How Can States Protect their Policies in Federal Class Actions?

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ABSTRACT

More than any other procedural device, class actions have substantive goals. By allowing negative-value suits and collective punishment for widespread wrongs, class actions allow plaintiffs and defendants to protect rights that would otherwise go unvindicated. States also use class actions to implement industrial and consumer protection policies. Despite their importance to state policy, however, many state class action rules do not survive the transition into the federal court system. Under the *Erie* doctrine, federal courts apply federal class action rules even when state rules are more permissive and even when the state rules are intended to serve important substantive policies. Federal courts could correct this imbalance by adopting a new conceptualization of the *Erie* doctrine that relies on a simple doctrinal argument to incorporate state standards for class certification into Federal Rule 23. Doctrinal arguments notwithstanding, federal courts are unlikely to begin using state law to certify state law-based class actions. But there is room elsewhere in federal procedure for states to influence class action policy, and a state that wanted to promote or restrict implementation of its substantive policies through class actions could easily do so.
Introduction

The role of the states in our constitutional system is to protect their citizens and supply tort liability. Where federal law does not preempt 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 importantly, as Section 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.

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Section II 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 constitutional, ergo procedural” reasoning. And subsequent decisions have read Federal Rules to “give effect to the substantive thrust of [state law],” when that was possible. Given these federal decisions recognizing the importance of state policies, federal *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 in the federal courts. Section 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, the substantive elements of the state law at issue. Federal courts already look to state jurisprudence to answer these questions. A

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7 . 380 U.S. 460, 471.
8 . *Id.*
9 . *Id.* at 476 (Harlan, J., concurring).
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state with a substantive preference for or against class 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 most states have their analogous procedural rules. But like statutes of limitation, pleading standards, and other rules of a procedural flavor, class actions have always served purposes beyond docket control. The question for this section is what those ends are, and how important they are to the states that desire them.

Rule 23 itself organizes class actions, in part, by their goals. When a defendant's resources are 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. And all of these class actions allow the plaintiffs to benefit from the same economies of scale that the defendant does.

There are a great variety of possible state 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.\textsuperscript{16}

Many of the state interests Justice Mosk cites are interests in regulating primary behavior.\textsuperscript{17} It is that desire to regulate primary behavior 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.\textsuperscript{18}

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 rest of this section catalogues some specific state rules dealing with class actions. The goal of these examples is not to discuss how they would be treated in federal courts; it is to show the variety of ways in which states manifest their preferences through mechanisms that seem more or less procedural.

\textsuperscript{16} 484 P.2d 964, 968–69 (1971).
\textsuperscript{18} See Amchem Prods. v. Windsor, 521 U.S. 591, 615 (referring to Rule 23 and the advisory committee notes and concluding that Rule 23(b)(3) permits class certification in situations where “class certification is not as clearly called for as it is in Rule 23(b)(1) and (b)(2) situations, [but] class suit may nevertheless be \textit{convenient} and desirable” (emphasis added; internal quotation marks omitted)).
Negative-value claims and Consumer Fraud

Consumer fraud is a classic example of the kind of claim that is frequently negative-value.\textsuperscript{19} 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, reclaiming the value of their damages from the merchants that have harmed them.\textsuperscript{20} A major way that states remedy this under-deterrence problem is by authorizing class actions.\textsuperscript{21} The converse of this is also true. Class actions (at least 23(b)(3) class action) 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 potential recoveries into something worth someone's (usually an attorney's) labor.\textsuperscript{22}

\textit{Vasquez} is a paradigmatic example of a state altering its class action practices in pursuit of a substantive goal. In \textit{Vasquez}, the Supreme Court of California loosened the elements of fraud to allow a consumer fraud class action to proceed.\textsuperscript{23} In California, as elsewhere, fraud actions had traditionally required an individualized showing of reliance.\textsuperscript{24} \textit{Vasquez} involved a group of door-to-door salesmen who had each memorized a sales formula.\textsuperscript{25} From this (in a mandamus action reviewing the denial of class certification), the court concluded that it would be reasonable to infer that each plaintiff had relied on the salesmen's representation from the

\begin{itemize}
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id. Another method is statutory damages. See id.; see also, e.g., Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227.
  \item \textsuperscript{22} Amchem Prods., 521 U.S. at 617.
  \item \textsuperscript{23} 484 P.2d at 971.
  \item \textsuperscript{24} See id. at 972–973; id. at 976 n.16.
  \item \textsuperscript{25} Id. at 971.
\end{itemize}
common formula and their purchase of the services. The court changed a burden of proof to allow class certification, because “[a]bsent a class suit, a wrong-doing defendant would retain the benefits of its wrongs.”

More recently, in Varacallo, the New Jersey Superior Court Appeals Division used similar reasoning to reverse a denial of certification in a vanishing premium insurance case. It confronted the same question as Vazquez: whether the common law fraud requirement of individual reliance could defeat predominance. And Varacallo gave the same answer: “if the plaintiffs in this case establish the core issue of liability, they will be 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 other courts 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. As Varacallo recognized, “[r]ather than counting cases . . . it is more important to identify and apply principles established in [New Jersey].” The important principles in New Jersey derived from Riley v. New Rapids Carpet

26. Id.
27. Id. at 970 (citing Daar v. Yellow Cab Co., 433 P.2d 732 (1967)).
29. Id. at 817.
30. 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 Vazquez, 484 P.2d at 973) (deletion in original)).
32. See, e.g., Varacallo, 752 A.2d at 814 (citing cases rejecting similar theories in Louisiana, New York, and federal courts in the District of Connecticut, the District of Minnesota, and the Western District of Michigan).
33. Id. at 814.
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Center, which identified concerns similar to Justice Mosks’s. Most notably, Riley was concerned about the possibilities that “wrongs would go without redress, and [that] there would be no deterrence to future aggressions.” These policies go to the regulation of primary conduct; they are not matters of judicial convenience.

Varying Class Certification Standards

Standards for class certification vary widely across the fifty states. Some states, like South Carolina, have extremely liberal standards. Some, like Arkansas, claim to adhere to federal standards, but do not. Some, like Texas, have stricter standards than federal courts. But the important question for purposes of this section 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 care

34. 294 A.2d 7, 10 (1972) (“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.”).
35. Id.
about individual rights, consumer fraud claims seem perfectly calculated to inspire substantive indignation, leading to the high-flying justifications given by Justice Mosk and others. The analysis of class certification motions, on the other hand, is highly tied 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 authority justifies its deviations from the federal rule in primarily procedural terms. *Littlefield*, for example, cites 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. 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 instructive example. West Virginia’s basic class certification standards—much more liberal than the federal courts’—are laid down in *In re West Virginia Rezulin Litigation*. In West Virginia, commonality “requires only that the resolution of common questions affect all or a substantial number of the class members.” Typicality 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

39. 523 S.E.2d at 784.
41. 585 S.E.2d 52 (W.Va. 2003); see also State of West Virginia ex rel. Chemtall, Inc. v. Madden, 607 S.E.2d 772 (W.Va. 2004) (calling *In re West Virginia Rezulin Litigation* “the definitive case on the certification of class actions and the application of [West Virginia’s] Rule 23”).
42. *In re West Virginia Rezulin Litigation*, 585 S.E. 2d at 57.
remedial theory, the presence of factual variation is normally not sufficient to preclude class
action treatment.” 43 These standards are significantly more permissive than the Supreme Court’s
glosses on the federal rules. Although In re West Virginia Rezulin Litigation does speak of the
purposes of Rule 23, it does so opaquely. It describes the rule as “a procedural device that was
adopted with the goals of economies of time, effort and expense.” 44 But it also holds 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.” 45

Texas presents a contrast. In Southwestern Refining Co. v. Bernal, the Texas Supreme
Court took a position that was diametrically opposed to West Virginia’s. 46 Rather than focusing
on the need for collective redress, the court highlighted its dangers. “By 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.’” 47 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. 48

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

43. Id.
44. Id. at 62.
45. Id.
47. Id. at 438 (quoting Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996)).
48. See Brown, supra note 41, at 486.
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 denigrates their value in relation to business interests, as in Bernal. But the justifications for Rule 23(b)(3) classes are also heavily tied up in judicial convenience. Every one of the decisions mentioned above that mention the litigants’ rights also mention courts’ necessity.

The Conflict between Class Actions and Statutory Damages

This last example of explicit state consideration of class actions’ substantive effects is negative rather than positive. New York C.P.L.R. § 901(b) 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 § 901(b) and concluded that “the Legislature declined to make class actions available where individual plaintiffs were afforded sufficient economic encouragement to

49. 484 P.2d at 968–69.
50. 585 S.E. 2d at 62.
51. 22 S.W. 3d at 438.
52. Vasquez, 484 P.2d at 968–69; In re West Virginia Rezulin Prods. Lit., 585 S.E.2d at 62; Bernal, 22 S.W.3d at 437.
53. N.Y. C.P.L.R. § 901(b) provides: “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.”
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institute actions . . . . This 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.”

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

*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 are substantive or procedural. *Shady Grove* held that the federal rule was procedural and state rule was substantive, because the purposes behind the rules were respectively procedural and substantive.

**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 should be asking ourselves whether and to what extent states’ class action policies should be protected.

55. 549 F.3d 137, 139 (2d. Cir. 2008), *cert. granted*, 2009 WL 329585.
56. *Id.* at 142.
57. *Id.* at 143.
58. *Id.* at 145.
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More specifically, the one area of law which would seem most relevant to class action jurisprudence—class certification—is the area in which state policies are least likely to be respected. Under Hanna, federal courts apply Federal Rules, including Rule 23, even when they conflict with state policies, unless they are invalid under the Rules Enabling Act.59 And rules are never invalid under the Rules Enabling Act.

This section explores an argument that Hanna’s rule should be reconsidered, at least in the class action context. Although Hanna seemed to apply categorically,60 courts and commentators have been criticizing Hanna since Justice Harlan’s dissent.61 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.”62 Because 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.

Federal Solicitude for Substantive Policies

In Gasperini v., 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

59. Hanna, 380 U.S. at 471.
60. Id. at 471 (“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).
61. 380 U.S. 474–478
62. Chesney v. Marek, 720 F.2d 474, 479 (7th Cir. 1983).
the trial and decision of civil cases."  

In support for this framing, 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 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 court of its existence. Because these results are not dictated by the federal rules, but rather by courts’ glosses, they should not be

63. *Id.* at 426.
66. Rule 4(d)(1) authorizes service by “leaving copies of the summons and the complaint with respondent’s wife at his residence.” *Hanna*, 380 U.S. at 461.
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.”

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

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. In addition to class certification, Professor Steinman suggests that summary judgment and pleading standards should be guided by state preferences.

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69. Id. at 287.
70. Id.
71. _Gasperini_, 518 U.S. at 437 n.22 (internal quotation marks omitted) (quoting id. at 468 (Scalia, J., dissenting)).
72. “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. See 28 U.S.C. §§ 2072(a) and (b) (“Supreme Court shall have the power to prescribe general rules of ... procedure”; “[s]uch rules shall not abridge, enlarge or modify any substantive right”); _Browning-Ferris_, 492 U.S., at 279, 109 S.Ct., at 2922 (“standard of excessiveness” is a “matter[r] of state, and not federal, common law”); see also R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 729-730 (4th ed.1996) (observing that Court “has continued since [ _Hanna v. Plumer_, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).] to interpret the federal rules to avoid conflict with important state regulatory policies,” citing _Walker v. Armco Steel Corp._, 446 U.S. 740, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980)).” _Gasperini_, 518 U.S. at 437 n.22.
73. Id.
74. _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).
75. Steinman, _supra_ note 68 at 273.
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Class Actions in particular

Gasperini’s command—interpret Federal Rules to further state policies—applies to Rule 23. Federal courts have held over and over again that state class action policies are worthy of respect. And the Supreme Court in Ortiz v. Fibreboard explicitly limited its construction of Rule 23(b)(1)(B) to avoid affecting constitutional rights. 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. The combination of these threads leads inevitably to the 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 provides the flavor. In Amchem, the Supreme Court was “mindful that Rule 23’s requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act.” But Amchem’s only nod to state policies was its holding that differences in the state law applicable to the plaintiffs frustrate the commonality requirement.

Shady Grove involved an unusually clear example of a state substantive policy relating to class actions. The policy, expressed in New York C.P.L.R. § 901(b), prohibited statutory damages class actions. The Second Circuit was quick to dismiss the possibility that § 901(b) conflicted with Rule 23 by holding that Rule 23 did not require federal courts to offer class

76. See, e.g., infra notes 82–91.
80. Id. at 624.
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actions on all state claims.81 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.82

In re Fibreboard is a more famous, more problematic example of federal solicitude for states’ substantive policies. In Fibreboard the Fifth Circuit rejected the lower court's certification of an asbestos class action based on Texas products liability law.83 The plan was to allow a jury to determine class-wide damages after hearing expert medical and statistical testimony.84 The court's decision turned on its conclusion that Texas law required individual proof of liability and damages.85

Finally, Windham v. American Brands, Inc.,86 refused to certify a federal antitrust claim.87 According to the Fourth Circuit, the Sherman Act “le[ft] no room for awarding damages to some amorphous fluid class.”88

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 it was interpreting Rule 23(b)(1)(B) rather than Rule 23(b)(3).89 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

81 .  Shady Grove, 549 F.3d at 143.
82 .  Id. at 146.
83 .  In re Fibreboard Corp., 893 F.2d 706, 711 (5th Cir. 1990) (citing Gaulding v. Celotex Corp., 772 S.W.2d 66, 77 (Tex. 1989)).
84 .  The court’s discomfort with the plan's departure from procedures that “reflecte[d] the very culture of the jury trial and the case and controversy requirement of Article III” also played a role. Id. at 709.
85 .  Id. at 710–711.
86 .  565 F.2d 59 (4th Cir. 1977).
87 .  Although the decision was based on a federal claim, the court’s solicitude for the federal policies behind the claim make Windham relevant here. See id. at 66.
88 .  Id. (internal quotation marks omitted).
89 .  See 527 U.S. at 841.
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substantive right.”90 The Court, in rejecting certification of the settlement class, purported to be respecting “the rights of individual tort victims at law.”91

The unifying theme of these cases is that they all cite substantive concerns as reasons not to certify a class. So, if we think of Federal Rule 23 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 its status as the last in a long line of cases reaffirming the principles of the Rules Enabling Act. Semtek holds that courts should not interpret Federal 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.”92 There could hardly be a greater influence on choice of forum than the likelihood of class certification. A federal court considering whether to certify a class action based on a West Virginia claim (for example) would surely be tempted to apply Federal 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.

90. Id. at 845 (internal quotation marks omitted).
91. Id.
92. 531 U.S. at 504 (internal quotation marks omitted).
III. States Can Protect Their Substantive Interests Without Federal Cooperation.

The previous section 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 Section II, 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.\textsuperscript{93} The Seventh Amendment requires jury trials on some issues, but state law creates those issues.\textsuperscript{94} Federal courts have refused to hear aggregated evidence of liability or damages, but state law controls the admissibility of that evidence.\textsuperscript{95} By fitting their policy preferences into federal procedural 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.\textsuperscript{96} 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

\begin{itemize}
  \item \textsuperscript{93} See, e.g., Varacallo, 752 A.2d 807, (N.J. Super. 2000).
  \item \textsuperscript{94} See, e.g., Cimino v. Raymark Ind., 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 at XX (1970))).
  \item \textsuperscript{95} See, e.g., In re Fibreboard, 893 F.2d at 711 (“In 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 . . . . These requirements of proof define the duty of the manufacturers.’” (quoting Gaulding v. Celotex Corp., 772 S.W.2d 66, 77 (Tex. 1989))
  \item \textsuperscript{96} See id. at 2024.
\end{itemize}
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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. 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.\(^97\) Also entitled to respect is a state’s decision that class actions or statutory damages are appropriate separately but not together.\(^98\)

This section is intended as an overview of the places in federal procedure where states can affect class action certification. Although many of the questions discussed are interrelated, it is organized roughly by the order in which issues would appear in a case.

*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.\(^99\) The note argues that courts should allow victims of mass torts to form voluntary

\(^98\) See Shady Grove, 549 F.3d at 146.
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associations to bring their claims. Although such an association would face customary prudential limits on associational standing, Roche argued that the use of statistical evidence would address those concerns and allow the association to bring suit. Although the note recommends that courts should allow voluntary associations, for the purposes of this paper, 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.

Blue Cross & Blue Shield of N.J. took another approach. The Second Circuit confronted an insurance company bringing a consumer fraud suit on behalf of its subscribers. 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. The Second Circuit thought that it would be reasonable to interpret Section 349 to allow the case to proceed on an indirect injury theory. But the question was close and important to state policy, so the court certified the question to the New York Court of Appeals.

100. Id. at 1476.
101. These limits are spelled out in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977) (“[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.”).
102. Roche, supra note 29, at 1498–1502.
103. Blue Cross & Blue Shield of N.J., 344 F.3d at 215. The Second Circuit also approved Blue Cross’s use of “aggregated evidence of causation and harm.”
104. Id. at 215.
105. Id. at 219–220.
106. Id. at 221.
rejected the Second Circuit’s interpretation of Section 349, holding that Blue Cross’s only remedy was equitable subrogation. 107

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 smokers’ class action. Because the claims had already been aggregated, aggregate proof of damages was especially appropriate. 108

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 states’ laws apply to the facts of the litigation, federal courts (and state courts, too, are reluctant to certify classes. 109 Under Klaxon v. Stentor, federal courts apply the choice of law rules of the state in which they sit. 110 But when they are confronted with a

108. 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). Here, the class has already been defined.
potential nation-wide class, they frequently pay this duty only lip-service.\footnote{See Silberman, \textit{supra} note 112, at 2007–2014.} 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.\footnote{See \textit{Id}.} 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,\footnote{The relevant provisions are codified at Tex. Rev. Civ. Stat. arts. 581-12A, 581-33A(1).} which the Texas Supreme Court recently held to constrain Texas courts’ choice of law.\footnote{See \textit{Citizens Ins. Co. of Am. v. Daccach}, 217 S.W.3d 430, 439–448 (2007).} \textit{Daccach} was a purported class action against a Colorado company that sold life insurance from an office in Texas. 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 has not . . . register[ed] as a securities dealer or satisfied a[n] . . . exemption from registration.”\footnote{\textit{Id.} at 444.} This language applied both to wholly in-state transactions and to transactions where a Texas dealer sold securities to a non-resident.\footnote{\textit{Id}.}

The important lesson to draw from \textit{Daccach} and other cases like it\footnote{See, e.g., \textit{In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Pract. Litig.}, 201 F.R.D. 456, 461 n.1 (D. Minn. 2001).} 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. But the only claim suitable for class treatment was the TSA claim.

In addition to choice of law rules tied to particular claims, states could also devise choice of law rules applicable generally to requests for class certification. Whether this is appropriate depends 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 to change choice of law rules to make them easier to certify. If, on the other hand, class actions serve important state policies independent of the individual claims they aggregate, states might have an interest in having their law control a class action that is stronger than any interest they might have in having their law control an individual claim.

Such an interest in collective adjudication as such 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 Daccach and Lutheran Brotherhood, each of which applied a state’s regulatory laws to transactions that could have also been regulated by other sovereigns. An individual action between a citizen of one state and a manufacturer in another state might reasonably by governed by either state’s law, because each state has an interest in the outcome. But the aggregation of a nation-wide 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 very strong

118 Daccach, 217 S.W.2d at 436.
119 Because the class representative abandoned his other claims, the only claim the trial court certified was the TSA claim. Id. at 436–37. However, he argued that the claims were abandoned because they were inappropriate for class treatment, and the court did not disagree. Id. at 451.
120 See generally Silberman, supra note 112, at 2022–24.
121 See id. at 2024.
122 Daccach, 217 S.W.3d at 439; Lutheran Bhd., 201 F.R.D. at 462.
incentives to change its practices, and 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 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 nation-wide 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 nation-wide class.

Clarifications or Changes to State Tort Law

Once the 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 Texas claim in Fibreboard required (according to the Texas courts) individualized proof of causation. Although the court below had devised an innovative solution to the fundamental

123 See Silberman, supra note 112, at 2015.
125 Shutts, 472 U.S. at 822 (“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.”).
126 See Daccach, 217 S.W.2d at 446–447 (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)).
127 Fibreboard, 893 F.2d at 711.
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problem in Fibreboard, it was a “change[] in substantive duty . . . dressed as a change in procedure.”128 The court ultimately vacated the trial order at issue, but it also pointed to a possible solution. Although “the rights of the class members cr[ied] powerfully for innovation and judicial creativity,” the courts said that those arguments were better directed to law-making bodies.129

Law-making 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;130 the impossibility of separating the individual issues from the collective issues sabotages many more.131 In Castano v. American Tobacco Co., for example, the district court certified a class action based, inter alia, on fraud and negligence.132 The Fifth Circuit decertified 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.133 Rule 42(b) authorize 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

128 . Id.
129 . Id. at 712.
130 . See, e.g., Fibreboard, 893 F.2d 706.
131 . See, e.g., Castano v. American Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996).
132 . Id.
133 . Id. at 750.
findings of a first jury.”\textsuperscript{134} Judges bifurcating trials must “carve at the joint,” according to Judge Posner,\textsuperscript{135} but most torts do not come with joints.

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

In \textit{Vasquez} and \textit{Varacallo}, discussed above,\textsuperscript{136} 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 \textit{Fibreboard} court’s concerns, and appropriately so: a body properly vested with lawmaking authority (in this case, a state’s common law courts) saw the problem that individual proof represented, and responded by eliminating the requirement.

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. The basic lesson is that bifurcation does not violate the seventh amendment.\textsuperscript{137} However, the Seventh Amendment does, as \textit{Castano} recognized, prevent juries from considering the same issue twice.\textsuperscript{138} 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.

\textsuperscript{134} Id. at 751.
\textsuperscript{135} In re Rhone-Poulenc Rhorer, Inc., 51 F.3d 1293, 1302 (7th Cir. 1995).
\textsuperscript{136} See supra notes 26–38 and accompanying text.
\textsuperscript{138} See 84 F.3d at 751; Cimino, 151 F.3d at 320 n.50.
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*Mullen v. Treasure Chest Casino*, however, indicates that the Seventh Amendment problem may be less serious than *Castano* thought. In *Mullen*, one jury was to consider the defendant’s conduct, and a second would have considered the plaintiffs’ comparative negligence. The Fifth Circuit felt that “leaving all issues of causation for the phase-two jury” solved the Seventh Amendment problem. 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.

The distinction between *Castano* and *Mullen* seems tenuous at best. The *Castano* court characterized comparative negligence as “requir[ing] a comparison between the plaintiffs’ and the defendant’s conduct.” *Mullen*, on the other hand, saw comparative negligence as getting at causation. Further complicating the reading of these judicial entrails, neither opinion cited state law in its Seventh Amendment reasoning. And it doesn’t help that *Mullen*’s Seventh Amendment reasoning was probably dictum.

But the lesson from *Rhone-Poulenc, Castano*, and *Mullen* is analogous the one we drew from *Daccach* and *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.

139 . 186 F.3d 620, 628 (5th Cir. 1999).
140 . Id.
141 . Id.
142 . Id.
143 . 84 F.3d at 741.
144 . 186 F.3d at 628.
145 . 84 F.3d at 741; 186 F.3d at 628.
146 . 186 F.3d at 628 (“Treasure Chest did not raise [the Seventh Amendment] issue to the district court nor has it been argued on appeal.”).
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 (it seems unlikely that they will), there already exist many fulcrums in the federal system through which states can assert their policy preferences relating to class actions.