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How States Can Protect Their Policies in Federal Class Actions

LUCAS WATKINS*

INTRODUCTION

The role of the states in our constitutional system is to protect their citizens and supply tort liability. Where federal law does not pre-empt state systems of liability, state law supplies the tort- and contract-based rules that govern the vast majority of the relationships in our society and economy. Some think that national rules of liability, or new national choice-of-law rules, should supplant today’s state-by-state regulation. But until Congress enacts a comprehensive regulatory scheme, state law will control the causes of action that plaintiffs can bring. And the state law that controls the cause should control the way that the cause is adjudicated—at least insofar as the method of adjudication affects the substance of the right.

This is particularly true in the context of class actions. Although class actions are almost always defined in procedural terms—the federal class action rules are located in the Federal Rules of Civil Procedure, after all—they have important substantive effects. More

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4. Cf. Issacharoff & Sharkey, supra note 2, at 1360–64 (addressing the obvious commerce clause objections to such a comprehensive regulatory scheme by pointing to “the sweep of the recognized federal interest in national market conduct under current doctrine”).

5. See FED. R. CIV. P. 23.

6. See, e.g., Stephen B. Burbank, The Class Action Fairness Act in Historical Context: A Preliminary View, 156 U. PA. L. Rev. 1439, 1442 (2008) (“[A]ll informed observers of the litigation process now understand that Federal Rule of Civil Procedure 23 and state class action rules, although regulating the process of litigation, can still have major substantive impact[s].”); Lawrence B. Solum, Procedural Justice, 78 S.
importantly, as Part I explains, states intend those substantive effects. And to the extent that states are attempting substantively to affect the behavior of the parties their law regulates, federal law should take account of the policies states are trying to implement.

Part II of this Article argues that federal courts hearing state claims should take account of state class action policies, even when deciding the apparently purely federal question of class certification under Federal Rule 23. To be sure, Hanna v. Plumer directs federal courts to apply valid Federal Rules regardless of state law. But Hanna itself recognized the important role of context in divining the line between substance and procedure. Justice Harlan’s concurrence in Hanna famously questioned the decision’s “arguably procedural, ergo constitutional” reasoning. And subsequent decisions have read the Federal Rules to “give effect to the substantive thrust of [state law]” when possible. Given these federal decisions recognizing the importance of state policies, the Erie doctrine is flexible enough to take more account of state class action practice.

Even if federal courts refuse to include state policies in class action certification decisions, states can protect their substantive policy preferences by taking advantage of other routes to influence the federal courts. Part III explores these options. State law can affect federal courts’ decisions on diversity in many different ways, including the questions of which parties may sue, which state’s law controls the lawsuit, and the substantive elements of the state law at issue. Federal courts already look to state jurisprudence to answer these questions. A state with a substantive preference for or against class

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9. Id. at 476 (Harlan, J., concurring).
10. Id. at 476 (Harlan, J., concurring).
12. The Erie doctrine mandates that a federal court sitting in diversity jurisdiction must apply state substantive law. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
action resolution of its causes of action can use these levers to affect federal certification decisions.

I. CLASS ACTIONS PROTECT IMPORTANT SUBSTANTIVE RIGHTS

The class action defies easy classification under the traditional substance–procedure divide. Class actions have always been enacted via procedural rules. Federal class actions were put in place through the Federal Rules of Civil Procedure, and many states have very similar procedural rules. Like statutes of limitation, pleading standards, and other rules of a procedural flavor, class actions have always served purposes beyond docket control. The jurisprudence on class actions is massive. Any subset of class action rules could provide a basis for separating substantive justifications from procedural justifications, as could any category of class action claims.

The discussion below focuses on Rule 23(b)(3) and similar state provisions, and on consumer fraud claims. Federal Rule of Civil Procedure 23—which authorizes class actions in federal court—provides a useful introduction to the issues involved in class certification. To be certified, a class must satisfy the prerequisites of Rule 23(a): the class members must be numerous, their claims must raise common questions of law or fact, the class representative must be typical of the class, and the class representative must adequately represent the class. The class must also fall into one of the categories in Rule 23(b), which organizes class actions by their goals. When a defendant’s resources cannot satisfy all of the claims against it, Rule 23(b)(1)(B) ensures a fair distribution of the limited fund. A group of plaintiffs claiming harm from a continuing course of conduct may use Rule 23(b)(2) to prevent holdouts from holding a judgment or a settlement hostage. Rule 23(b)(3) makes “negative-value” suits economically viable by

22. A negative-value suit is a lawsuit in which the cost to bring an individual claim is larger than the expected return on the claim. See infra Part I.A; cf. Samuel
allowing a class action in any case where it would be "superior to other methods . . . for adjudicating the controversy." And all of these class actions allow the plaintiffs to benefit from the same economies of scale that the defendant does.

States have a great variety of possible interests in authorizing class actions and fine-tuning their effects. Justice Mosk outlined them well in *Vasquez v. Superior Court*:

Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary byproducts, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.

Many of the state interests Justice Mosk cites are interests in regulating "primary conduct." It is that desire to regulate primary conduct that makes these rules particularly worthy of respect.

Although many substantive justifications for class actions can be cited, class actions also undoubtedly serve judicial convenience. When a common set of facts creates many legal claims, it is a relief to the docket to allow those claims to be consolidated. Indeed, Federal Rule 23(b)(3) class actions are, from one federal perspective, all about judicial convenience.


26. I use the term "primary conduct" as Justice Harlan did: "[T]he proper line of approach in determining whether to apply a state or federal rule . . . [is to] inquir[e] if the choice of rule would substantially affect . . . primary decisions respecting human conduct." Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., dissenting). For a more elaborate treatment of this concept, see Solum, *supra* note 6, at 224-25.

27. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997) (referring to Rule 23 and the advisory committee notes and concluding that Rule 23(b)(3) permits class certification in situations where "class-action treatment is not as clearly called for
Like every other class of ambiguously substantive procedural rule, states use class actions for substance, procedure, and everything in between. And like every other class of legal rules, the policies motivating them can vary widely. The discussion below catalogues three areas of state class action law. First, state courts' reasoning in class actions involving negative-value claims are frequently reasoned on explicit policy grounds—and sometimes modify substantive rules to allow class treatment of the lawsuit. Second, it can be hard to separate substantive from procedural rationales for state-specific class certification rules. Third, states sometimes address the problems of widespread harms with tools other than the class action—such as statutory damages. The goal of these examples is not to discuss how they would be treated in federal courts; rather, it is to show the diversity of ways in which states express their policies through procedural mechanisms.

A. Negative-value Claims and Consumer Fraud

Consumer fraud is a classic example of the kind of claim that is frequently negative-value. Negative-value causes of action, if they can only be brought individually for individual damages, will always under-deter wrongdoers because litigation costs overwhelm the conventional incentive for plaintiffs to bring suit for the value of their damages from the merchants that have harmed them. A major way that states remedy this under-deterrence problem is by authorizing class actions. The converse of this is also true. Class actions—at least Rule 23(b)(3) class actions—are primarily about promoting negative-value suits:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry as it is in Rule 23(b)(1) and (b)(2) situations, [but] . . . class suit may nevertheless be convenient and desirable" (emphasis added) (internal quotation marks omitted)).
potential recoveries into something worth someone’s (usually an attorney’s) labor.\textsuperscript{34}

\textit{Vasquez v. Superior Court} offers a paradigmatic example of a state altering its class action practices in pursuit of a substantive goal.\textsuperscript{35} In \textit{Vasquez}, the Supreme Court of California created an inference to allow a consumer fraud class action to proceed.\textsuperscript{36} In California, as elsewhere, fraud actions had traditionally required an individualized showing of reliance.\textsuperscript{37} The plaintiffs brought a fraud class action against the Bay Area Meat Company, which had employed a group of door-to-door salesmen who used a memorized a dishonest sales formula.\textsuperscript{38} The problem for these plaintiffs was that it would be impossible to present individualized proof of reliance for each member of the class. The requirement of individualized proof negated the benefits of the class action form—the plaintiffs could no longer save time and money by bringing their hundreds of claims in one lawsuit. In response to this problem, the court relaxed the requirement of individualized showings of reliance and held that the uniformity of the sales pitches justified a rebuttable inference that each plaintiff had purchased the services in reliance on the salesmen’s representations.\textsuperscript{39} The change in the burden of proof permitted the class to be certified by allowing reliance to be demonstrated or defeated on a class-wide basis—a change that was necessary because “absent a class suit, a wrongdoing defendant would retain the benefits of its wrongs.”\textsuperscript{40}

More recently, in \textit{Varacallo v. Massachusetts Mutual Life Insurance Co.}, the New Jersey Superior Court Appellate Division used similar reasoning to reverse a denial of certification in a vanishing premium insurance case.\textsuperscript{41} It confronted the same question as \textit{Vazquez}: whether the common law fraud requirement of individual reliance could defeat predominance.\textsuperscript{42} The \textit{Varacallo} court gave the same answer: “if the plaintiffs in this case establish the core issue of liability, they will be

\begin{footnotesize}
35. Vasquez v. Superior Court, 484 P.2d 964 (Ca. 1971).
36. \textit{Id.} at 971.
37. \textit{Id.} at 972-73, 976 n.16.
38. \textit{Id.} at 971.
39. \textit{Id.}
40. \textit{Id.} at 970.
42. \textit{Id.} at 817.
\end{footnotesize}
entitled to a presumption of reliance and/or causation." Both of these courts shifted a burden from the plaintiff to the defendant to solve a problem that threatened to defeat class certification.

Although states other than California have followed the Vasquez approach, many have not. This is important and relevant; some states believe class treatment of consumer fraud important enough to justify creating an inference of reliance, but some do not. The Varacallo court focused on the policies of New Jersey law instead of looking at jurisprudence from outside the state. The court applied Riley v. New Rapids Carpet Center, a New Jersey case. Most notably, Riley was concerned about "wrongs . . . without redress, and . . . deterrence to future aggressions." Such policies are not about judicial convenience; they are meant to regulate primary conduct.

B. Varying Class Certification Standards

Standards for class certification vary widely across the fifty states. Some states, like South Carolina, have extremely liberal standards. 

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43. Id. at 818; cf. id. at 817 ("[A]n inference of reliance would arise as to the entire class . . . if the trial court finds material misrepresentations were made to the class members." (quoting Vasquez, 484 P.2d at 973) (omission in original)).


46. Id. ("Rather than counting cases . . . it is more appropriate to identify and apply principles established in [New Jersey].")

47. Varacallo, 752 A.2d at 813, 814.

48. Riley v. New Rapids Carpet Center, 294 A.2d 7, 10 (N.J. 1972). The court explained the relationship between class action suits and consumer fraud:

The subject of consumer fraud has emerged as a major problem of our commercial scene. Being unequal to the vendor, the consumer is easily overreached. When the selling pitch is directed to the unsophisticated poor, the problem is heightened, for the dollar impact upon the victim is intensified and a society which provides for its poor itself feels the burden of the imposition. The reputable vendor, too, has a stake in the suppression of dishonest competition. If each victim were remitted to an individual suit, the remedy could be illusory, for the individual loss may be too small to warrant a suit or the victim too disadvantaged to seek relief. Thus the wrongs would go without redress, and there would be no deterrence to further aggressions.

Id.

Some, like Arkansas, claim to adhere to federal standards but do not.\textsuperscript{50} Others, like Texas, have stricter standards than federal courts.\textsuperscript{51} But the important question for present purposes is why these standards vary from state to state. How much are states worried about protecting their judges' schedules, and how much are they worried about regulating their citizens' primary conduct?

The policies behind state class certification jurisprudence are much murkier than those apparent in consumer protection claims. On one level, this is not surprising. In courts that give high priority to the consumer rights protected by consumer fraud claims, such claims seem perfectly calculated to inspire variations from the technical requirements for certification. The analysis of class certification motions, on the other hand, is tightly bound to the specific requirements of the state rule at issue.

South Carolina, whose version of Rule 23 lacks Federal Rule 23(b)'s limitations on class certification, is a prime example. South Carolina courts have justified their deviations from the federal rule in primarily procedural terms. In \textit{Littlefield v. South Carolina Forestry Commission}, for example, the South Carolina Supreme Court cited as factors supporting class certification the large number of plaintiffs, the single issue of law uniting them, and the ease with which damages could be calculated.\textsuperscript{52} The procedure-substance divide may be hard to ascertain as a general matter, but these factors fall firmly on the procedural side: they are relevant to judicial convenience, rather than the conduct underlying the lawsuit.

West Virginia provides another example.\textsuperscript{53} West Virginia's basic class certification standards—much more liberal than their federal analogues\textsuperscript{54}—are explained in \textit{In re West Virginia Rezulin Litigation}.\textsuperscript{55} In


\textsuperscript{52} \textit{Littlefield}, 523 S.E.2d at 784.


\textsuperscript{55} \textit{Rezulin Litig.}, 585 S.E.2d at 64; see also \textit{State ex rel. Chemtall, Inc. v. Madden}, 607 S.E.2d 772, 781 (W. Va. 2004) (describing \textit{Rezulin Litigation} as the "definitive
the state of West Virginia, the "commonality" prong of the certification standard "requires only that the resolution of common questions affect all or a substantial number of the class members." 56 Similarly, the "typicality" prong requires only "that the class representatives' claims be typical of the other class members' claims, not that the claims be identical. When the claim arises out of the same legal or remedial theory, the presence of factual variation is normally not sufficient to preclude class action treatment." 57 These standards are significantly more permissive than the United States Supreme Court's glosses on the Federal Rules. Although the Rezulin Litigation opinion spoke of the purposes of Rule 23, it did so only opaquely, describing the rule as "a procedural device that was adopted with the goals of economies of time, effort and expense." 58 But the court also stated that "[a] primary function of the class action is to provide a mechanism to litigate small damage claims which could not otherwise be economically litigated." 59

Texas presents a contrast. In Southwestern Refining Co. v. Bernal, that state's supreme court took a position that was diametrically opposed to West Virginia's position. 60 Rather than focusing on the need for collective redress, the Texas court highlighted its dangers. 61 The court stated that "[b]y removing individual considerations from the adversarial process, the tort system is shorn of a valuable method for screening out marginal and unfounded claims. In this way, '[c]lass certification magnifies and strengthens the number of unmeritorious claims.'" 62 Maintaining tight restrictions on class certification was, to the Bernal court, a way to protect Texas's businesses, whose interests the court saw as unprotected relative to consumers. 63

If one thing unites the substantive rationales for permitting class actions, it is the importance of classes for the vindication of negative-value claims. 64 Most of the energy in today's class action litigation is

56. Rezulin Litig., 585 S.E.2d at 57.
57. Id. at 68.
58. Id.
59. Id.
61. Id. at 438.
62. Id. (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996)).
63. See Brown, supra note 51, at 486.
64. See, e.g., Vasquez v. Superior Court, 484 P.2d 964, 968-69 (1971); Rezulin Litig., 585 S.E.2d at 62; Bernal, 22 S.W.3d at 438.
expended on Rule 23(b)(3) classes—the kind of class suited for negative-value claims. And the rhetoric employed in deciding certification motions regarding Rule 23(b)(3) classes is all about negative-value claims. Either the rhetoric supports negative-value claims, as in Vasquez and In re West Virginia Rezulin Products Litigation, or it minimizes their value in relation to the interests of business, as in Bernal. But the justifications for Rule 23(b)(3) classes are also heavily tied up in judicial convenience. Each of the decisions named above that mentions the litigants' rights also discusses judicial economy.

C. The Conflict Between Class Actions and Statutory Damages

This last example of explicit state consideration of the substantive effects of class actions is negative rather than positive. Section 901(b) of the New York Class Actions Laws bars class actions in suits to recover statutory damages. This is the result of a conflict between two mechanisms to achieve the same result. Class actions eliminate the negative-value problem by allowing plaintiffs to band together, thus allowing fraud penalties to have the appropriate deterrent effect. Statutory damages try to achieve the same end by giving individual plaintiffs greater recoveries. But New York was apparently worried that the confluence of the two mechanisms to compensate for under-deterrence would instead produce over-deterrence. This can most clearly be seen in Sperry v. Crompton Corp., in which the New York Court of Appeals delved into the legislative purposes behind section 901(b) and concluded that the Legislature declined to make class actions available where individual plaintiffs were afforded sufficient economic encouragement to institute actions.

68. Bernal, 22 S.W.3d at 438.
69. Vasquez, 484 P.2d at 968-69; Rezulin Litig., 585 S.E.2d at 62; Bernal, 22 S.W.3d at 437.
70. N.Y. CLASS ACTIONS LAW § 901 (McKinney 2005 & Supp. 2007) ("Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.").
71. See Vasquez, 484 P.2d at 968-70.
72. See id.
74. Id. at 1017.
Incated, "[t]his makes sense, given that class actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be too small."75

In Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co., the Second Circuit was confronted with the question of whether section 901(b) applied in federal courts.76 The court asked the Hanna question: whether 901(b) was in conflict with a Federal Rule of Civil Procedure.77 Because it was written permissively, the court concluded that "Rule 23 leaves room for the operation of [section] 901(b), which is a substantive rule that eliminates statutory penalties under New York law as a remedy for class action plaintiffs."78 The court believed that ignoring section 901(b) would encourage forum shopping, and thus held that application of its provisions would serve the twin aims of Erie.79 The New York rule barring class actions, being a substantive attempt to avoid over-regulating businesses, applied in federal court.80

D. Conclusion: Are Class Actions Substantive or Procedural?

Shady Grove was discussed last because it best exemplifies the absurdity of trying to resolve the question whether class actions as a whole are substantive or procedural. Sometimes they are; sometimes they are not. In Shady Grove, the federal class action rule was procedural because the purpose behind it was procedural.81 Likewise, the state rule was substantive because the purposes behind it were substantive.82

II. The Erie Doctrine is Flexible Enough to Account for States' Class Action Policies

Given the important substantive goals protected by class action policy, we must ask whether and to what extent states' class action policies should be protected in federal class actions based on state law. Part I showed how states sometimes use their class action rules to implement substantive policy goals. It may not always be easy to know whether a particular rule is justified procedurally or substantively, but

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75. Id.
77. Id. at 142.
78. Id. at 143.
79. Id. at 145.
80. Id. at 144-45.
81. Id. at 145.
82. Id. at 144-45.
this branch of legal reasoning is no different from any other—there will always be uncertainty. The special feature of class actions is the contrast between the important substantive role that class certification can play in state courts and the comprehensive way that Rule 23 regulates class certification in federal courts. The area of law that is most relevant to the use of class actions as a regulatory device—class certification—is the area in which state policies are least likely to be respected.

Under Hanna, federal courts apply federal procedural rules (including Rule 23) even when they conflict with state policies, unless they are invalid under the Rules Enabling Act.83 And federal procedural rules are never invalid under the Rules Enabling Act.

This part of the discussion explores an argument that Hanna should be reconsidered, at least in the class action context. Although Hanna seemed to apply categorically,84 courts and commentators have been limiting Hanna since Justice Harlan's dissent.85 And although no rule has ever been invalidated under the Rules Enabling Act, "rules have sometimes been interpreted or their domain of application narrowed to avoid abridging substantive rights."86 Since class actions have special connections to substantive rights, federal courts—already sensitive to substantive rights in the interpretation of federal rules—should give class action policies special solicitude; and in deciding questions of certification, they should look to the certification law of the state whose substantive law provides the cause of action.

A. Federal Solicitude for Substantive Policies

Gasperini v. Center for Humanities, Inc. was a suit by a journalist who reported on events in Central America and made over 5000 slide transparencies, a portion of which he sold to the Center for use in making an educational video.87 The Center violated its agreement with Gasperini by failing to return the original transparencies after the project was completed.88 The jury awarded Gasperini $450,000 in damages, and the Center attacked the verdict on excessiveness.

84. Id. ("When a situation is covered by one of the Federal Rules, ... the court has been instructed to apply the Federal Rule, and can refuse to do so only if [the Rule is invalid]."). See generally Allen Ides, The Supreme Court and the Law to Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the Erie Doctrine and Related Problems, 163 F.R.D. 19 (1995).
85. Id. at 474–78 (Harlan, J., dissenting).
88. Id.
Upon review by the Supreme Court, the larger procedural issue was what "standard a federal court [should] use[] to measure the alleged excessiveness of a jury's verdict in an action for damages based on state law." Citing *Erie*, the Court explained that the "dispositive question . . . [was] whether federal courts can give effect to the substantive thrust of [New York law] without untoward alteration of the federal scheme for the trial and decision of civil cases." In answering this question in the affirmative, the Court noted that federal courts have historically read the Federal Rules "with sensitivity to important state interests and regulatory policies.

These observations may seem difficult to apply to Rule 23: its detailed provisions have been subject to constant litigation and have given rise to legions of even more detailed interpretations. But *Gasperini* is properly read as a general command for federal courts to let state policies color their interpretations of the Federal Rules of Civil Procedure—even when prior interpretations seem to be controlling authority. And this command applies even more strongly when the Rule at issue is general and permissive in nature.

Professor Steinman's recent article takes *Gasperini* at its word and argues that federal courts should incorporate state standards in areas of federal procedure governed by vague federal rules. Some Federal Rules—like *Hanna*'s interpretation of Rule 4(d)(1)—are precise, but many merely prescribe general rules. Rule 23's approach to class certification is an example. Its content is supplied by interpretation and policy-making rather than by the language of the Rule. This can be seen in Rule 23's slowly shifting interpretations over the course of its existence. Because these results are not dictated by the Federal Rules, but rather by judicial gloss, they should not be protected by
the Rules’ presumption of validity. Instead, federal interpretations of Rule 23 should be treated as an "unguided Erie choice between state and federal law."\(^{100}\)

Gasperini illustrates this precise point. Responding to Justice Scalia’s dissent, which argued that Rule 59 supplied a “federal standard for new trial motions,”\(^{101}\) the Court noted that while Rule 59 established a procedural form, it did not supply all of the relevant substantive standards of decision.\(^{102}\) Instead, for the substantive question at issue (whether the damages were excessive), New York law provided the standard.\(^{103}\)

Under Gasperini’s reasoning, many federal rules could be treated as providing procedural vessels for states’ substantive preferences. Gasperini has been applied to let state policies color federal rules in several cases.\(^{104}\) In addition to class certification, Professor Steinman suggests that summary judgment and pleading standards should be guided by state preferences.\(^{105}\)

B. Class Actions in Particular

Gasperini’s command—interpret federal procedural rules to further state policies—applies to Rule 23. Federal courts have stated over and over again that state class action policies are worthy of respect.\(^{106}\) And the Supreme Court in Ortiz v. Fibreboard (in which the defendant, an asbestos manufacturer, faced decades of litigation for compensatory damages) explicitly limited its construction of Rule 23(b)(1)(B) to avoid affecting constitutional rights.\(^{107}\) Finally, Semtek International, Inc. v Lockheed Martin Corp. recently reaffirmed the need to interpret the Federal Rules to avoid trespassing on state-created substantive rights.\(^{108}\) The combination of these threads leads inevitably to the

\(^{100}\) Id.
\(^{101}\) Id. at 468 (Scalia, J., dissenting) (internal quotation marks omitted).
\(^{102}\) Id. at 437 n.22 (majority opinion) (“Whether damages are excessive for the claim-in-suit must be governed by some law. And there is no candidate for that governance other than the law that gives rise to the claim for relief—here, the law of New York.” (citations omitted)).
\(^{103}\) Id.
\(^{104}\) See, e.g., Houben v. Telular Corp., 309 F.3d 1028, 1038-39 (7th Cir. 2002) (suggesting accommodation of an Illinois post-judgment interest rule, as long as that was possible within the constraints of Federal Rule 62).
\(^{105}\) Steinman, supra note 95, at 273.
\(^{106}\) See, e.g., text accompanying supra notes 88-97 (discussing case examples).
\(^{108}\) Semtek Int’l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 504 (2001). This case dealt with filing deadlines in state courts, removals to federal courts for diversity
conclusion that federal courts should consider state certification standards when deciding certification motions.

I will run through several quick examples of cases in which federal courts have respected state policies. *Amchem Products, Inc. v. Windsor* provides the flavor. This was another asbestos case in which the Supreme Court considered the validity of a class-action certification that was intended to settle all current and future asbestos-related claims. The Court was “mindful that Rule 23’s requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act.” But the Court’s only nod to state policies was its observation that differences in the state law applicable to the plaintiffs frustrate the commonality requirement.

*Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* involved an unusually clear example of a state substantive policy relating to class actions. In that case, a medical provider tried to bring a class action against the defendant insurer for failing to pay a statutory penalty on certain types of automobile insurance policies. The state policy, expressed in section 901(b) of the New York Civil Practice Law and Rules, prohibited statutory damages class actions. The Second Circuit was quick to dismiss the possibility that section 901(b) conflicted with Rule 23 by holding that Rule 23 did not require federal courts to offer class actions on all state claims. It was then a simple matter to conclude that 901(b)’s substantive rule applied to bar class actions for statutory damages in federal courts.

*In re Fibreboard Corp.* is a more famous, more problematic example of federal solicitude for states’ substantive policies. Here, the Fifth Circuit rejected the lower court’s certification of an asbestos class action based on Texas products liability law. The district court had intended to allow a jury to determine class-wide damages after hearing

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110. *See id.* at 599-600.
111. *Id.* at 613.
112. *Id.* at 624.
114. *Id.* at 140.
115. *Id.*
116. *Id.* at 143.
117. *Id.* at 146.
118. *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990).
119. *Id.* (citing Gaulding v. Celotex Corp., 772 S.W.2d 66, 67 (Tex. 1989)).
expert medical and statistical testimony. But the Fifth Circuit held that Texas law required individual proof of liability and damages.

Finally, in Windham v. American Brands, Inc., the Fourth Circuit refused to certify a federal antitrust claim under the Sherman Act. The court justified this refusal based, among other things, on the fact that several of the plaintiffs would be able to continue without certification and notification to 20,000 parties would have to be made. According to the court, the Sherman Act "leave[s] no room for awarding damages to some amorphous fluid class." All of these cases were rooted in concerns about the substantive effects that class certification can have on behavior. And Ortiz reaffirmed the importance of those concerns, although the Court was interpreting Rule 23(b)(1)(B) rather than Rule 23(b)(3). Critically, the Ortiz Court reaffirmed Amchem's instruction that "no reading of the Rule can ignore the [Rules Enabling] Act's mandate that rules of procedure shall not abridge, enlarge, or modify any substantive right." In rejecting certification of the settlement class in Ortiz, the Supreme Court purported to be respecting "the rights of individual tort victims at law."

The unifying theme of these cases is that they all cite substantive concerns as reasons not to certify a class. So, if Federal Rule 23 is thought of as limiting federal courts' discretion, it would seem uncontroversial to suggest that general state objections to class actions should limit federal certification. This is close to the holding of Shady Grove but would require a federal court to read substantive justifications into a state's certification standards (as opposed to affirmative statutory limits on class actions). The more difficult question is how to argue that a state preference for liberal certification rules should control federal procedure.

Semtek provides the answer, if only by its status as the last in a long line of cases reaffirming the principles of the Rules Enabling Act.

120. The court's discomfort with the plan's departure from procedures that "reflect[ed] the very culture of the jury trial and the case and controversy requirement of Article III" also played a role. Id. at 710–11.
121. Id.
123. Although the decision was based on a federal claim, see id. at 60, the court's solicitude for the federal policies behind the claim make Windham relevant here.
124. Id.
125. Id. (internal quotation marks omitted).
127. Id. at 845 (internal quotation marks omitted).
128. Id.
Semtek holds that courts should not interpret federal procedural rules to “violate the federalism principle of Erie . . . by engendering substantial variations in outcomes between state and federal litigation which would likely influence the choice of forum.” There could hardly be a greater influence on choice of forum than the likelihood of class certification. For example, a federal court considering whether to certify a class action based on a West Virginia claim would surely be tempted to apply Rule 23 jurisprudence as federal courts always have. But if the federal court denies certification in a situation where West Virginia would have granted it, it has created exactly the kind of situation that Semtek disfavors. It would thus be well-advised to consider whether Rule 23 should be reinterpreted in light of Semtek and West Virginia class action practice.

III. STATES CAN PROTECT THEIR SUBSTANTIVE INTERESTS WITHOUT FEDERAL COOPERATION

The discussion above notwithstanding, it seems unlikely that the federal courts will incorporate state standards for class certification into Rule 23 any time soon. Until they do, states will have to protect their interests through other means. The key insight, similar to the Rule 23 argument in Part II above, is that there are many places in the federal courts where state substantive law provides the content. The most obvious example is the cause of action, but every stage of a diversity case hinges in some way on state law. Certification is sometimes denied when necessarily individual elements of a tort cause of action predominate over common elements, but states can reduce or remove those individual elements. The Seventh Amendment requires jury trials on some issues, but state law creates those issues. Federal courts have refused to hear aggregated evidence of liability or damages, but state law controls the admissibility of that evidence. By fitting their policy preferences into federal procedural

130. See, e.g., Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
132. See, e.g., Cimino v. Raymark Indus., Inc., 151 F.3d 297, 311 (5th Cir. 1998) (“The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.” (quoting Ross v. Bernhard, 396 U.S. 531, 538 (1970))).
133. See, e.g., In re Fibreboard, 893 F.2d 706, 711 (5th Cir. 1990) (stating that "[i]n Texas, it is a fundamental principle of products liability law . . . that the plaintiffs must prove that the defendant supplied the product which caused the injury," and that
boxes, states can fulfill their role in the constitutional system as protectors of their citizens' safety and their industries' viability.

Whether one supports or opposes state efforts to control class certification will depend on whether one views class actions as mere procedural devices or as serving substantive ends. If class actions are merely a device for convenient aggregation, it makes no sense for states to try to influence the conduct of class actions in federal courts. If, on the other hand, class actions serve important state policies independent of the individual claims they aggregate, states have a legitimate interest in making sure that their policies are respected in federal as well as state courts. But it is states that decide what their policies are, and how they wish to achieve them. For instance, a state's decision to regulate tobacco companies by allowing or forbidding insurers' indirect injury suits is a substantive decision that federal courts must respect.134 Similarly entitled to respect is a state's decision that class actions or statutory damages are appropriate separately but not together.135

What follows is an overview of the places in federal procedure where states can affect class action certification. Although many of the questions addressed are interrelated, this part of the discussion is organized roughly by the order in which issues would appear in a case.

A. Expanding Standing: Allowing Associations and Insurance Companies to Sue

An initial question in any lawsuit is whether the plaintiffs have standing to bring their claims. One way to eliminate the class certification inquiry altogether is for states to authorize new entities to bring mass tort actions. Either of the two approaches described below would allow states to decide which groups can take advantage of their substantive law—even when those groups bring claims in federal court.

One approach to a solution in this vein was put forward in a recent note in the Virginia Law Review.136 Christopher Roche argues that courts should allow victims of mass torts to form voluntary

"[t]hese requirements of proof define the duty of the manufacturers" (citing Gaulding v. Celotex Corp., 772 S.W.2d 66, 68 (Tex. 1989))).
associations to bring their claims.\textsuperscript{137} Although such an association would face customary prudential limits on associational standing,\textsuperscript{138} Roche argues that the use of statistical evidence would address those concerns and allow the association to bring suit.\textsuperscript{139} Although Roche recommends that courts should allow voluntary associations, for the purposes of this Article, the relevant recommendation is that states allow voluntary associations. This could be done either by a legislature or in the courts, depending on what would be appropriate in a particular state.

In \textit{Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris U.S.A., Inc.}, the Second Circuit took another approach. The court confronted an insurance company bringing a consumer fraud suit on behalf of its subscribers.\textsuperscript{140} Blue Cross sued several tobacco companies under New York's consumer protection statute, section 349, for their "scheme to distort public knowledge concerning the risks of smoking" and demanded compensation for its increased costs caused by the defendants' deceptive advertising.\textsuperscript{141} The Second Circuit thought that it would be reasonable to interpret section 349 to allow the case to proceed on an indirect injury theory.\textsuperscript{142} However, the question was close and important to state policy, so the court certified the question to New York's court of appeals.\textsuperscript{143} The state's high court rejected the Second Circuit's interpretation of section 349, holding that Blue Cross's only remedy was equitable subrogation.\textsuperscript{144}

New York's refusal to allow Blue Cross's claim notwithstanding, this is an important way that a state could allow insurers to sue on behalf of those they insure. An indirect injury theory would also obviate many of the individual proof problems that would come up in a

\textsuperscript{137} \textit{Id.} at 1476.
\textsuperscript{138} These limits are spelled out as follows:

\begin{quote}
[A]n association has standing to bring suit on behalf of its members when:
(a) its members would otherwise have standing to sue in their own right;
(b) the interests it seeks to protect are germane to the organization's purpose;
and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.
\end{quote}


\textsuperscript{139} \textit{Roche, supra} note 136, at 1498-1502.

\textsuperscript{140} \textit{Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris U.S.A., Inc., 344 F.3d 211, 215 (2d Cir. 2003). The court approved Blue Cross's use of "aggregated evidence of causation and harm." Id. at 226.}

\textsuperscript{141} \textit{Id.} at 215.

\textsuperscript{142} \textit{Id.} at 219-20.

\textsuperscript{143} \textit{Id.} at 221.

\textsuperscript{144} \textit{Blue Cross & Blue Shield of N.J., Inc. v. Phillip Morris U.S.A., Inc., 818 N.E.2d 1140, 1143-44 (N.Y. 2004).}
smokers' class action. Because the claims had already been aggregated, aggregate proof of damages was especially appropriate.145

B. Clarifications or Changes to State Choice of Law Rules

Another major obstacle to class certification derives from state choice of law rules. When more than one state's laws apply to the facts of the litigation, federal courts (as well as state courts) are reluctant to certify classes.146 Federal courts apply the choice of law rules of the state in which they sit.147 But when they are confronted with a potential nationwide class, they frequently pay this duty only lip service.148 The difficulty is that federal courts require plaintiffs to show that only one state's law applies, or that only a few states' laws apply.149 Given the complexity of many choice of law regimes, this can be an unbearable burden. A state wishing to control class action certification under its laws has two choices: choice of law rules related to specific causes of action, and choice of law rules related to class action certification in general.

One choice of law rule linked to a cause of action is the Texas Securities Act (TSA),150 which Texas's supreme court recently held to constrain Texas courts' choice of law.151 Citizens Insurance Co. of America v. Daccach was a purported class action against a Colorado

145. Professor Nagareda has argued that reliance on aggregate proof presupposes the existence of a class, and that one therefore needs to tread carefully when considering certification of a class based on a legal theory involving aggregate proof. See Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 115 (2009). This concern is not relevant here, because the class has already been defined.


149. See id.


company that sold life insurance from an office in Texas.\textsuperscript{152} In the Texas Securities Act, "[t]he Texas Legislature prohibited the offer or sale of a security [in Texas] by any company or person, who ha[d] not . . . register[ed] as a securities dealer or satisfied a[n] . . . exemption from registration."\textsuperscript{153} This language applied both to wholly in-state transactions and to transactions where a Texas dealer sold securities to a non-resident.\textsuperscript{154}

The important lesson to draw from \textit{Daccach} and other cases like it\textsuperscript{155} is that explicit statutes and explicit court opinions can make an unmanageable class manageable by applying the law of one state to one of the claims in the case. There were many other claims at issue in \textit{Daccach}, including common-law claims like fraud, negligent misrepresentation, breach of the duty of good faith, and unjust enrichment.\textsuperscript{156} But the only claim suitable for class treatment was the TSA claim.\textsuperscript{157}

In addition to choice of law rules tied to particular claims, states could also devise choice of law rules generally applicable to requests for class certification.\textsuperscript{158} Whether this is appropriate depends on whether one views class actions as mere procedural devices or as serving substantive ends.\textsuperscript{159} If class actions are merely a device for convenient aggregation, it makes no sense to change choice of law rules to make them easier to certify. If, on the other hand, class actions serve important state policies—indeed, if the claims they aggregate—states might have a stronger interest in having their law control a class action than an interest in having their law control an individual claim.

Such an interest in collective adjudication could arise from a desire to control the adverse effects of in-state activities. This would be a generalization of the principle at work in \textit{Daccach} and \textit{Lutheran Brotherhood}, each of which applied a state’s regulatory laws to transactions that could have also been regulated by other sovereigns.\textsuperscript{160} An

\textsuperscript{152} Id. at 435.
\textsuperscript{153} Id. at 444 (citing TEX. CIV. STAT. ANN. art. 581, §§ 12(A), 33(A)).
\textsuperscript{154} Id.
\textsuperscript{156} \textit{Daccach}, 217 S.W.3d at 436.
\textsuperscript{157} Because the class representative abandoned the other claims, the only claim the trial court certified was the TSA claim. \textit{Id}. at 436-37. However, the defendant argued that the claims were abandoned because they were inappropriate for class treatment, and the court did not disagree. \textit{Id}. at 451.
\textsuperscript{158} See \textit{Silberman}, supra note 146, at 2022-24.
\textsuperscript{159} See \textit{id}. at 2024.
\textsuperscript{160} \textit{Daccach}, 217 S.W.3d at 439; \textit{Lutheran Bhd.}, 201 F.R.D. at 462.
individual action between a citizen of one state and a manufacturer in another state might reasonably be governed by either state's law, because each state has an interest in the outcome. But the aggregation of a nationwide class's claims could change this analysis. The manufacturer's home state's interests would be especially strong when the manufacturer is threatened with bankruptcy or given very strong incentives to change its practices. The plaintiffs' states' interests—various and perhaps contradictory—would be weak in comparison.

More importantly, if a state decided to create special choice of law rules for class actions, it probably could. The only real limitation on state choice of law rules—at least as long as Congress remains silent—is the Fourteenth Amendment's Due Process Clause, which only requires "that [the] State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." This language would prohibit a state's law from applying to a nationwide class when the state's only relationship to the lawsuit is a small fraction of the plaintiff class. But it would not seem to prevent a state that was home to a defendant corporation from applying its laws to a nationwide class.

C. Clarifications or Changes to State Tort Law

Once a court has decided which state's law applies, the next potential bar to a class action comes from the cause of action itself. The certification question often comes down to the appropriateness of the particular cause of action to class action treatment. For example, the state law claim in *Fibreboard* required (according to the Texas courts) individualized proof of causation. Although the district court had devised an innovative solution to the fundamental problem in *Fibreboard*, it was a "change in substantive duty . . . dressed as a change in procedure." The Fifth Circuit ultimately vacated the trial

161. See Silberman, supra note 146, at 2015.
163. Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 822 (1985) ("Given Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.").
164. See Daccach, 217 S.W.3d at 446-47 (holding that the choice of Texas law to govern a worldwide class met constitutional requirements); *Lutheran Bhd.*, 201 F.R.D. at 461 n.1 (rejecting defendants' constitutional arguments against "applying Minnesota law to a nationwide class" (internal quotation marks omitted)).
165. *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990).
166. Id.
order at issue, but it also pointed to a possible solution. Although “[t]he rights of the class members . . . cry[ed] powerfully for innovation and judicial creativity,” the courts said that those arguments were better directed to lawmaking bodies.

Lawmaking is what is needed. The problem is this: torts are, for the most part, designed with individual actions in mind. The necessity of individual issues to almost every tort sabotages many class actions, and the impossibility of separating the individual issues from the collective issues sabotages many more. In Castano v. American Tobacco Co., for example, the district court certified a class action based, inter alia, on fraud and negligence. But the Fifth Circuit de-certified the class because it worried that “in order to make [the] class action manageable, the court [would] be forced to bifurcate issues in violation of the Seventh Amendment” by determining the defendant’s negligence in a collective proceeding and the plaintiffs’ comparative negligence in subsequent individual proceedings. Rule 42(b) authorized bifurcation, but in Castano,

[t]here [was] a risk that in apportioning fault, the second jury could reevaluate the defendant’s fault, determine that the defendant was not at fault, and apportion 100% of the fault to the plaintiff. In such a situation, the second jury would be impermissibly reconsidering the findings of a first jury.

Judges bifurcating trials must “carve at the joint,” according to Judge Posner, but most torts do not come with “joints.”

These two cases highlight two major opportunities: (1) changes that shift burdens of production or proof, reducing the number of individual issues, and (2) changes that make causes of action more easily separable, allowing the individual issues to be bifurcated away.

In Vasquez and Varacallo, discussed above, California and New Jersey created an inference to allow class treatment of consumer fraud claims. Their express abjuration of individual proof in class actions completely undercuts the Fibreboard court’s concerns, and appropriately so: a body properly vested with lawmaking authority (in this

167. Id. at 712.
168. Id.
169. See, e.g., id.
170. See, e.g., Castano v. Am. Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996).
172. Castano, 84 F.3d. at 750.
173. Id. at 751.
174. In re Rhone-Poulenc Rhorer, Inc., 51 F.3d 1293, 1302 (7th Cir. 1995).
175. See supra notes 26-38 and accompanying text.
case, a state's common law courts) saw the problem that individual proof represented, and responded by eliminating the requirement.\textsuperscript{176}

The second mode of change here—moving towards easier separability—is more complex. A great deal has been written on the requirements of the Seventh Amendment, but the basic lesson is that bifurcation does not violate it.\textsuperscript{177} However, as \textit{Castano} recognized, the Seventh Amendment does prevent different juries from considering the same issue twice.\textsuperscript{178} The goal of a state that wants to promote class actions, then, must be to structure its torts so that juries will not be deciding the same issues.

\textit{Mullen v. Treasure Chest Casino}, however, indicates that the Seventh Amendment problem may be less serious than \textit{Castano} suggests.\textsuperscript{179} In \textit{Mullen}, former employees of the casino sued Treasure Chest for respiratory injuries caused by its improperly maintained ventilation system.\textsuperscript{180} One jury was to consider the defendant's conduct, and a second would have considered the plaintiffs' comparative negligence.\textsuperscript{181} The Fifth Circuit determined that "leaving all issues of causation for the phase-two jury" solved the Seventh Amendment problem.\textsuperscript{182} Since causation was the only issue the second jury would address, there would be no danger that it would contradict the findings of the first jury.\textsuperscript{183}

The distinction between \textit{Castano} and \textit{Mullen} seems tenuous at best. The \textit{Castano} court characterized comparative negligence as "[r]equir[ing] a comparison between the defendant's and the plaintiff's conduct."\textsuperscript{184} \textit{Mullen}, on the other hand, saw comparative negligence as getting at causation.\textsuperscript{185} Further complicating the interpretation of

\begin{itemize}
\item \textsuperscript{176} In \textit{re Rhone-Poulenc Rhorer}, 51 F.3d at 1302.
\item \textsuperscript{177} See Patrick Woolley, \textit{Mass Tort Litigation and the Seventh Amendment Reexamination Clause}, 83 \textit{Iowa L. Rev.} 499, 499-503 (1998) (stating that "bifurcation violates the Seventh Amendment whenever it leads to 'confusion and uncertainty,' a possibility that should be considered case-by-case before overlapping issues are separated for trial").
\item \textsuperscript{178} See \textit{Castano}, 84 F.3d at 751; Cimino v. Raymark Ind., Inc., 151 F.3d 297, 320 (5th Cir. 1998).
\item \textsuperscript{179} Mullen v. Treasure Chest Casino, 186 F.3d 620, 628 (5th Cir. 1999) (stating that "unlike the 'Frankenstein's monster' feared in \textit{Castano}, this class is akin to other bifurcated class actions this court has approved").
\item \textsuperscript{180} Id. at 623.
\item \textsuperscript{181} Id. at 628.
\item \textsuperscript{182} Id. at 629.
\item \textsuperscript{183} Id.
\item \textsuperscript{184} \textit{Castano}, 84 F.3d at 751.
\item \textsuperscript{185} \textit{Mullen}, 186 F.3d at 628 (stating that "[w]hen a jury considers the comparative negligence of a plaintiff, the focus is upon causation" and that "[i]t is inevitable that a
these judicial auguries is that neither opinion cited state law in its Seventh Amendment reasoning.\textsuperscript{186} And it doesn’t help that Mullen’s Seventh Amendment reasoning was probably dictum.\textsuperscript{187}

But the lesson from \textit{Castano} and \textit{Mullen} is analogous to the one we drew from \textit{Daccach} and \textit{Lutheran Brotherhood}. Federal courts reason about bifurcation and the Seventh Amendment in predictable ways. Given greater specificity in state laws creating causes of action, a state could exert a great amount of control over the way those causes are treated in federal court.

\textbf{Conclusion}

States use class action policy to affect primary conduct. It is one of many tools, and class actions are also often used for other goals, but regulation is often a primary motive in a state's decision to allow class actions to be brought under its laws. An advocate of state substantive policies might despair, though. Despite the significance of regulation in state class action policy, there seem to be few avenues for states to assert control over federal class action practice; federal cases interpreting Rule 23 are dense, and there seems to be no room for state standards. However, several important Supreme Court cases establish support for the idea that state certification standards should be incorporated into federal certification practice. And even if the federal courts do not take up that argument (for it seems unlikely that they will), many fulcrums already exist in the federal system through which states can assert their policy preferences relating to class actions.

\textsuperscript{186} See \textit{Castano}, 84 F.3d 734; \textit{Mullen}, 186 F.3d 620.
\textsuperscript{187} \textit{Id.} at 628 ("Treasure Chest did not raise [the Seventh Amendment] issue to the district court nor has it been argued on appeal.").