curtailing class actions.

Finally, although this Article focuses on case law developments, it should be noted that even if the current reprieve in the case law proves to be more than just ephemeral, Congress may step in and pass major legislation curtailing class actions. At the time this Article went to press, the Fairness in Class Actions Litigation Act of 2017 had passed the House of Representatives and was pending in the Senate. The bill, which has drawn widespread criticism from the plaintiffs’ bar and many scholars and commentators, would significantly restrict

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16 See Shook v. Bd. of Cty. Comm’rs, 543 F.3d 597, 604 (10th Cir. 2008) (applying manageability and cohesiveness in (b)(2) case). Other class action opinions authored by Justice Gorsuch prior to his appointment to the Supreme Court are not especially illuminating. They include Hammond v. Stamps.com, 844 F.3d 909, 912 (10th Cir. 2016) (holding that amount in controversy was sufficient to meet CAFA minimum for removal); McClendon v. City of Albuquerque, 630 F.3d 1288, 1290 (10th Cir. 2011) (holding that order withdrawing approval for class action settlement is not a final decision for purposes of appeal); and BP America v. Oklahoma ex rel. Edmondson, 613 F.3d 1029, 1031 (10th Cir. 2010) (granting discretionary review of remand order).

17 See Robert H. Klonoff, Class Actions in the Year 2026: A Prognosis, 65 EMORY L.J. 1569, 1636 & n.407 (2016) (discussing Justice Scalia’s focus on class actions and citing his restrictive class action opinions).


the class action device. Among other things, in its current form it would codify (or even expand) the heightened ascertainability requirement that has been adopted by some courts,21 would arguably preclude certification in cases involving individualized damages,22 and would create a higher threshold for class certification—requiring courts to conduct a frontloaded merits analysis contrary to the Supreme Court’s holding in Amgen.23 It is almost certain that President Trump would sign the bill in its current form. Thus, there is reason for concern that, even if the case law trends remain favorable for class actions, Congress and the President will reverse this progress.

I

SUPREME COURT DENIALS OF CERTIORARI

In the past few years, the Supreme Court has denied certiorari in a number of high-profile cases that could have been effective vehicles to impose new limits on class actions. This trend stands in marked contrast to the Court’s prior approach as I recounted in Decline. As I explained there, looking at the case law as of 2013, it appeared that a majority of the Supreme Court was on a mission to rein in class actions. The Court not only granted certiorari in a significant number of class action cases, but also took an unusually aggressive role in shaping the issues to be decided.

For instance, when the Supreme Court granted review in Wal-Mart Stores, Inc. v. Dukes, a massive sex discrimination class action, it added its own issue for review (in addition to those raised by Wal-Mart): “Whether the class certification ordered . . . was consistent with Rule 23(a) [requiring a common issue of law or fact].”24 This commonality issue had barely been mentioned in Wal-Mart’s petition for certiorari,25 but the Court ended up devoting a major portion of its opinion establishing a new, strict test for commonality.26 Likewise, in Comcast Corp. v. Behrend,27 the Court granted review but rewrote the

Representatives (Mar. 8, 2017), http://www.civilrights.org/advocacy/letters/2017/oppose-hr-985-the-fairness.html (criticizing the bill’s drafting and arguing it will have a chilling effect on those who might otherwise bring class actions, like people of color and the elderly).

21 H.R. 985 § 1718(a). See infra Section III.D (discussing heightened ascertainability requirement).

22 See H.R. 985 § 1716 (requiring affirmative proof that each class member has suffered the same type and scope of injury as named plaintiffs in suits seeking money damages).

23 See id. (“An order . . . that certifies a class seeking monetary relief . . . shall include a determination, based on a rigorous analysis of the evidence presented,” that the class members have all been similarly injured).


25 Decline, supra note 1, at 774.


27 133 S. Ct. 1426 (2013).
question presented.\textsuperscript{28} Ultimately, the Court did not reach even its own rewritten question because it found that Comcast had failed to preserve the issue.\textsuperscript{29} Usually, in such a circumstance, the Court would dismiss certiorari as improvidently granted,\textsuperscript{30} but in Comcast, the Court proceeded to decide the case in Comcast’s favor on the ground that plaintiffs’ expert model was flawed and thus could not establish classwide damages.\textsuperscript{31}

The Court also took a very aggressive role in the context of class action waivers and arbitration agreements, deciding three important cases on the topic—Concepcion, Italian Colors, and DIRECTV, Inc. \textit{v. Imburgia}\textsuperscript{32}—since 2011.

In many of these seminal Supreme Court cases, the business community had mobilized substantial amicus support at the certiorari stage (as well as at the merits stage).\textsuperscript{33} For instance, nine amicus briefs in support of certiorari were filed in \textit{Dukes}, four were filed in \textit{Concepcion}, and four were filed in \textit{Italian Colors}. Multiple amicus briefs in support of certiorari were also filed in two of the three 2015 Term class action cases: seven in \textit{Tyson Foods} and seven in \textit{Spokeo}. While it is difficult to know the precise impact of these amicus briefs, it is reasonable to assume that they played a part in the Court’s decision to hear so many class action cases given its limited docket.

But the surprising trend in the past few years is the number of class action cases that the Court has refused to hear, notwithstanding strong pleas from the business community. For instance, in \textit{Butler v. Sears, Roebuck & Co.},\textsuperscript{34} Sears sought review of a Seventh Circuit decision upholding class certification in a case alleging defective (mold producing) front-loading washing machines. Sears sought review on issues of predominance under Rule 23(b)(3) and on whether a class may be certified when most class members did not experience the

\textsuperscript{28} See \textit{Decline}, supra note 1, at 753–54 & n.142 (contrasting the question upon which Comcast sought review with the question upon which the Court granted review).

\textsuperscript{29} Id. at 754.

\textsuperscript{30} See, e.g., Michael E. Solimine & Rafael Gely, \textit{The Supreme Court and the DIG: An Empirical and Institutional Analysis}, 2005 Wis. L. Rev. 1421, 1450–54 (distinguishing principled reasons to dismiss review as improvidently granted from unacceptable reasons); \textit{cf. Visa, Inc. v. Osborn}, 137 S. Ct. 289 (2016) (dismissing certiorari as improvidently granted, noting that petitioners “‘persuaded us to grant certiorari’ on [one] issue . . . [but then] ‘chose to rely on a different argument’ in their merits briefing’”) (citation omitted).

\textsuperscript{31} 133 S. Ct. at 1435.

\textsuperscript{32} 133 S. Ct. 463 (2015).

\textsuperscript{33} Repeat amicus players on behalf of the business community include the U.S. Chamber of Commerce (Chamber), the Defense Research Institute (DRI), the Washington Legal Foundation (WLF), and the Product Liability Advisory Council (PLAC). See infra notes 39, 54–55, 59, and 61.

\textsuperscript{34} 702 F.3d 359 (7th Cir. 2012), \textit{vacated}, 133 S. Ct. 2768 (2013).
alleged product defect. The Supreme Court granted review, vacated the judgment, and remanded in light of Comcast. On remand, the Seventh Circuit adhered to its earlier opinion upholding class certification. Sears again petitioned for certiorari, and eight amicus briefs were filed in support of certiorari. Yet, the Court denied certiorari, with no Justice dissenting.

Another moldy washing machine case had a parallel history. In Whirlpool Corp. v. Glazer, the Supreme Court initially granted review of, vacated, and remanded a Sixth Circuit decision upholding class certification, also in light of Comcast. When the Sixth refused to reverse its ruling, Whirlpool again sought certiorari, supported by the same eight amici who filed briefs in Sears. The Supreme Court denied certiorari in that case as well, again with no dissent.

Given the Supreme Court’s heavy focus on class actions in recent years, the Court’s denial of review in these cases surprised many on both the plaintiff and the defense sides. These denials pre-dated Justice Scalia’s death; thus, there were clearly four potential votes for certiorari, the number required to grant review, among the conservative Justices (Roberts, Scalia, Thomas, and Alito).

Moreover, given all of the firepower supporting the petitioners in Sears and Whirlpool, it was logical to think that the Court would be persuaded that the issues were important. This was especially so given

36 133 S. Ct. 2768, remanded to 727 F.3d 796 (7th Cir. 2013).
37 727 F.3d at 802.
41 Whirlpool, 678 F.3d 409 (6th Cir. 2012), vacated, 133 S. Ct. 1722, remanded to 722 F.3d 838 (6th Cir. 2013).
42 722 F.3d 838, 845 (6th Cir. 2013).
44 See sources cited supra note 39.
that the amici predicted dire and profound consequences from the failure to grant review. Illustrative is the combined brief filed by the Chamber in *Sears* and *Whirlpool*. The Chamber, which touts itself as “the world’s largest business organization representing the interests of more than 3 million businesses,” argued that, if the rulings were allowed to stand, they would “dramatically increase the class-action exposure” faced by the business community. The Chamber also invoked the unfair pressure to settle:

In light of the costs of discovery and trial, certification unleashes “hydraulic” pressure to settle. That pressure is generally less rooted in the merits of the plaintiffs’ claims than in the economic rationality of defendants, meaning that class certification—particularly certification based on a loose application of Rule 23’s essential prerequisites—dramatically increases the chances that plaintiffs with even meritless claims will obtain an unwarranted payout.

Yet, despite these and similar arguments by petitioners and amici, the Court denied review without dissent.

Similarly, in *Mullins v. Direct Digital, LLC*, petitioner Direct Digital sought review on whether a class can be certified when a significant number of class members cannot be ascertained. The so-called heightened ascertainability requirement—requiring plaintiffs to demonstrate an administratively feasible means of identifying class members—had divided the courts, with the Seventh Circuit in *Mullins* expressly rejecting Third Circuit decisions, including *Marcus v. BMW of North America, LLC*, that had imposed such a requirement. Direct Digital thus had a strong argument for certiorari, based on the acknowledged circuit conflict. Nor could there be any serious doubt that the issue was important. A strict ascertainability requirement provided a powerful vehicle to curtail small claims class actions. The Chamber once again filed an amicus brief in support of certiorari, citing the “clear split” among the circuits, and advising the Court that

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48 *Id.* at 20 (citation omitted) (quoting *Newton v. Merrill Lynch*, 259 F.3d 154, 165 (3d Cir. 2001)).

49 795 F.3d 654 (7th Cir. 2015).


51 See *infra* Section III.D.

52 795 F.3d at 657.

53 687 F.3d 583, 592–94 (3d Cir. 2012). But see *infra* notes 161–65 and accompanying text (noting that the Third Circuit itself has retreated on heightened ascertainability).
the issue “call[ed] out for immediate review.” Several other amici also urged the Court to grant review. Again, the Supreme Court, without dissent, denied review.

Still another example is *Rikos v. Procter & Gamble Co.* In *Rikos*, a consumer fraud case, the primary issue was whether a district court, in certifying a class, must evaluate whether there is a “common injury” that cohesively binds the plaintiffs. The Chamber, in an amicus in support of certiorari, noted that while the decision was an “outlier,” review was necessary because “all it takes is one overly permissive circuit for abusive litigation to take hold.” The International Association of Defense Counsel (IADC) also filed an amicus brief in support of certiorari. Yet, the Court denied review.

What explains the Court’s denial of certiorari in these cases? My own sense is that, at least for now, the Court has lost interest in announcing major new limits on class actions. It is not uncommon for the Supreme Court to target an area, focus on it rigorously in several cases, and then decline to hear other cases. A similar scenario took place in the area of punitive damages; the Court granted review and decided a number of punitive damages cases, and then became much

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56 136 S. Ct. 1161 (2016).

57 799 F.3d 497 (6th Cir. 2015).

58 Id. at 505.


less interested in the topic.\textsuperscript{62} Having given so much attention to class actions in recent years, the Justices may simply be ready for a break from the topic, and thus not especially eager to add class action cases to the docket. Of course, the Justices could also be stepping back to see how the lower courts apply cases such as \textit{Dukes}, \textit{Concepcion}, and \textit{Amgen}.

Relatedly, while the threat of “blackmail pressure to settle” may at one time have been persuasive, that mantra has lost its punch. Various amici have invoked it so many times in recent years that, I believe, the Court has become numb to it. Indeed, that argument has become increasingly tenuous because, as I have noted elsewhere, defendants are more willing than ever to go to trial in large, bet-the-company class action cases.\textsuperscript{63} For example, after the Court denied review in \textit{Whirlpool}, the company went to trial and \textit{won}.\textsuperscript{64} Although the Supreme Court has not explicitly disparaged the “blackmail settlement” rationale, it has come close.\textsuperscript{65} Recently, other courts have explicitly disparaged the rationale.\textsuperscript{66}

Moreover, it is my opinion that, wholly apart from the unpersuasive reliance on the “pressure to settle,” the business community has suffered a lack of credibility in its amicus strategy. When numerous amicus briefs are filed in one class action after another, trumpeting the same parade of horribles for businesses, the message inevitably


\textsuperscript{63} \textit{See} Klonoff, \textit{supra} note 17, at 1641–50 (2016) (laying out several explanations for an increase in trials).


\textsuperscript{65} \textit{See} Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1199–1201 (2013) (stating, in response to defendant’s “seeking [the Court’s] aid in warding off ‘in terrorem’ settlements” by requiring proof of materiality at the class certification stage, that “[w]e do not think it appropriate for the judiciary to . . . reinterpret[] Rule 23 to make likely success on the merits essential to class certification in securities-fraud suits” (quoting Schleicher v. Wendt, 618 F.3d 679, 686 (7th Cir. 2010) (alteration in \textit{Amgen}))).

\textsuperscript{66} \textit{See}, \textit{e.g.}, \textit{In re Oppenheimer Rochester Funds Grp. Sec. Litig.}, 318 F.R.D. 435, 440 (D. Colo. 2015) (characterizing the argument about “unfair[ ] pressure[ ] . . . to settle for reasons wholly unrelated to the merits” as “transparent hyperbole”); Ebin v. Kangadis Food Inc., 297 F.R.D. 561, 572 (S.D.N.Y. 2014) (noting that the alleged “pressure” to settle “is common to virtually all class actions, so that if it were a sufficient argument to defeat certification, virtually no class actions would ever be certified”).
gets diluted. After all, the Court grants review and oral argument in only about 60–80 cases per year out of more than 7,500 petitions filed. The Chamber’s brief in Rikos illustrates the problem of overstated arguments. Even though the Chamber admitted that the case was an “outlier,” it claimed that this one flawed case would lead to an avalanche of bad decisions.

Interestingly, the Chamber’s aggressive amicus strategy on behalf of the business community appears to be deliberate and recent. Its litigation arm, the U.S. Chamber Litigation Center, was created in 1977, but it was completely revamped in 2010 because “inside the [Chamber] some clamored for a more aggressive approach.” The Chamber hired a number of former Bush Administration officials to write amicus briefs, and as a result “the Chamber became more active before the Supreme Court and throughout the U.S. court system.” It is possible that this deliberate strategy has backfired and that the Chamber would have been better off filing fewer, more carefully targeted amicus briefs.

To be sure, the Court will continue to grant review in class action cases that meet the high standards for certiorari. Thus, in January 2017, it granted review to decide whether arbitration agreements that bar class actions are unlawful under the National Labor Relations Act and thus unenforceable under the Federal Arbitration Act. The circuits are indisputably in conflict on the question. Also in January 2017, it granted review to decide whether tolling under American Pipe...
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& Construction Co. v. Utah74 applies to a three-year time limit contained in section 3 of the 1933 Securities Act.75 The Court had granted review on that issue in 2014,76 but the parties settled before the Court could resolve the case.77 And in January 2016, the Court granted review in Microsoft Corp. v. Baker to determine whether a federal court of appeals has jurisdiction to review an order denying class certification where plaintiffs have sought to obtain immediate review by voluntarily dismissing their individual claims with prejudice.78

Thus, I am not suggesting that the Court is now denying review simply because a case raises a class action issue. What I am suggesting, however, is that the Court will not reach out and decide a case merely because the business community says the case is important and invokes the mantra of blackmail pressure to settle. For now at least, the Court does not appear to be on a conscious mission to scale back class actions.

II
RECENT SUPREME COURT CLASS ACTION RULINGS

A. The Court’s 2013 Amgen Opinion

In Decline, I discussed the trend among various circuits in favor of frontloading evidence (and resolving merits issues) at the class certification stage.79 These cases have led some courts to essentially require mini-trials at the class certification stage, even when no merits discovery has occurred. In its 6–3 decision in Amgen Inc. v. Connecticut Retirement Plans & Trust Funds,80 the Supreme Court reined in that approach, drawing a sharp distinction between the district court’s role at the class certification stage and its role at the summary judgment stage. The Court cautioned against “put[ting] the cart

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74 414 U.S. 538, 550 (1974) (holding that “the filing of a timely class action complaint commences the action for all members of the class as subsequently determined”).
78 797 F.3d 607 (9th Cir. 2015), cert. granted, 136 S. Ct. 890 (2016). This case was decided on June 12, 2017. Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017); see infra notes 123–24 and accompanying text (discussing decision).
79 See Decline, supra note 1, at 747–51.
80 133 S. Ct. 1184 (2013).
before the horse,” and emphasized that Rule 23 is not a “license to engage in free-ranging merits inquiries at the certification stage.” It explained that “Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class.” Even two of the conservative Justices (Roberts and Alito) joined Justice Ginsburg’s opinion for the Court. Importantly, the Court gave short shrift to defendant’s argument that a plaintiff needed to prove materiality at the class certification stage because certification places unfair pressure on defendants to settle. The Court was sending a clear message that class certification decisions should focus on the requirements of Rule 23, not on the strength of the underlying claims.

**B. 2015 Term**

In the 2015 Term, the Supreme Court decided three closely watched class action cases: *Tyson Foods v. Bouaphakeo*, *Campbell-Ewald Co. v. Gomez,* and *Spokeo v. Robins.* Each of these cases had the potential to weaken the class action device, and many observers viewed the granting of certiorari in those cases—three in one term—as a signal that the Court was poised to do further significant damage. But in each case, the Court rejected broad arguments urged by defendants.

*Tyson Foods,* which addressed the propriety of plaintiffs’ use of statistical evidence, was brought as a class action for state law claims and as a collective action for claims under the Fair Labor Standards Act. The members of those aggregate actions were workers at a pork-processing facility who alleged entitlement to overtime based upon the time involved in “donning and doffing” protective gear and walking to and from their work areas. To prove their case, given Tyson Foods’s failure to preserve relevant records, plaintiffs relied on an expert study that purported to calculate the average donning and

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81 Id. at 1191.
82 Id. at 1194–95.
83 Id. at 1191 (second emphasis added).
84 Id. at 1190.
85 136 S. Ct. 1036 (2016).
86 136 S. Ct. 663 (2016).
87 136 S. Ct. 1540 (2016).
88 See, e.g., Zoe Niesel, What’s Coming for Class Actions, WAKE FOREST L. REV. BLOG (Jan. 31, 2016), http://wakeforestlawreview.com/2016/01/whats-coming-for-class-actions/ (“By taking up *Tyson Foods v. Bouaphakeo, Spokeo v. Robins,* and *Campbell-Ewald v. Gomez,* the Court could be signaling that a shift against class actions is underway which could have significant consequences for plaintiffs seeking class certification.”).
89 29 U.S.C. §§ 207(a), 216(b) (2012).
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doffing time based on a non-random sample of employees.91 At trial, the expert admitted that there was significant variation among class members because they performed different jobs, used different equipment, and put on different quantities of protective gear depending on the specific work performed.92 Another plaintiff expert used the average to calculate classwide damages but conceded that many of the employees did not suffer injury because they did not work more than forty hours per week.93 The jury found for the plaintiffs, and a divided Eighth Circuit panel affirmed.94

The Supreme Court, in a 6–2 decision, rejected the aggressive argument by Tyson Foods and several of its amici for “[a] categorical exclusion” of statistical proof in class actions, noting that such a ruling “would make little sense.”95 The Court explained that statistical proof “is used in various substantive realms of the law,”96 and is sometimes “the only practical means to collect and present relevant data’ establishing a defendant’s liability.”97 According to the Court, “[i]n a case where representative evidence is relevant in proving a plaintiff’s individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class.”98 Applying those principles, the Court found that, because Tyson Foods had failed to keep proper records, statistical proof would have been admissible in an individual case.99 Thus, such evidence was properly admitted in the aggregate trial.

This ruling has been characterized as a narrow one that, ultimately, is not harmful to plaintiffs.100 If anything, a few commentators view it as an important pro-plaintiff ruling that has the potential to

91 Id. at 1043–44.
93 Id. at 13.
94 Tyson Foods, 136 S. Ct. at 1044–45.
95 Id. at 1046.
96 Id. (citing Brief for Complex Litigation Law Professors as Amicus Curiae Supporting Respondents at 5–9, Tyson Foods, 136 S. Ct. 1036 (No. 14-1146); Brief for Economists and Other Social Scientists as Amici Curiae Supporting of Respondents at 8–10, Tyson Foods, 136 S. Ct. 1036 (No. 14-1146)).
97 Id. (citation omitted).
98 Id.
99 Id. at 1046–47.
greatly expand plaintiffs’ ability to use statistical evidence in class actions.101

Also in *Tyson Foods*, the petitioner raised the issue of whether an aggregate action may be maintained “when the class contains hundreds of members who were not injured and have no legal right to any damages.”102 The Court did not address the Article III question, concluding that it was not “fairly presented [in *Tyson Foods*], because the damages award ha[d] not yet been disbursed, nor [did] the record indicate how it [would] be disbursed.”103 This language suggests that perhaps the Article III problem would arise only if a court intended to distribute funds to uninjured people.

Finally, *Tyson Foods* is notable because the Court offered a plaintiff-friendly definition of predominance from Newberg’s treatise on class actions, one that indicated that individualized damages do not automatically defeat class certification.104 This language supports the argument that *Comcast Corp. v. Behrend*105 should not be read to bar class actions merely because damages are individualized.106

The second case, *Campbell-Ewald Co. v. Gomez*,107 involved a tactic whereby a defendant attempts to “pick off” a class representative under Federal Rule of Civil Procedure 68108 by offering the full judgment sought by the representative. The goal is to moot not only the representative’s own claim but also the putative class action complaint, with the hope that new class representatives will not emerge. Gomez was the class representative in a putative class action alleging that Campbell-Ewald violated the Telephone Consumer Protection Act (TCPA),109 which bars “using any automatic telephone dialing

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102 Brief of Petitioner, *supra* note 92, at i.

103 *Tyson Foods*, 136 S. Ct. at 1050.

104 *Id.* at 1045 (quoting 2 W. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:50 (5th ed. 2012)) (“The predominance inquiry ‘asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregate-defeating, individual issues.’”).

105 133 S. Ct. 1426 (2013).

106 See infra notes 145–47 and accompanying text (discussing how defendants have argued that the existence of individualized damages, by itself, defeats class certification and how courts have rejected that argument).


108 Rule 68(a) provides that “a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued.” FED. R. CIV. P. 68(a). The offer lapses if it is not accepted “within 14 days.” Id. Rule 68(b) states that “[a]n unaccepted offer is considered withdrawn.” FED. R. CIV. P. 68(b).

system” to send a text message to a cell phone without the recipient’s consent.110 Prior to the deadline for the motion for class certification, Campbell-Ewald proposed to settle Gomez’s individual claims for their full value.111 Gomez did not accept the offer, and it thus lapsed. Campbell-Ewald thereafter argued that the unaccepted offer mooted Gomez’s individual claims (as well as those of the putative class).112 The district court and the Ninth Circuit rejected that argument. In a 6–3 decision, the Supreme Court held that the unaccepted offer of judgment did not moot the case and that defendant’s contrary argument was unsupported by Rule 68.113 Limiting the case to its facts, the Court noted: “We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff’s individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount.”114

The third case, *Spokeo v. Robins*,115 involved a putative class action filed by respondent Robins under the Fair Credit Reporting Act (FCRA),116 claiming that the web site known as “Spokeo” posted inaccurate information about him, thereby harming his prospects for finding work.117 The defendant argued that Robins had not suffered actual injury. The district court dismissed the case for lack of standing, but the Ninth Circuit reversed, holding that Robins had adequately alleged that his statutory rights had been violated.118 Although the Court reversed in a 6–2 ruling, the opinion did not break new ground. The majority reasoned that the Ninth Circuit erred in its Article III analysis by focusing solely on particularity and not on concreteness. According to the Court, the fact that Congress has “identif[ied] and elevat[ed]” intangible interests “does not mean that a plaintiff automati-cally satisfies the injury-in-fact requirement . . . .”119 Yet, the Court stated that even a “risk of real harm” can satisfy the concreteness requirement.120 The dissenters agreed with most of the majority’s legal analysis but merely disagreed about the need for a remand under the specific facts.121 Had the Court issued a sweeping opinion, the case

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112 *Id.* at 668.
113 *Id.* at 670–71.
114 *Id.* at 672.
115 136 S. Ct. 1540 (2016).
117 *Spokeo*, 136 S. Ct. at 1544–46.
118 *Id.* at 1544.
119 *Id.* at 1549.
120 *Id.*
121 See *id.* at 1555.
could have eliminated many statutory damages class actions (which, according to the business community, were classic “settlement pressure” cases). But the Court left open the possibility that many such cases can still go forward.

These decisions cannot be explained by Justice Scalia’s death. He participated in the 6–3 *Campbell-Ewald* decision, joining Chief Justice Roberts’s dissent. And while both *Tyson Foods* and *Spokeo* postdated his death, his vote would not have changed the outcome in either case because both were 6–2 decisions.

All three decisions avoided establishing sweeping, bright-line tests. None of them even alluded to the pressure to settle as a guiding principle or in any way suggested that class actions are typically abusive and unfair. Although *Spokeo* was resolved against the plaintiff, the decision left open a path for the plaintiff’s case to go forward after review on remand. Both *Tyson Foods* and *Campbell-Ewald* were plaintiff victories, and in both cases the Court was critical of defendants’ overly aggressive arguments. In short, what began as a potential watershed Supreme Court term for class actions ended with a whimper.

C. 2016 Term

In the 2016 Term, the Supreme Court decided three cases that could negatively impact class actions. Nonetheless, I do not view these decisions—either individually or collectively—as reflecting any sort of anti-class action agenda on the part of the Court.

First, in *Microsoft v. Baker*, the Court unanimously held that a class representative cannot voluntarily dismiss his or her case with prejudice after a denial of class certification (and subsequent denial of Rule 23(f) review) and then appeal the class certification decision as a final judgment. The majority, in an opinion by Justice Ginsburg, determined that the tactic was an improper end-run around Rule 23(f) and the final judgment rule. The three concurring justices believed that the outcome was justified because there was no Article III case or controversy. The case simply reflects the Court’s rejection of an attempt

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122 See, e.g., John Nadolenco, Archis A. Parasharami & Joseph P. Minta, *Too High a Price? The Perilous Combination of Statutory Damages and Class Certification*, 18 Class Action 1 (2011), https://m.mayerbrown.com/Files/Publication/1fed2fc-e4e1-48ea-8da0-9dbdd0e2887a/Presentation/PublicationAttachment/0a7523a3-6f13-4566-a573-5dc9645a9ed1/10563.pdf (“[S]tatutory damages provisions sometimes create a risk of staggeringly large awards . . . . The threat of such awards can place intense settlement pressure on defendants in class actions.”).


124 See id. at 1715–16 (Thomas, J., concurring in the judgment) (“I agree with the Court that the Court of Appeals lacked jurisdiction over [plaintiff’s] appeal, but I would ground
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to circumvent the final judgment rule and the limited grounds for
interlocutory review under Rule 23(f).

Second, in California Public Employees’ Retirement System v.
ANZ Securities, Inc.,¹²⁵ the Court held (in a 5–4 decision) that tolling
under American Pipe¹²⁶ does not apply to section 11 of the Securities
Act of 1933 because the time limit is a statute of repose, which “super-
sedes the application of a tolling rule based in equity.”¹²⁷ The Court’s
opinion did not question the general validity of American Pipe tolling
but simply held that tolling does not apply to the particular statute at
issue.

Third, in Bristol-Myers Squibb Co. v. Superior Court of
California,¹²⁸ the Court (in an 8–1 decision) took a narrow view of
personal jurisdiction, holding that there was no personal jurisdiction
over Bristol-Myers in a suit by more than 600 plaintiffs claiming inju-
ries from the company’s blood-thinning drug, Plavix. The Court found
no connection between the relevant plaintiffs (who were not Cali-
fornia residents) and California, and thus no basis for specific jurisdic-
tion. The case was not a class action, although the rationale could
conceivably apply to class actions as well as non-class aggregated
cases.¹²⁹ The decision does not reflect anti-aggregation sentiment, but
is simply another case in which the Court has taken a narrow view of
personal jurisdiction.¹³⁰

III
RECENT CIRCUIT COURT DECISIONS REJECTING
PROPOSED NEW LIMITS

On multiple occasions in recent years, the circuits have rebuffed
efforts by defendants to push Supreme Court and prior circuit prece-
dents to their limits. Like the Supreme Court’s recent decisions, most
recent circuit decisions have been fact specific and have avoided the
adoption of broad, bright-line rules that would severely restrict class

¹²⁶ 414 U.S. 538 (1974); see supra notes 74–75 and accompanying text.
¹²⁷ ANZ Sec., 137 S. Ct. at 2052.
¹²⁹ Cf. id. at 1789 n.4 (Sotomayor, J., dissenting) (“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.”).
¹³⁰ See, e.g., Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (adopting narrow view of
general jurisdiction).
actions.\footnote{Of course, there are exceptions to this trend. For instance, in In re Modafinil Antitrust Litig., 837 F.3d 238, 249 (3d Cir. 2016), the Third Circuit imposed new requirements for numerosity, citing pressure on defendants to settle after certification.} Given space constraints, I offer several examples without purporting to be exhaustive.

A. Interpretation of Amgen, Tyson Foods, Campbell-Ewald, and Spokeo

The circuits have not been reticent about applying the teachings in Amgen and, as a result, supporting class certification in various cases. For instance, in Rikos v. Procter & Gamble Co.,\footnote{799 F.3d 497 (6th Cir. 2015).} the Sixth Circuit cited Amgen and criticized Procter & Gamble for “misconstru[ing] Plaintiffs’ burden at the class-certification stage.”\footnote{Id. at 505.} In Suchanek v. Sturm Foods, Inc.,\footnote{764 F.3d 750 (7th Cir. 2014).} the Seventh Circuit cited Amgen and noted, in reversing a decision denying class certification, that “‘Rule 23 allows certification of classes that are fated to lose as well as classes that are sure to win.’”\footnote{Id. at 758 (citation omitted).} In Alcantar v. Hobart Service,\footnote{800 F.3d 1047 (9th Cir. 2015).} the Ninth Circuit likewise cited Amgen in reversing a denial of class certification on the ground that the district court “ask[ed] too much” of the plaintiffs in weighing the merits of their common contentions at the class certification stage.\footnote{Id. at 1053.} And in Williams v. Jani-King of Philadelphia, Inc.,\footnote{837 F.3d 314 (3d Cir. 2016).} the Third Circuit cited Amgen and emphasized that “the class certification stage is not the place for a decision on the merits.”\footnote{Id. at 322.}

With respect to the 2015 Term cases, although plaintiffs have suffered some circuit court defeats as a result of Tyson Foods, Campbell-Ewald, and Spokeo,\footnote{See, e.g., Bank v. All. Health Networks, LLC, No. 15-4037-cv, 2016 WL 6128043, at *1–2 (2d Cir. Oct. 20, 2016) (holding (post-Campbell-Ewald) that by accepting an offer of judgment, plaintiff lacked standing to pursue class certification on behalf of the class, and declining to leave the case open for an opportunity to substitute a new class representative); Nicklaw v. Citimortgage, Inc., 839 F.3d 998, 1002–03 (11th Cir. 2016) (dismissing suit (post-Spokeo) alleging violation of New York statute because of failure to allege concrete injury); Hancock v. Urban Outfitters, Inc., 830 F.3d 511, 514 (D.C. Cir. 2016) (same); DiCuio v. Brother Int’l Corp., 653 F. App’x 109, 113 (3d Cir. 2016) (citing Tyson Foods and refusing to allow the use of company maintenance reports that were not representative of the class in a consumer class action).} the overall response to those cases has been nuanced and mildly favorable for plaintiffs. For instance, two circuits
have cited *Tyson Foods* as support for the proposition that individualized damages do not automatically defeat class certification.\(^{141}\) And two circuits have held, post-*Campbell-Ewald*, that even if a “pick off” successfully moots a class representative’s individual case, the representative should be given an opportunity to seek class certification.\(^{142}\) These latter decisions, of course, remove all incentive for defendants to make offers of judgment as a way to derail class actions. And post-*Spokeo*, a number of circuits have found no Article III concerns with allegations of purely intangible injuries or mere risk of harm.\(^{143}\)

### B. Damages and Class Certification

In *Comcast*, the Supreme Court ruled that Rule 23(b)(3)’s predominance requirement was not satisfied because “respondents’ [damages] model [fell] far short of establishing that damages are capable of measurement on a classwide basis.”\(^{144}\) After *Comcast*, defendants began to argue (contrary to pre-*Comcast* case law) that the existence of individualized damages, by itself, defeated class certification. Even prior to *Tyson Foods*’s discussion of the issue,\(^{145}\) defendants had virtually no success in selling that interpretation of *Comcast* to the circuits. Examples of decisions rejecting the argument include *Roach v. T.L. Cannon Corp.*,\(^{146}\) and *Neale v. Volvo Cars of North*.

\(^{141}\) See Ibe v. Jones, 836 F.3d 516, 529 (5th Cir. 2016) (recognizing this takeaway from *Tyson Foods*, although finding that class certification inappropriate on the facts of the case because of the difficulty in calculating damages); Vaquero v. Ashley Furniture Indus., 824 F.3d 1150, 1155 (9th Cir. 2016) (explaining that under *Tyson Foods* the need for individual damages does not alone defeat class certification).

\(^{142}\) See Richardson v. Bledsoe, 829 F.3d 273, 286 (3d Cir. 2016); Chen v. Allstate, 819 F.3d 1136, 1147 (9th Cir. 2016); see also Fulton Dental, LLC v. Bisco, Inc., 860 F.3d 541, 546–547 (7th Cir. 2017) (settlement offer accompanied by deposit of offered funds with court did not moot class representative’s individual claims). *But see Bank*, 2016 WL 6128043, at *1–2 (holding that class representative “lack[ed] standing to pursue the class claims” after his individual claims were mooted by successful Rule 68 pick-off).

\(^{143}\) See, e.g., Attias v. CareFirst, Inc., 865 F.3d 620 (D.C. Cir. 2017) (reversing district court’s dismissal of data breach case on standing grounds; allegation of substantial risk of identity theft was sufficient under Article III); Galaria v. Nationwide Mut. Ins. Co., 663 F. App’x 384, 388 (6th Cir. 2016) (finding a substantial risk of harm enough for Article III standing); Church v. Accretive Health, Inc., 654 F. App’x 990, 993 (11th Cir. 2016) (explaining that “injury need not be tangible to be concrete”); *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 272–73 (3d Cir. 2016) (finding an intangible injury sufficient to establish Article III standing).

\(^{144}\) Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433 (2013).

\(^{145}\) See *supra* notes 95–99 and accompanying text (discussing *Tyson Foods*’s treatment of damages and class certification).

\(^{146}\) 778 F.3d 401, 407–08 (2d Cir. 2015) (characterizing *Comcast*’s holding as “narrow[]” and as “‘simply’ requir[ing] that a damages calculation reflect the associated theory of liability” (citation omitted)).
America, LLC.\textsuperscript{147} Again, the fact that defendants have been almost universally unsuccessful in their sweeping reading of \textit{Comcast} is notable.

\subsection*{C. Impact of Dukes}

\textit{Dukes} has no doubt had an impact on class action jurisprudence. In a number of cases, courts have relied on \textit{Dukes} to reverse class certification in injunctive suits under Rule 23(b)(2) where a significant component of the case involves damages.\textsuperscript{148} Similarly, several circuits have held that employment class actions involving decentralized decision making cannot go forward under \textit{Dukes} because of a lack of commonality.\textsuperscript{149} But the impact of \textit{Dukes} has been less profound than one might have predicted when it was decided in 2011.

In a recent article, I pointed out that numerous courts have approved Rule 23(b)(2) public interest class actions involving juveniles, prisoners, immigrants, and disabled people notwithstanding \textit{Dukes}.\textsuperscript{150} Moreover, \textit{Dukes} has by no means meant the end of employment discrimination class actions. As one commentator has observed, “[c]ourts throughout the nation have continued to certify class actions in employment cases since \textit{Dukes} . . . .”\textsuperscript{151} A prominent example is \textit{McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.},\textsuperscript{152} in which the Seventh Circuit, in a decision by Judge Posner, reversed the district court’s denial of class certification in a race discrimination case involving 700 African-American brokers currently or formerly employed by Merrill Lynch.\textsuperscript{153} The court relied on two company-wide policies that allegedly resulted in a disparate impact.\textsuperscript{154} It described \textit{Dukes} as a case where “there was no company-wide policy to challenge . . . —the only relevant corporate policies were a policy

\begin{footnotes}
\footnotetext[147]{794 F.3d 353, 374–75 (3d Cir. 2015) (emphasizing that “the predominance analysis [in \textit{Comcast}] was specific to the antitrust claim at issue”).}
\footnotetext[149]{See, e.g., \textit{Davis v. Cintas Corp.}, 717 F.3d 476, 488–89 (6th Cir. 2013) (rejecting a class action alleging gender discrimination under a “largely subjective hiring system”); \textit{Bennett v. Nucor Corp.}, 656 F.3d 802, 814–16 (8th Cir. 2011) (finding no commonality in a race discrimination claim).}
\footnotetext[150]{See Klonoff, supra note 17, at 1590–91 (explaining that public interest class actions have fared well, even after \textit{Dukes}).}
\footnotetext[152]{672 F.3d 482 (7th Cir. 2012), \textit{cert. denied}, 133 S. Ct. 338.}
\footnotetext[153]{\textit{Id.} at 492.}
\footnotetext[154]{\textit{Id.} at 489–90.}
\end{footnotes}
forbidding sex discrimination and a policy of delegating employment decisions to local managers—[and thus] there was no common issue to justify class treatment.”\(^{155}\) Other employment cases have similarly distinguished *Dukes*.\(^ {156}\)

**D. Ascertainability**

Under the Third Circuit’s “ascertainability” requirement, “if class members are impossible to identify without extensive and individualized fact-finding or ‘mini-trials,’ then a class action is inappropriate.”\(^ {157}\) As noted earlier,\(^ {158}\) in *Mullins v. Direct Digital, LLC*,\(^ {159}\) the Seventh Circuit rejected the Third Circuit’s ascertainability jurisprudence, and the Supreme Court declined to review that decision.\(^ {160}\) What is particularly interesting, however, is that even the Third Circuit has retreated in the face of overly aggressive advocacy by defendants.

In *Byrd v. Aaron’s Inc.*,\(^ {161}\) the Third Circuit reversed the denial of class certification on ascertainability grounds.\(^ {162}\) The case alleged damages from spyware installed on leased computers. The putative class included purchasers or lessees of computers, along with their “household members.” The court held that the inclusion of “household members” should not derail certification because “‘household members’ is a phrase that is easily defined and not, as Defendants argue, inherently vague.”\(^ {163}\) Notably, the court criticized defendants for “seiz[ing] upon [the] lack of precision [in the case law] by invoking the ascertainability requirement with increasing frequency in order to

\(^{155}\) *Id.* at 488.

\(^{156}\) See, e.g., *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 113–14 (4th Cir. 2013) (explaining that a putative class may still meet the commonality requirement if there is an allegation of a company-wide policy of discrimination, even when the complaint alleges discretion); *Vaquero v. Ashley Furniture Indus.*, 824 F.3d 1150, 1153–54 (9th Cir. 2016) (rejecting *Dukes'* application to a small group of salespersons alleging one type of injury caused by one actor).

\(^{157}\) *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012).

\(^{158}\) See supra notes 52–56 and accompanying text (explaining the Seventh Circuit’s rejection of the Third Circuit’s heightened ascertainability requirement).

\(^{159}\) 795 F.3d 654, 657–58 (7th Cir. 2015), cert. denied, 136 S. Ct. 1161 (2016) (rejecting the Third Circuit approach because it goes beyond the adequacy of the class and looks into the validity of individual claims).

\(^{160}\) The Third Circuit’s ascertainability requirement was also rejected in *Briseño v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), *petition for cert. filed*, No. 16-1221, 2017 WL 1353282 (U.S. Apr. 10, 2017), and *In re Petrobras Sec.*, 862 F.3d 250 (2d Cir. 2017).

\(^{161}\) 784 F.3d 154 (3d Cir. 2015).

\(^{162}\) *Id.* at 158–59.

\(^{163}\) *Id.* at 170–71.
defeat class certification.”\textsuperscript{164} It noted that the doctrine was “narrow” and that “[i]f defendants intend to challenge ascertainability, they must be exacting in their analysis . . . .”\textsuperscript{165} Clearly, the court was stating, in judicious terms, that defendants had been too aggressive in relying on ascertainability as a basis for defeating class certification.

\section*{E. Standing of Unnamed Class Members}

As noted above,\textsuperscript{166} \textit{Tyson Foods} did not decide whether a class action that includes uninjured class members can go forward. Defendants have been aggressive in the circuits in arguing that a class with some uninjured class members is barred by Article III of the Constitution. While defendants have had some success,\textsuperscript{167} several circuits have rejected the argument.\textsuperscript{168} As the Seventh Circuit put it, “How many (if any) of the class members have a valid claim is the issue to be determined after the class is certified.”\textsuperscript{169} Or, as the Third Circuit put it: “[U]nnamed, putative class members need not establish Article III standing.”\textsuperscript{170} This standing issue would have been low-hanging fruit to any circuit that was determined to cut back on class actions in a dramatic fashion. The fact that a number of circuits have refused to embrace defendants’ arguments is noteworthy.

\section*{F. Arbitration Clauses}

The Supreme Court’s most recent arbitration cases—\textit{Concepcion}, \textit{Italian Colors}, and \textit{DIRECTV}—have made it very difficult for plaintiffs to circumvent arbitration agreements and class action waivers. Not surprisingly, a number of circuit cases have relied on those authorities in rejecting efforts by plaintiffs to avoid such agreements.

\begin{footnotesize}
\begin{enumerate}
\item[164] Id. at 162.
\item[165] Id. at 165.
\item[166] See supra notes 95–99 and accompanying text (discussing \textit{Tyson Foods}'s treatment of damages and class certification).
\item[167] See, e.g., Denney v. Deutsche Bank AG, 443 F.3d 253, 263–64 (2d Cir. 2006) (explaining that, although unnamed class members were not required to “submit evidence of personal standing,” it was essential that the class “be defined in such a way that anyone within it would have standing”); accord Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010).
\item[169] Parko v. Shell Oil Co., 739 F.3d 1083, 1085 (7th Cir. 2014).
\item[170] Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 362 (3d Cir. 2015).
\end{enumerate}
\end{footnotesize}
and waivers. Nonetheless, there have been some surprising pro-plaintiff developments at the circuit level.

Most importantly, contrary to several other circuits, the Seventh and Ninth Circuits have held that arbitration agreements and class action waivers in employment cases are unenforceable under the National Labor Relations Act (NLRA), and that the Federal Arbitration Act (FAA) does not require a contrary conclusion. For example, in Lewis v. Epic Systems Corp., the Seventh Circuit determined that the FAA “work[s] hand in glove” with the NLRA. The Ninth Circuit has reached a similar conclusion, and the Supreme Court has granted review as noted above. Regardless of the outcome, the point for present purposes is that, even in the arbitration area, with several sweeping Supreme Court cases to grapple with, some circuits have been unwilling to enforce arbitration agreements and class action waivers in employment cases.

G. Consumer Class Actions

As discussed above, the Supreme Court declined to review the Sixth and Seventh Circuit “moldy washing machine” cases, thus leaving these important precedents intact. In Sears, the Seventh Circuit (in an opinion by Judge Posner) recognized that predominance is not “determined simply by counting noses: that is, [by] determining whether there are more common issues or more individual issues . . . .” The court also recognized that it is “more efficient” to decide common liability issues once than to litigate them “separately

171 See, e.g., Rueli v. Baystate Health, Inc., 835 F.3d 53, 64–65 (1st Cir. 2016) (enforcing arbitration clause in wage and hour context, noting that group arbitration could be sought); Kaspers v. Comcast Corp., 631 F. App’x 779, 782 (11th Cir. 2015) (enforcing arbitration agreement between Comcast and customers alleging that services were not received).
172 E.g., D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 362 (5th Cir. 2013) (holding a mutual arbitration agreement must be enforced because the NLRA does not contain a congressional command exempting the statute from application of the FAA and because the NLRB’s interpretation does not fall under the FAA’s “saving clause”); Sutherland v. Ernst & Young, LLP, 726 F.3d 290, 292 (2d Cir. 2013) (per curiam) (same); see also Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772, 775–76 (8th Cir. 2016) (same).
175 823 F.3d 1147 (7th Cir. 2016), cert. granted, 127 S. Ct. 809 (2017).
176 See id.
177 Butler v. Sears, Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013).
in hundreds of different trials.” In *Whirlpool*, the Sixth Circuit noted that “[u]se of the class method [was] warranted particularly because class members are not likely to file individual actions—the cost of litigation would dwarf any potential recovery.”

In *Reyes v. Netdeposit, LLC*, a 2015 case involving allegations of a fraudulent telemarketing scheme and unauthorized debits from bank accounts, the Third Circuit reversed the denial of class certification. In so holding, the court reasoned: “Class actions are often the only practical check against the kind of widespread mass-marketing scheme alleged here.” It noted that “[t]he individual claims arising from such conduct are usually too small to justify suit unless aggregated in a class action.”

In *Rikos v. Procter & Gamble Co.*, another case that the Supreme Court declined to review, the Sixth Circuit upheld class certification in a case alleging that Procter & Gamble's probiotic, Align, did not work as advertised. The court found that the common question—whether Align is snake oil that does not work for anyone—is one that “will yield a common answer for the entire class that goes to the heart of whether P & G will be found liable under the relevant false-advertising laws.”

All four cases recognized that small-claim consumer cases were especially suitable for classwide litigation. These cases are the antithesis of hostility to class actions.

* * *

Like the Supreme Court’s recent opinions, the recent circuit cases, for the most part, do not reflect hostility to class actions. In general, they are cautious, narrow, and generally unreceptive to defendants’ requests to impose sweeping new limits on class actions. Exceptions can be found, but the overall tenor of the recent case law is notable. Importantly, the “pressure to settle” rationale for limiting class actions has all but disappeared from circuit court decisions in the past few years.

180 Id. at 799.
182 802 F.3d 469 (3d Cir. 2015).
183 Id. at 491.
184 Id.
185 799 F.3d 497 (6th Cir. 2015).
186 See *supra* note 61 and accompanying text (discussing the Court’s denial of certiorari).
187 *Rikos*, 799 F.3d at 508–09.
October 2017] CLASS ACTIONS PART II: A RESPITE FROM THE DECLINE

CONCLUSION

For those (such as myself) who believe that the class action device is a valuable tool in many kinds of cases, the reprieve I have described in the Supreme Court and the circuits is a welcome change from years of adverse case law. How long this reprieve will last, however, is anyone’s guess.
therefore concur only in the judgment reversing the Second Circuit.

MICROSOFT CORPORATION, Petitioner

v.

Seth BAKER, et al.

No. 15–457.

Argued March 21, 2017.

Decided June 12, 2017.

Background: Consumers brought putative class action against manufacturer of a video game console, alleging that console was inherently defective. The United States District Court for the Western District of Washington, Ricardo S. Martinez, J., 851 F.Supp.2d 1274, entered an order striking consumers’ class allegations, and subsequently entered an order granting a stipulated motion to dismiss with prejudice. Consumers appealed. On denial of a petition for rehearing en banc, the United States Court of Appeals for the Ninth Circuit, Rawlinson, Circuit Judge, 797 F.3d 607, reversed and remanded. Certiorari was granted.

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

(1) consumers’ voluntary dismissal did not result in a final decision allowing for immediate appellate review of district court’s order striking class allegations, and

(2) plaintiffs cannot transform a tentative interlocutory order denying class certification into a final judgment subject to immediate review by dismissing their claims with prejudice, abrogating

Reversed and remanded.

Justice Thomas filed a concurring opinion in which Chief Justice Roberts and Justice Alito joined.

Justice Gorsuch took no part in the consideration or decision of the case.

1. Federal Courts 3371

For a party to obtain review of an interlocutory order, the district court must certify that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, and the Court of Appeals may then, in its discretion, permit an appeal to be taken from such order. 28 U.S.C.A. § 1292(b).

2. Federal Courts 3299

The fact that an interlocutory order may induce a party to abandon his claim before final judgment in class action is not a sufficient reason for considering the order a final decision subject to immediate appellate review. 28 U.S.C.A. § 1291.

3. Federal Courts 3278

The collateral-order doctrine applies only to a small class of decisions that are conclusive, that resolve important issues completely separate from the merits, and that are effectively unreviewable on appeal from a final judgment. 28 U.S.C.A. § 1291.

4. Federal Courts 3299

5. Federal Courts ⇐3299


6. Federal Courts ⇐3299

The decision whether to permit interlocutory appeal from an adverse class certification decision is committed to the sole discretion of the Court of Appeals. Fed.Rules Civ.Proc.Rule 23(f), 28 U.S.C.A.

7. Federal Courts ⇐3299

The Court of Appeals may grant or deny permissive interlocutory appeal from an adverse class certification order on the basis of any consideration. Fed.Rules Civ.Proc.Rule 23(f), 28 U.S.C.A.

8. Federal Courts ⇐3299

An order striking class allegations is functionally equivalent to an order denying class certification, and, therefore, is appealable at the discretion of the Court of Appeals. Fed.Rules Civ.Proc.Rule 23(f), 28 U.S.C.A.

9. Federal Courts ⇐3275

As a general rule, the whole case and every matter in controversy in it must be decided in a single appeal.

10. Federal Courts ⇐3275

The final judgment rule preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice. 28 U.S.C.A. § 1291.

11. Federal Courts ⇐3299

Consumers' voluntary dismissal with prejudice of their inherent defect claims against manufacturer of a video game console did not result in a final decision allowing for immediate appellate review of district court's order striking their class allegations, even though dismissal did not involve a settlement; consumers' voluntary dismissal tactic undermined final judgment rule and subverted balanced solution put in place by Congress to determine whether class certification orders may be immediately appealed. 28 U.S.C.A. § 1291; Fed.Rules Civ.Proc.Rule 23(f), 28 U.S.C.A.

12. Federal Courts ⇐3275

Finality for purposes of appeal is to be given a practical rather than a technical construction. 28 U.S.C.A. § 1291.

13. Estoppel ⇐68(2)

Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.

14. Federal Courts ⇐3299


15. Federal Courts ⇐3275

The final judgment rule is not satisfied whenever a litigant persuades a district court to issue an order purporting to end the litigation. 28 U.S.C.A. § 1291.

16. Federal Courts ⇐3299

The voluntary dismissal with prejudice of claims in a putative class action does not support appellate jurisdiction of prejudgment orders denying class certifi-
Orders granting or denying class certification are inherently interlocutory, hence not immediately reviewable under 28 U.S.C. § 1291, which empowers federal courts of appeals to review only “final decisions of the district courts.” In *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351, a 1978 decision, this Court held that the death-knell doctrine—which rested on courts’ recognition that a denial of class certification would sometimes end a lawsuit for all practical purposes—did not warrant mandatory appellate jurisdiction of certification orders. *Id.*, at 470, 477, 98 S.Ct. 2454. Although the death-knell theory likely “enhanced the quality of justice afforded a few litigants,” it did so at a heavy cost to § 1291’s finality requirement. *Id.*, at 473, 98 S.Ct. 2454.

First, the potential for multiple interlocutory appeals inhered in the doctrine. See *id.*, at 474, 98 S.Ct. 2454. Second, the death-knell theory forced appellate courts indiscriminately into the trial process, circumventing the two-tiered “screening procedure” Congress established for interlocutory appeals in 28 U.S.C. § 1292(b). *Id.*, at 474, 476, 98 S.Ct. 2454. Finally, the doctrine “operat[ed] only in favor of plaintiffs,” even though the class-certification question may be critically important to defendants as well. *Id.*, at 476, 98 S.Ct. 2454.

Two decades later, in 1998, after Congress amended the Rules Enabling Act, 28 U.S.C. § 2071 et seq., to empower this Court to promulgate rules providing for interlocutory appeal of orders “not otherwise provided for [in § 1292],” § 1292(e), this Court approved Federal Rule of Civil Procedure 23(f). Rule 23(f) authorizes “permissive interlocutory appeal” from adverse class-certification orders in “the sole discretion of the court of appeals.” 28 U.S.C.App., p. 815. This discretionary arrangement was the product of careful calibration on the part of the rulemakers.

Respondents, owners of Microsoft’s videogame console, the Xbox 360, filed this putative class action alleging a design defect in the device. The District Court struck respondents’ class allegations from the complaint, and the Court of Appeals denied respondents permission to appeal that order under Rule 23(f). Instead of pursuing their individual claims to final judgment on the merits, respondents stipulated to a voluntary dismissal of their claims with prejudice, but reserved the right to revive their claims should the Court of Appeals reverse the District Court’s certification denial. Respondents then appealed, challenging only the interlocutory order striking their class allegations. The Ninth Circuit held it had jurisdiction to entertain the appeal under § 1291. It then held that the District Court’s rationale for striking respondents’ class allegations was an impermissible one, but refused to opine on whether class certification was inappropriate for a different reason, leaving that question for the District Court on remand.

*Held:* Federal courts of appeals lack jurisdiction under § 1291 to review an order denying class certification (or, as here, an order striking class allegations) after the named plaintiffs have voluntarily dismissed their claims with prejudice. Pp. 1712–1715.

(a) Section 1291’s final-judgment rule preserves the proper balance between trial
and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice. This Court has resisted efforts to stretch § 1291 to permit appeals of right that would erode the finality principle and disserve its objectives. See, e.g., Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100, 112, 130 S.Ct. 599, 175 L.Ed.2d 458. Attempts to secure appeal as of right from adverse class certification orders fit that bill. Pp. 1712–1713.

(b) Respondents’ voluntary-dismissal tactic, even more than the death-knell theory, invites protracted litigation and piecemeal appeals. Under the death-knell doctrine, a court of appeals could decline to hear an appeal if it determined that the plaintiff “ha[d] adequate incentive to continue” despite the denial of class certification. Coopers & Lybrand, 437 U.S., at 471, 98 S.Ct. 2454. Under respondents’ theory, however, the decision whether an immediate appeal will lie resides exclusively with the plaintiff, who need only dismiss her claims with prejudice in order to appeal the district court’s order denying class certification. And she may exercise that option more than once, interrupting district court proceedings with an interlocutory appeal again, should the court deny class certification on a different ground.

Respondents contend that their position promotes efficiency, observing that after dismissal with prejudice the case is over if the plaintiff loses on appeal. But plaintiffs with weak merits claims may readily assume that risk, mindful that class certification often leads to a hefty settlement. And the same argument was evident in the death-knell context, yet this Court determined that the potential for piecemeal litigation was “apparent and serious.” Id., at 474, 98 S.Ct. 2454. That potential is greater still under respondents’ theory, where plaintiffs alone determine whether and when to appeal an adverse certification ruling. Pp. 1712–1714.

(c) Also like the death-knell doctrine, respondents’ theory allows indiscriminate appellate review of interlocutory orders. Beyond disturbing the “‘appropriate relationship between the respective courts.’” Coopers & Lybrand, 437 U.S., at 476, 98 S.Ct. 2454 respondents’ dismissal tactic undercuts Rule 23(f)’s discretionary regime. This consideration is “[o]f prime significance to the jurisdictional issue” in this case, Swint v. Chambers County Comm’n, 514 U.S. 35, 46, 115 S.Ct. 1203, 131 L.Ed.2d 60, because Congress has established rulemaking as the means for determining when a decision is final for purposes of § 1291 and for providing for appellate review of interlocutory orders not covered by statute, see §§ 2072(c) and 1292(e).

Respondents maintain that Rule 23(f) is irrelevant, for it concerns interlocutory orders, whereas this case involves an actual final judgment. Yet permitting respondents’ voluntary-dismissal tactic to yield an appeal of right would seriously undermine Rule 23(f)’s careful calibration, as well as Congress’ designation of rulemaking “as the preferred means for determining whether and when prejudgment orders should be immediately appealable,” Mohawk Industries, 558 U.S., at 113, 130 S.Ct. 599. Plaintiffs in putative class actions cannot transform a tentative interlocutory order into a final judgment within the meaning of § 1291 simply by dismissing their claims with prejudice. Finality “is not a technical concept of temporal or physical termination.” Cobbledick v. United States, 309 U.S. 323, 326, 60 S.Ct. 540, 84 L.Ed. 783. It is one “means [geared to] achieving a healthy legal system,” ibid., and its contours are determined accordingly. Pp. 1713–1715.
(d) The one-sidedness of respondents’ voluntary-dismissal device reinforces the conclusion that it does not support mandatory appellate jurisdiction of refusals to grant class certification. The tactic permits only plaintiffs, never defendants, to force an immediate appeal of an adverse certification ruling. Yet the “class issue” may be just as important to defendants, Coopers & Lybrand, 437 U.S., at 476, 98 S.Ct. 2454 for class certification may force a defendant to settle rather than run the risk of ruinous liability. P. 1715.

797 F.3d 607, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, in which ROBERTS, C.J., and ALITO, J., joined. GORSUCH, J., took no part in the consideration or decision of the case.

Jeffrey L. Fisher, Stanford, CA, for Petitioner.

Peter K. Stris, Los Angeles, CA, for Respondents.


For U.S. Supreme Court briefs, see:
2015 WL 9313239 (Reply.Brief)
2016 WL 3268749 (Reply.Brief)
2016 WL 2893931 (Resp.Brief)
2016 WL 1055619 (Pet.Brief)

Justice GINSBURG delivered the opinion of the Court.

This case concerns options open to plaintiffs, when denied class-action certification by a district court, to gain appellate review of the district court’s order. Orders granting or denying class certification, this Court has held, are “inherently interlocutory,” Coopers & Lybrand v. Livesay, 437 U.S. 463, 470, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), hence not immediately reviewable under 28 U.S.C. § 1291, which provides for appeals from “final decisions.” Pursuant to Federal Rule of Civil Procedure 23(f), promulgated in 1998, however, orders denying or granting class certification may be appealed immediately if the court of appeals so permits. Absent such permission, plaintiffs may pursue their individual claims on the merits to final judgment, at which point the denial of class-action certification becomes ripe for review.

The plaintiffs in the instant case, respondents here, were denied Rule 23(f) permission to appeal the District Court’s refusal to grant class certification. Instead of pursuing their individual claims to final judgment on the merits, respondents stip-
ulated to a voluntary dismissal of their claims "with prejudice," but reserved the right to revive their claims should the Court of Appeals reverse the District Court's certification denial.

We hold that the voluntary dismissal essayed by respondents does not qualify as a "final decision" within the compass of § 1291. The tactic would undermine § 1291's firm finality principle, designed to guard against piecemeal appeals, and subvert the balanced solution Rule 23(f) put in place for immediate review of class-action orders.

I

A

Under § 1291 of the Judicial Code, federal courts of appeals are empowered to review only "final decisions of the district courts." 28 U.S.C. § 1291.1 Two guides, our decision in Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), and Federal Rule of Civil Procedure 23(f), control our application of that finality rule here.

1

In Coopers & Lybrand, this Court considered whether a plaintiff in a putative class action may, under certain circumstances, appeal as of right a district court order striking class allegations or denying a motion for class certification. We held unanimously that the so-called "death-knell" doctrine did not warrant mandatory appellate jurisdiction of such "inherently interlocutory" orders. 437 U.S., at 470, 477, 98 S.Ct. 2454. Courts of Appeals employing the doctrine "regarded [their] jurisdiction as depending on whether [rejection of class-action status] had sounded the 'death knell' of the action." Id., at 466, 98 S.Ct. 2454. These courts asked whether the refusal to certify a class would end a lawsuit for all practical purposes because the value of the named plaintiff's individual claims made it "economically imprudent to pursue his lawsuit to a final judgment and [only] then seek appellate review of [the] adverse class determination." Id., at 469–470, 98 S.Ct. 2454. If, in the court of appeals' view, the order would terminate the litigation, the court deemed the order an appealable final decision under § 1291. Id., at 471, 98 S.Ct. 2454. If, instead, the court determined that the plaintiff had "adequate incentive to continue [litigating], the order [was] considered interlocutory." Ibid. Consequently, immediate appeal would be denied.

The death-knell theory likely "enhance[d] the quality of justice afforded a few litigants," we recognized. Id., at 473, 98 S.Ct. 2454. But the theory did so, we observed, at a heavy cost to § 1291's finality requirement, and therefore to "the judicial system's overall capacity to administer justice." Id., at 473, 98 S.Ct. 2454; see id., at 471, 98 S.Ct. 2454 (Section 1291 "evinces a legislative judgment that 'restricting appellate review to final decisions prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition.' " (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (alterations and internal quotation marks omitted))). First, the potential for multiple interlocutory appeals inhered in the doctrine: When a ruling denying class certification on one ground was reversed on appeal, a death-knell plaintiff might again claim "entitlement to an appeal as a matter of right" if, on remand, the district court denied class certification on a different ground. Coopers & Lybrand, 437 U.S., at 474, 98 S.Ct. 2454.

1. Section 1292, which authorizes review of certain interlocutory decisions, does not include among those decisions class-action certifications. See 28 U.S.C. § 1292.
Second, the doctrine forced appellate courts indiscriminately into the trial process, thereby defeating a "vital purpose of the final-judgment rule—that of maintaining the appropriate relationship between the respective courts." \(^1\) \(\text{Id.},\) at 476, 98 S.Ct. 2454 (internal quotation marks omitted); see \(\text{id.},\) at 474, 98 S.Ct. 2454.

The Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b), we explained, had created a two-tiered "screening procedure" to preserve this relationship and to restrict the availability of interlocutory review to "appropriate cases." 437 U.S., at 474, 98 S.Ct. 2454. For a party to obtain review under § 1292(b), the district court must certify that the interlocutory order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The court of appeals may then, "in its discretion, permit an appeal to be taken from such order." The death-knell doctrine, we stressed, "circumvent[ed] [§ 1292(b)'s] restrictions." \(\text{Id.},\) at 475, 98 S.Ct. 2454.

Finally, we observed, the doctrine was one sided: It "operate[d] only in favor of plaintiffs," even though the class-certification question is often "of critical importance to defendants as well." \(\text{Id.},\) at 476, 98 S.Ct. 2454. Just as a denial of class certification may sound the death knell for plaintiffs, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." \(\text{Ibid.}\)\(^2\)

\(\text{[2, 3]}\) In view of these concerns, the Court reached this conclusion in \(\text{Coopers \& Lybrand}:\) "The fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering [the order] a 'final decision' within the meaning of § 1291." \(\text{Id.},\) at 477, 98 S.Ct. 2454.\(^3\)

2. This scenario has been called a "reverse death knell," Sullivan & Trueblood, Rule 23(f): A Note on Law and Discretion in the Courts of Appeals, 246 F.R.D. 277, 280 (2008), or "inverse death knell," 7B C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1802, p. 299 (3d ed. 2005), for it too ends the litigation as a practical matter.

3. \(\text{Coopers \& Lybrand}\) also rejected the collateral-order doctrine as a basis for invoking § 1291 to appeal an order denying class certification. The collateral-order doctrine applies only to a "small class" of decisions that are conclusive, that resolve important issues "completely separate from the merits," and that are "effectively unreviewable on appeal from a final judgment." 437 U.S., at 468, 98 S.Ct. 2454. An order concerning class certification, we explained, fails each of these criteria. See \(\text{id.},\) at 469, 98 S.Ct. 2454.
[4, 5] Another avenue opened in 1998 when this Court approved Federal Rule of Civil Procedure 23(f). Seen as a response to Coopers & Lybrand, see, e.g., Blair v. Equifax Check Services, Inc., 181 F.3d 832, 834 (C.A.7 1999); Solimine & Hines, Deciding To Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f), 41 Wm. & Mary L. Rev. 1531, 1568 (2000), Rule 23(f) authorizes “permissive interlocutory appeal” from adverse class-certification orders in the discretion of the court of appeals, Advisory Committee’s 1998 Note on subd. (f) of Fed. Rule Civ. Proc. 23, 28 U.S.C.App., p. 815 (hereinafter Committee Note on Rule 23(f)). The Rule was adopted pursuant to § 1292(e), see Committee Note on Rule 23(f), which empowers this Court, in accordance with the Rules Enabling Act, 28 U.S.C. § 2072, to promulgate rules “to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for [in § 1292].” § 1292(e).1 Rule 23(f) reads:

“A court of appeals may permit an appeal from an order granting or denying class-action certification . . . if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.” 5

Courts of appeals wield “unfettered discretion” under Rule 23(f), akin to the discretion afforded circuit courts under § 1292(b). Committee Note on Rule 23(f).

But Rule 23(f) otherwise “departs from the § 1292(b) model,” for it requires neither district court certification nor adherence to § 1292(b)’s other “limiting requirements.” Committee Note on Rule 23(f); see supra, at 1707–1708.

[6] This resolution was the product of careful calibration. By “[r]emoving the power of the district court to defeat any opportunity to appeal,” the drafters of Rule 23(f) sought to provide “significantly greater protection against improvident certification decisions than § 1292(b)” alone offered. Judicial Conference of the United States, Advisory Committee on Civil Rules, Minutes of November 9–10, 1995. But the drafters declined to go further and provide for appeal as a matter of right. “[A] right to appeal would lead to abuse” on the part of plaintiffs and defendants alike, the drafters apprehended, “increas[ing] delay and expense” over “routine class certification decisions” unworthy of immediate appeal. Ibid. (internal quotation marks omitted). See also Brief for Civil Procedure Scholars as Amici Curiae 6–7, 11–14 (“Rule 23(f) was crafted to balance the benefits of immediate review against the costs of interlocutory appeals.” (capitalization omitted)). Rule 23(f) therefore commits the decision whether to permit interlocutory appeal from an adverse certification decision to “the sole discretion of the court of appeals.” Committee Note


5. Rule 23(f) has changed little since its adoption in 1998. See Advisory Committee’s 2007 and 2009 Notes on subd. (f) of Fed. Rule Civ. Proc. 23, 28 U.S.C.App., p. 820 (deleting a redundancy and increasing the time to petition for permission to appeal from ten to 14 days, respectively).
on Rule 23(f); see Federal Judicial Center, T. Willging, L. Hooper, & R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 86 (1996) (hereinafter Federal Judicial Center Study) (“The discretionary nature of the proposed rule ... is designed to be a guard against abuse of the appellate process.”).

The Rules Committee offered some guidance to courts of appeals considering whether to authorize appeal under Rule 23(f). “Permission is most likely to be granted,” the Committee Note states, “when the certification decision turns on a novel or unsettled question of law,” or when “the decision on certification is likely dispositive of the litigation,” as in a death-knell or reverse death-knell situation. Committee Note on Rule 23(f); see supra, at 1708, and n. 2. Even so, the Rule allows courts of appeals to grant or deny review “on the basis of any consideration.” Committee Note on Rule 23(f) (emphasis added).

B

With this background in mind, we turn to the putative class action underlying our jurisdictional inquiry. The lawsuit is not the first of its kind. A few years after petitioner Microsoft Corporation released its popular videogame console, the Xbox 360, a group of Xbox owners brought a putative class action against Microsoft based on an alleged design defect in the device. See In re Microsoft Xbox 360 Scratched Disc Litigation, 2009 WL 10219350, *1 (W.D.Wash., Oct. 5, 2009). The named plaintiffs, advised by some of the same counsel representing respondents in this case, asserted that the Xbox scratched (and thus destroyed) game discs during normal game-playing conditions. See ibid. The District Court denied class certification, holding that individual issues of damages and causation predominated over common issues. See id., at *6–*7.

The plaintiffs petitioned the Ninth Circuit under Rule 23(f) for leave to appeal the class-certification denial, but the Ninth Circuit denied the request. See 851 F.Supp.2d 1274, 1276 (W.D.Wash.2012). Thereafter, the Scratched Disc plaintiffs settled their claims individually. 851 F.Supp.2d, at 1276.

Two years later, in 2011, respondents filed this lawsuit in the same Federal District Court. They proposed a nationwide class of Xbox owners based on the same design defect alleged in Scratched Disc Litigation. See 851 F.Supp.2d, at 1275–1276. The class-certification analysis in the earlier case did not control, respondents urged, because an intervening Ninth Circuit decision constituted a change in law sufficient to overcome the deference ordinarily due, as a matter of comity, the previous certification denial. Id., at 1277–1278. The District Court disagreed. Concluding that the relevant Circuit decision had not undermined Scratched Disc Litigation’s causation analysis, the court determined that comity required adherence to the earlier certification denial and
therefore struck respondents’ class allegations. 851 F.Supp.2d, at 1280–1281.

[8] Invoking Rule 23(f), respondents petitioned the Ninth Circuit for permission to appeal that ruling. Interlocutory review was appropriate in this case, they argued, because the District Court’s order striking the class allegations created a “death-knell situation”: The “small size of [their] claims ma[de] it economically irrational to bear the cost of litigating th[e] case to final judgment,” they asserted, so the order would “effectively kil[l] the case.” Pet. for Permission To Appeal Under Rule 23(f) in No. 12–80085(CA9), App. 118. The Ninth Circuit denied the petition. Order in No. 12–80085 (CA9, June 12, 2012), App. 121.

Respondents then had several options. They could have settled their individual claims like their Scratched Disc predecessors or petitioned the District Court, pursuant to § 1292(b), to certify the interlocutory order for appeal, see supra, at 1707–1708. They could also have proceeded to litigate their case, mindful that the District Court could later reverse course and certify the proposed class. See Fed. Rule Civ. Proc. 23(c)(1)(C) (“An order that grants or denies class certification may be altered or amended before final judgment.”); Coo pers & Lybrand, 437 U.S., at 469, 98 S.Ct. 2454 (a certification order “is subject to revision in the District Court”). Or, in the event the District Court did not change course, respondents could have litigated the case to final judgment and then appealed. Id., at 469, 98 S.Ct. 2454 (“an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff”).

Instead of taking one of those routes, respondents moved to dismiss their case with prejudice. “After the [c]ourt has entered a final order and judgment,” respondents explained, they would “appeal the . . . order striking [their] class allegations.” Motion To Dismiss in No. 11–cv–00722 (WD Wash., Sept. 25, 2012), App. 122–123. In respondents’ view, the voluntary dismissal enabled them “to pursue their individual claims or to pursue relief solely on behalf of the class, should the certification decision be reversed.” Brief for Respondents 15. Microsoft stipulated to the dismissal, but maintained that respondents would have “no right to appeal” the order striking the class allegations after thus dismissing their claims. App. to Pet. for Cert. 35a–36a. The District Court granted the stipulated motion to dismiss, id., at 39a, and respondents appealed. They challenged only the District Court’s interlocutory order striking their class allegations, not the dismissal order which they invited. See Brief for Plaintiffs–Appellants in No. 12–35946(CA9).

The Ninth Circuit held it had jurisdiction to entertain the appeal under § 1291. 797 F.3d 607, 612 (2015). The Court of Appeals rejected Microsoft’s argument that respondents’ voluntary dismissal, explicitly engineered to appeal the District Court’s interlocutory order striking the class allegations, impermissibly circumvented Rule 23(f). Ibid., n. 3. Because the stipulated dismissal “did not involve a settlement,” the court reasoned, it was “‘a sufficiently adverse—and thus appealable—final decision’” under § 1291. Id., 797 F.3d 419, 421 (C.A.7 2002). See also United Airlines, Inc. v. McDonald, 432 U.S. 385, 388, and n. 4, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977) (equating order striking class allegations with “a denial of class certification”).
Satisfied of its jurisdiction, the Ninth Circuit held that the District Court had abused its discretion in striking respondents’ class allegations. 797 F.3d, at 615. The Court of Appeals “express[ed] no opinion on whether” respondents “should prevail on a motion for class certification,” ibid., concluding only that the District Court had misread recent Circuit precedent, see id., at 613–615, and therefore misapplied the comity doctrine, id., at 615. Whether a class should be certified, the court said, was a question for remand, “better addressed if and when [respondents] move[d] for class certification.” Ibid.

We granted certiorari to resolve a Circuit conflict over this question: Do federal courts of appeals have jurisdiction under § 1291 and Article III of the Constitution to review an order denying class certification (or, as here, an order striking class allegations) after the named plaintiffs have voluntarily dismissed their claims with prejudice? 8 577 U.S. ——, 136 S.Ct. 890, 193 L.Ed.2d 783 (2016). Because we hold that § 1291 does not countenance jurisdiction by these means, we do not reach the constitutional question, and therefore do not address the arguments and analysis discussed in the opinion concurring in the judgment.

and for determining when nonfinal orders may be immediately appealed, see §§ 2072(c) and 1292(e), the tactic does not give rise to a “final decisio[n]” under § 1291.

A

Respondents' voluntary-dismissal tactic, even more than the death-knell theory, invites protracted litigation and piecemeal appeals. Under the death-knell doctrine, a court of appeals could decline to hear an appeal if it determined that the plaintiff “ha[d] adequate incentive to continue” despite the denial of class certification. Cooper & Lybrand, 437 U.S., at 471, 98 S.Ct. 2454. Appellate courts lack even that authority under respondents' theory. Instead, the decision whether an immediate appeal will lie resides exclusively with the plaintiff; she need only dismiss her claims with prejudice, whereupon she may appeal the district court's order denying class certification. And, as under the death-knell doctrine, she may exercise that option more than once, stopping and starting the district court proceedings with repeated interlocutory appeals. See id., at 474, 98 S.Ct. 2454 (death-knell doctrine offered “no assurance that the trial process [would] not again be disrupted by interlocutory review”).

Consider this case. The Ninth Circuit reviewed and rejected only the District Court's application of comity as a basis for striking respondents' class allegations. 797 F.3d, at 615. The appeals court declined to reach Microsoft's other arguments against class certification. See ibid. It remained open to the District Court, in the Court of Appeals' view, to deny class certification on a different ground, and respondents would be free, under their theory, to force appellate review of any new order denying certification by again dismissing their claims. In designing Rule 23(f)'s provision for discretionary review, the Rules Committee sought to prevent such disruption and delay. See supra, at 1709–1710.

9 Rule 23(f) avoids delay not only by limiting class-certification appeals to those permitted by the federal courts of appeals, but also by specifying that “[a]n appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.” See Blair v. Equifax Check Services, Inc., 181 F.3d 832, 835 (C.A.7 1999) (“Rule 23(f) is drafted to avoid delay.”). Respondents' dismissal tactic, by contrast, halts district court proceedings whenever invoked.

10 The very premise of the death-knell doctrine was that plaintiffs “would not pursue their claims individually.” Cooper & Lybrand, 437 U.S., at 466, 98 S.Ct. 2454. Having pressed such an argument for the benefit of immediate review, a death-knell plaintiff who lost on appeal would encounter the general
that potential is greater still under respondents’ theory, where plaintiffs alone determine whether and when to appeal an adverse certification ruling.

B

Another vice respondents’ theory shares with the death-knell doctrine, both allow indiscriminate appellate review of interlocutory orders. *Ibid.* Beyond disturbing the “appropriate relationship between the respective courts,” *id.*, at 476, 98 S.Ct. 2454 (internal quotation marks omitted), respondents’ dismissal tactic undermines Rule 23(f)’s discretionary regime. This consideration is “of prime significance to the jurisdictional issue before us.” *Swint v. Chambers County Comm’n*, 514 U.S. 35, 46, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995) (pendent appellate jurisdiction in collateral-order context would undermine § 1292(b)); see *supra*, at 1707–1708 (death-knell doctrine impermissibly circumvented § 1292(b)).

In the Rules Enabling Act, as earlier recounted, Congress authorized this Court to determine when a decision is final for purposes of § 1291, and to provide for appellate review of interlocutory orders not covered by statute. See *supra*, at 1709, and n. 4. These changes are to come from rulemaking, however, not judicial decisions in particular controversies or inventive litigation ploys. See *Swint*, 514 U.S., at 48, 115 S.Ct. 1203. In this case, the rulemaking process has dealt with the matter, yielding a “measured, practical solution” to the questions whether and when adverse certification orders may be immediately appealed. *Mohawk Industries*, 558 U.S., at 114, 130 S.Ct. 599. Over years the Advisory Committee on the Federal Rules of Civil Procedure studied the data on class-certification rulings and appeals, weighed various proposals, received public comment, and refined the draft rule and Committee Note. See Solimine & Hines, 41 Wm. & Mary L. Rev., at 1564–1566, and nn. 178–189; Federal Judicial Center Study 80–87. Rule 23(f) reflects the rulemakers’ informed assessment, permitting, as explained *supra*, at 1708–1710, interlocutory appeals of adverse certification orders, whether sought by plaintiffs or defendants, solely in the discretion of the courts of appeals. That assessment “warrants the Judiciary’s full respect.” *Swint*, 514 U.S., at 48, 115 S.Ct. 1203; see *Mohawk Industries*, 558 U.S., at 118–119, 130 S.Ct. 599 (THOMAS, J., concurring in part and concurring in judgment).

Here, however, the Ninth Circuit, after denying respondents permission to appeal under Rule 23(f), nevertheless assumed jurisdiction of their appeal challenging only the District Court’s order striking the class allegations. See *supra*, at 1710–1712. According to respondents, even plaintiffs who altogether bypass Rule 23(f) may force an appeal by dismissing their claims with prejudice. See Tr. of Oral Arg. 34. Rule 23(f), respondents say, is irrelevant, for it “address[es] interlocutory orders,” whereas this case involves “an actual final judgment.” Brief for Respondents 26, 28.

We are not persuaded. If respondents’ voluntary-dismissal tactic could yield an appeal of right, Rule 23(f)’s careful calibration—as well as Congress’ designation of rulemaking “as the preferred means for determining whether and when prejudgment orders should be immediately appealable,” *Mohawk Industries*, 558 U.S., at 113, 130 S.Ct. 599 (majority opinion)—

cause his interests have changed, assume a contrary position.” *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895).
of Pittsburgh Medical Center, 729 F.3d 239, 244 (C.A.3 2013).

Plaintiffs in putative class actions cannot transform a tentative interlocutory order, see supra, at 1710 – 1711, into a final judgment within the meaning of § 1291 simply by dismissing their claims with prejudice—subject, no less, to the right to “revive” those claims if the denial of class certification is reversed on appeal, see Brief for Respondents 45; Tr. of Oral Arg. 31 (assertion by respondents’ counsel that, if the appeal succeeds, “everything would spring back to life” on remand). Were respondents’ reasoning embraced by this Court, “Congress[‘] final decision rule would end up a pretty puny one.” Digital Equipment Corp., 511 U.S., at 872, 114 S.Ct. 2454; see supra, at 1708. Respondents’ theory permits plaintiffs only, never defendants, to force an immediate appeal of an adverse certification ruling. Yet the “class issue” may be just as important to defendants, Coopers & Lybrand, 437 U.S., at 476, 98 S.Ct. 2454 for “[a]n order granting certification . . . may force a defendant to settle rather than . . . run the risk of potentially ruinous liability,” Committee Note on Rule 23(f); see supra, at 1708, and n. 2 (defendants may face a “reverse death knell”). Accordingly, we recognized in Coopers & Lybrand that “[w]hatever similarities or differences there are between plaintiffs and defendants in this context involve questions of policy for Congress.” 437 U.S., at 476, 98 S.Ct. 2454. Congress chose the rulemaking process to settle the matter, and the rulemakers did so by adopting Rule 23(f)’s evenhanded prescription. It is not the prerogative of litigants or federal courts to disturb that settlement. See supra, at 1713 – 1714.

For the reasons stated, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice GORSUCH took no part in the consideration or decision of this case.

Justice THOMAS, with whom THE CHIEF JUSTICE and Justice ALITO join, concurring in the judgment.

I agree with the Court that the Court of Appeals lacked jurisdiction over respon-

11. Respondents also invoke our decision in United States v. Procter & Gamble Co., 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958), but that case—a civil antitrust enforcement action—involved neither class-ac-

appellate jurisdiction of prejudgment orders denying class certification.” Coopers & Lybrand, 437 U.S., at 476, 98 S.Ct. 2454; see supra, at 1708. Respondents’ theory permits plaintiffs only, never defendants, to force an immediate appeal of an adverse certification ruling. Yet the “class issue” may be just as important to defendants, Coopers & Lybrand, 437 U.S., at 476, 98 S.Ct. 2454 for “[a]n order granting certification . . . may force a defendant to settle rather than . . . run the risk of potentially ruinous liability,” Committee Note on Rule 23(f); see supra, at 1708, and n. 2 (defendants may face a “reverse death knell”). Accordingly, we recognized in Coopers & Lybrand that “[w]hatever similarities or differences there are between plaintiffs and defendants in this context involve questions of policy for Congress.” 437 U.S., at 476, 98 S.Ct. 2454. Congress chose the rulemaking process to settle the matter, and the rulemakers did so by adopting Rule 23(f)’s evenhanded prescription. It is not the prerogative of litigants or federal courts to disturb that settlement. See supra, at 1713 – 1714.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice GORSUCH took no part in the consideration or decision of this case.

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11. Respondents also invoke our decision in United States v. Procter & Gamble Co., 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958), but that case—a civil antitrust enforcement action—involved neither class-ac-
The plaintiffs in this case, respondents here, sued Microsoft, petitioner here, to recover damages after they purchased allegedly faulty video game consoles that Microsoft manufactured. The plaintiffs brought claims for themselves (individual claims) and on behalf of a putative class of similarly situated consumers (class allegations). Early in the litigation, the District Court granted Microsoft’s motion to strike the class allegations, effectively declining to certify the class. The Court of Appeals denied permission to appeal that decision under Federal Rule of Civil Procedure 23(f), which requires a party to obtain permission from the court of appeals before appealing a decision regarding class certification.

The plaintiffs decided not to pursue their individual claims, instead stipulating to a voluntary dismissal of those claims with prejudice. They then filed a notice of appeal from the voluntary dismissal order. On appeal, they did not ask the Court of Appeals to reverse the District Court’s dismissal of their individual claims. They instead asked the Court of Appeals to reverse the order striking their class allegations. The question presented in this case is whether the Court of Appeals had jurisdiction to hear the appeal under both § 1291, which grants appellate jurisdiction to the courts of appeals over “final decisions” by district courts, and under Article III of the Constitution, which limits the jurisdiction of federal courts to “cases” and “controversies.”

The Court today holds that the Court of Appeals lacked jurisdiction under § 1291 because the voluntary dismissal with prejudice did not result in a “final decision.” I disagree with that holding. A decision is “final” for purposes of § 1291 if it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945). The order here dismissed all of the plaintiffs’ claims with prejudice and left nothing for the District Court to do but execute the judgment. See App. to Pet. for Cert. 39a (“direct[ing] the Clerk to enter Judgment ... and close th[e] case”).

The Court reaches the opposite conclusion, relying not on the text of § 1291 or this Court’s precedents about finality, but on Rule 23(f). Rule 23(f) makes interlocutory orders regarding class certification appealable only with the permission of the court of appeals. The Court concludes that the plaintiffs’ “voluntary dismissal” “does not qualify as a ‘final decision’” because allowing the plaintiffs’ appeal would “subvert the balanced solution Rule 23(f) put in place for immediate review of class-action orders.” Ante, at 1707.

The Court’s conclusion does not follow from its reasoning. Whether a dismissal with prejudice is “final” depends on the meaning of § 1291, not Rule 23(f). Rule 23(f) says nothing about finality, much less about the finality of an order dismissing individual claims with prejudice. I agree with the Court that the plaintiffs are trying to avoid the requirements for interlocutory appeals under Rule 23(f), but our view of the balance struck in that rule should not warp our understanding of finality under § 1291.

Although I disagree with the Court’s reading of § 1291, I agree that the plaintiffs could not appeal in these circumstances. In my view, they could not appeal because the Court of Appeals lacked jurisdiction under Article III of the Constitution. The “judicial Power” of the United States extends only to “Cases” and “Controversies.” Art. III, § 2. This require-

The plaintiffs' appeal from their voluntary dismissal did not satisfy this jurisdictional requirement. When the plaintiffs asked the District Court to dismiss their claims, they consented to the judgment against them and disavowed any right to relief from Microsoft. The parties thus were no longer adverse to each other on any claims, and the Court of Appeals could not "affect the[ir] rights" in any legally cognizable manner. *Ibid.* Indeed, it has long been the rule that a party may not appeal from the voluntary dismissal of a claim, since the party consented to the judgment against it. See, e.g., *Evans v. Phillips*, 4 Wheat. 73, 4 L.Ed. 516 (1819); *Lord v. Veazie*, 8 How. 251, 255–256, 12 L.Ed. 1067 (1850); *United States v. Bab- bitt*, 104 U.S. 767, 26 L.Ed. 921 (1882); *Deakins v. Monaghan*, 484 U.S. 193, 199–200, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988).

The plaintiffs contend that their interest in reversing the order striking their class allegations is sufficient to satisfy Article III's case-or-controversy requirement, but they misunderstand the status of putative class actions. Class allegations, without an underlying individual claim, do not give rise to a "case" or "controversy." Those allegations are simply the means of invoking a procedural mechanism that enables a plaintiff to litigate his individual claims on behalf of a class. See *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010) (plurality opinion). Thus, because the Court of Appeals lacked Article III jurisdiction to adjudicate the individual claims, it could not hear the plaintiffs' appeal of the order striking their class allegations.

Plaintiffs' representation that they hope to "revive their [individual] claims should they prevail" on the appeal of the order striking their class allegations does not undermine this conclusion. Brief for Respondents 45. This Court has interpreted Article III "to demand that an actual controversy be extant at all stages of review, not merely at the time the complaint is filed." *Campbell–Ewald Co., supra*, at ––––, 136 S.Ct., at 669 (internal quotation marks and alterations omitted). And in any event, a favorable ruling on class certification would not "revive" their individual claims: A court's decision about class allegations "in no way touch[es] the merits" of those claims. *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 482, 98 S.Ct. 2451, 57 L.Ed.2d 364 (1978).

* * *

Because I would hold that the Court of Appeals lacked jurisdiction under Article III to consider respondents' appeal, I concur in the judgment.