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The Uncertain Path of Class Action Law

Sergio J. Campos

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For the past ten terms the Supreme Court has increased its focus on the law of class actions. In doing so, the Court has revised the law to better accord with a view of the class action as an exception to an idealized picture of litigation. This "exceptional" view of the class action has had a profound impact not only on class action law, but on procedural and substantive law in general. However, in the October 2015 term the Court decided three class action cases that support an alternative, "functional" view of the class action, one that does not view the class action as exceptional, but as one of many equally permissible tools to serve the objectives of substantive law. This alternative view has the potential to have a similarly significant impact on the law, but it is not certain whether the Court will further develop this alternative, especially given its most recent class action decisions. This Article discusses the development of the "exceptional" view of the class action, the awakening of a "functional" alternative view, and the uncertain path ahead.

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INTRODUCTION

It is always risky to discuss the current views of the Supreme Court over any area of law. The Court's views are like riverbeds, which can dry from inattention at times, or flood with focus, or shift into new and unexpected directions. Moreover, like a riverbed, the Court's views can create channels that draw water after dry periods, influencing the course of the river when the Court's attention returns. It is difficult to chart the causes of these ebbs and flows, but it is helpful to map the river to better navigate it, to see what deep channels may still draw water, and, perhaps, to cultivate channels into new directions.

This is particularly true of the Supreme Court's views on the class action. Beginning in the October 2009 term, the Supreme Court has granted certiorari in a number of cases raising issues concerning the law of class actions.[1] During this time period, Justice Scalia had an enormous influence on the Supreme Court's understanding of the class action device. This is reflected in the many majority and plurality opinions he wrote in the class action cases decided during this period.[2] This influence, in fact, can be traced to deep channels that Justice Scalia, with the help of others, developed prior to this flood of attention.

One can also detect Justice Scalia's influence on class action law by his absence. This is especially true of the October 2015 term, a term which, unfortunately, saw the passing of Justice Scalia on February 13, 2016.[3] During that term the Court decided three major class action cases. The first, *Campbell-Ewald Co. v. Gomez*, was decided less than a month before Justice Scalia's death and was his last class action case.[4]

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1 Paul G. Karlsgodt & Dustin M. Dow, *The Practical Approach: How the Roberts Court Has Enhanced Class Action Procedure by Strategically Carving at the Edges*, 48 AKRON L. REV. 883, 886–87 (2015) (noting that, beginning in "2009, . . . the Supreme Court started a string of granting certiorari in several cases raising class-action-related issues each year").

2 These opinions include, in chronological order, (1) Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010) (plurality opinion); (2) AT&T Mobility LLC v. Concepción, 563 U.S. 333 (2011); (3) Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); (4) CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); (5) Comcast Corp. v. Behrend, 569 U.S. 27 (2013); and (6) American Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

3 Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0 [https://perma.cc/L2J6-3SL9].

4 Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016) (decided on January 20, 2016).

However, in *Campbell-Ewald*, Justice Scalia did not write the majority, but dissented. Moreover, in the two cases that followed—*Tyson Foods, Inc. v. Bouaphakeo*[5] and *Spokeo, Inc. v. Robins*[6]—the Court moved further away from the view that has informed Justice Scalia's, and the Court's, recent decisions on the class action.[7] The fact that this new path occurred so quickly after Justice Scalia's death only confirms the outsized influence he has had on the Court's class action jurisprudence.

This Article seeks, in part, to bring to light the view of the class action that motivated Justice Scalia's, and the Court's, decisions prior to his passing. This view is not unique to Justice Scalia, and can be traced back to decisions made by the Court in the 1990s concerning class actions and asbestos litigation,[8] if not earlier.[9] Indeed, this Article not only sets forth this view, but traces the development of this view over time, to arguably its apex just prior to the October 2015 term.

This view does not consider class actions per se unlawful, but it does consider them to be an exception to a particular idealized view of procedure. Specifically, under this "exceptional" view of class action, a class action is seen primarily as an "economical" procedure that decides issues collectively for the class.[10] However, the class action cannot be used if it would change what would have occurred in the "normal process" of separate actions filed by each individual class member.[11] Put

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5 136 S. Ct. 1036 (2016) (decided on Mar. 22, 2016).

6 136 S. Ct. 1540 (2016) (decided on May 16, 2016).

7 For a full discussion of that shift, see *infra* Part II.

8 *See* Amchem Prods. v. Windsor, 521 U.S. 591 (1997); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

9 Early precursors include such non-class action cases as *Martin v. Wilks*, where the Court first endorsed the ideal of a "day in court." 490 U.S. 755, 762 (1989).

10 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 n.5 (2011) (noting that the commonality requirement "serve[s] as [a] guidepost[] for determining whether under the particular circumstances maintenance of a class action is economical," among other things) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982)); *see also Wal-Mart*, 564 U.S. at 350 ("'What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.") (alterations in original) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

11 *See* Philip Morris USA Inc. v. Scott, 561 U.S. 1301, 1303 (Scalia, Circuit Justice 2010); *see also* Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013) ("The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'") (quoting Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979)).

another way, the Court has emphasized "our 'deep-rooted historic tradition that everyone should have his own day in court,'"[12] and the class action is an "exception" that cannot frustrate that tradition without great justification.[13]

The "exceptional" status of the class action, and the purportedly "deep-rooted tradition" upon which it is based, has had an enormous impact on class action law. Indeed, this exceptional view is a threat to the very existence of the class action itself, insofar as the Court has slowly forgotten the utility of, and thus the justification for, the class action procedure.

Critics of the Supreme Court's recent class action jurisprudence have pushed back against this exceptional view of the class action by highlighting the regulatory benefits of the class action in curtailing wrongdoing committed against a large group of dispersed individuals.[14] Older class action decisions by the Court have also pointed out the regulatory benefits of the class action.[15] But these regulatory benefits only appear to redound to persons outside the litigation, and thus, at least at first glance, sacrifice the interests of the parties to some diffuse, amorphous good.[16] The regulatory benefits do not, without more, counter the core appeal of the exceptional view. What makes the exceptional view compelling is that it prioritizes the individual over the

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12 *Fibreboard*, 527 U.S. at 846 (quoting *Wilks*, 490 U.S. at 762).

13 *Comcast*, 569 U.S. at 33.

14 *See, e.g.*, J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015); Judith Resnik, Comment, *Fairness in Numbers: A Comment on* AT&T v. Concepción, Wal-Mart v. Dukes, *and* Turner v. Rodgers, 125 HARV. L. REV. 78 (2011).

15 *See, e.g.*, Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government."); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 402–03 (1980) (highlighting "[t]he justifications that led to the development of the class action," which "include[d] . . . the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims.") (citing FED. R. CIV. P. 23 Advisory Committee notes to the 1966 amendments); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) (noting small size of antitrust claims, concluding that "[n]o competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all.").

16 *See* Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1167 (2009) (describing "inadequate deterrence" as a "more diffuse harm to society as a whole").

group, and thus seeks to prevent the collective from running roughshod over the individual's rights and interests.

As argued in more detail below, the three class action decisions of the October 2015 term have awakened an alternative to the exceptional view of the class action, one that takes on the core appeal of the exceptional view directly. Under this nascent alternative view, the class action is not an exception to an idealized, individualized procedure. Instead, the alternative view recognizes that such individualized procedures can be dysfunctional in some contexts, and in those contexts the class action may be a solution to that dysfunction. Accordingly, under this alternative view, the class action is not an imperfect procedure to be constrained but a solution that alleviates the problems that may arise from the very individualized procedures that the exceptional view regards as ideal.

More importantly, this alternative view does *not* differ from the exceptional view's concern with protecting the interests of each individual class member from being subordinated to the interests of the collective. They only differ in what those rights are and how they should be protected. Under the exceptional view, the procedural ideal of separate actions by individual victims has an enormous influence on what rights get protected in the first place. If the right cannot be protected by the procedural ideal, then it is not protected.

The alternative view, in contrast, takes substantive rights as they are, and tailors the procedure to ensure their protection. Unlike the exceptional view, the functional view does not idealize any procedure. Instead, it sees procedure as subservient to the rights and interests that are implicated in a given case. In other words, if, under the exceptional view, function follows an imagined, idealized form, then under this alternative view, form follows, and is subsidiary to, the function the law is trying to achieve.

Accordingly, a further goal of this Article is to describe the awakening of this alternative, functional view of the class action. The awakening is subtle and fragile, and, as discussed below, it may simply be an aberration in the Court's march to full adoption of the exceptional view of the class action. Indeed, the awakening can easily be reconciled with the exceptional view depending on the choices the Court makes going forward. As discussed below, the Court's most recent class action

decisions, most notably *Epic Systems Corp. v. Lewis*, have been, at best, agnostic with respect to these two different views.[17]

But the awakening also presents an opportunity for the Court to adopt the functional view, a view that, as argued below, is more appealing than the exceptional view and opens up other avenues of procedural innovation. It is also a view of the class action that better accords with the history and the purposes of the class action. In many ways, this nascent functional alternative is a throwback to a different era when courts were more willing to experiment with procedure for substantive ends. Thus, like the exceptional view, this alternative, functional view has its own deep channels.

The Article begins by discussing the development of the exceptional view in the Court's recent class action decisions. It then discusses the awakening of an alternative, functional conception of the class action based upon the Court's class action decisions during the October 2015 term. The third Part discusses the uncertain path forward for the alternative, functional view, its promise and historical support, and the roadblocks ahead. The Article then concludes.

I. THE CLASS ACTION AS AN EXCEPTION

A. *Sources of the View*

1. *Amchem*

Although precursors do exist,[18] the source of the Court's current exceptional view can be traced to two class action decisions involving

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[17] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); *see also* Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017); Cal. Pub. Emps.' Ret. Sys. (CalPERs) v. ANZ Sec., Inc., 137 S. Ct. 2042 (2017). For a fuller discussion of these recent cases, see *infra* Section III.A.

[18] The most notable is *Martin v. Wilks*, a Title VII case in which the Court addressed disparate impact claims made by black firefighters against the City of Birmingham, Alabama, fire department. 490 U.S. 755, 759 (1989). Nonparty white firefighters sought to intervene after issuance of a consent decree, even though the firefighters were invited to help craft the decree prior to its issuance. *Id.* at 775 (Stevens, J., dissenting). The Court permitted intervention, referring for the first time to the "deep-rooted historic tradition that everyone should have his own day in court." *Id.* at 762 (majority opinion). The case would later be abrogated by the Civil Rights Act of 1991. *See* Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1074–76 (codified as

the global settlement of asbestos claims—*Amchem Products v. Windsor*[19] and *Ortiz v. Fibreboard Corp.*[20] In *Amchem*, decided in 1997, the Court reviewed a global settlement of asbestos claims that would settle the unfiled claims of those presently injured and those who had been exposed to asbestos but "had not yet manifested any asbestos-related condition."[21] The settlement was reached through the vehicle of a Federal Rule of Civil Procedure Rule 23(b)(3) settlement-only class action, with the motion for certification of that class action filed literally the same day as the complaint and the settlement itself.[22]

As brief background, Rule 23 governs federal class actions, and under Rule 23, all class actions must satisfy the four prerequisites under Rule 23(a)[23] and must fit into "at least one of the three [categories of class actions] listed in Rule 23(b)."[24] Rule 23(b)(3) sets forth the third category, a residual category of class actions primarily designed for damage claims.[25] Under Rule 23(b)(3), a class action can only be certified if issues common to the class "predominate" over individual issues and that the class action is "superior" to other alternatives.[26]

In *Amchem*, the Court vacated certification of the class, in part, because common issues of law and fact did *not* predominate.[27] The

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amended at 42 U.S.C. § 2000e-2(n)(1) (2018)). The Court would later invoke this "day in court" tradition in *Richards v. Jefferson County*, a case decided the year before *Amchem*, in which the Court held that a prior taxpayer challenge to state statute did not bind a subsequent challenge brought by different taxpayers who were not parties to the previous action. 517 U.S. 793, 798 (1996).

19 Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

20 Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

21 *Amchem*, 521 U.S. at 603–04.

22 *Id.* at 601–02 ("[W]ithin the space of a single day, January 15, 1993, the settling parties—CCR defendants and the representatives of the plaintiff class described below—presented to the District Court a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification.").

23 FED. R. CIV. P. 23(a). These prerequisites are (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *See* FED. R. CIV. P. 23(a)(1)–(4).

24 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 345 (2011); *see also* FED. R. CIV. P. 23(b)(1)–(3).

25 *See* Amendments to Rules of Civil Procedure Supplemental Rules for Certain Admiralty & Maritime Claims Rules of Criminal Procedure, 39 F.R.D. 69, 103 (1966) (discussing the creation of Rule 23(b)(3) subdivision).

26 FED. R. CIV. P. 23(b)(3).

27 *See Amchem*, 521 U.S. at 624 (citing FED. R. CIV. P. 23(b)(3)).

Court, quoting the Third Circuit's earlier decision in the case, highlighted the many issues that were unique to each class member—"[c]lass members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma."[28] Here the Court pointed to the Advisory Committee notes to the 1966 Amendments to Rule 23, which noted that "'mass accident' cases" are "ordinarily not appropriate" for certification given that they "are likely to present 'significant questions, not only of damages but of liability and defenses of liability, . . . affecting [] individuals in different ways.'"[29]

Moreover, the Court distinguished mass tort claims like asbestos claims from litigation involving small claims against a common defendant. The Court noted that "[t]he 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."[30] In contrast to such small claims litigation, mass tort claims tend to have large expected recoveries, and thus "[e]ach plaintiff . . . has a significant interest in individually controlling the prosecution of" her case.[31] Again the Court pointed to the Advisory Committee notes to Rule 23, which noted that "[t]he interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action."[32] Given the size and heterogeneous nature of the claims involved in asbestos litigation, the Court concluded that "certification cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design."[33]

The Court also rejected certification of the class because of a fundamental conflict between the "presents," or those presently injured, who the Court concluded preferred "generous immediate payments," and "exposure-only" plaintiffs, who, in the Court's view, preferred "an

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28 *Id.* (quoting Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626 (3d Cir. 1996)).

29 *Id.* at 625 (first alteration in original).

30 *Id.* at 617 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

31 *Id.* at 616 (quoting *Georgine*, 83 F.3d at 633).

32 *Id.*

33 *Id.* at 625.

ample, inflation-protected fund for the future."[34] The Court, in particular, was concerned that the presents would not adequately represent the interests of the exposure-only plaintiffs. Accordingly, the Court concluded that the class action failed to satisfy the "adequacy of representation" prerequisite of Rule 23[35] because there was "no structural assurance of fair and adequate representation for the diverse groups and individuals affected."[36]

2. *Ortiz*

In *Amchem*, the Court noted as an aside that "[a]lthough this [case] is not a 'limited fund' case certified under Rule 23(b)(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability."[37] Rule 23(b)(1)(B) defines a second category of class actions to cover situations when separate actions "as a practical matter, would be dispositive of the interests of the other members . . . or would substantially impair or impede their ability to protect their interests."[38]

Two years later, in *Ortiz*,[39] the Court reviewed a slightly different global asbestos settlement that was clearly informed by the above dicta in *Amchem*. The parties in *Ortiz* apparently viewed this language as an invitation to seek certification under Rule 23(b)(1)(B), rather than Rule 23(b)(3). Class actions certified under Rule 23(b)(1)(B) provide an additional advantage for plaintiffs' attorneys. Unlike class actions certified under Rule 23(b)(3), Rule 23(b)(1)(B) class actions do not require the provision of notice and an opportunity to opt out to the class members.[40]

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34 *Id.* at 626.

35 *See* FED. R. CIV. P. 23(a)(4).

36 *Amchem*, 521 U.S. at 626–28.

37 *Id.* at 626–27.

38 FED. R. CIV. P. 23(b)(1)(B).

39 Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

40 *See* FED. R. CIV. P. 23(c)(2)(A) (providing that, for classes certified under 23(b)(1) and (b)(2), the court "may," but not must, "direct appropriate notice to the class" and further is not required to provide class members an opportunity to opt out). *Cf.* FED. R. CIV. P. 23(c)(2)(B) (requiring such notice and opt out rights for Rule 23(b)(3) class actions).

Despite its expansive language, Rule 23(b)(1)(B) class actions have been used primarily in litigation involving "limited fund[s]" or litigation where the fund cannot satisfy all of the class members' claims.[41] In those circumstances, a mandatory class action is certified to prevent class members from winning a race to the courthouse and exhausting the fund.[42] In *Ortiz*, the parties sought to characterize the settlement amount as a "limited fund" insofar as it was limited to proceeds from a specific insurance contract.[43]

In examining the proposed settlement, the Court engaged in a long historical exegesis of the use of Rule 23(b)(1)(B) class actions in limited fund contexts. Here, the Court rejected the parties' characterization of the case as involving a true limited fund because "Fibreboard was allowed to retain virtually its entire net worth."[44] Moreover, the Court identified a fundamental conflict similar to the one in *Amchem* that would equally result in inadequate representation—the interests of the class attorney vis-à-vis the class. The Court noted, in particular, that "[i]n a strictly rational world, plaintiffs' counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant."[45]

Consequently, the *Ortiz* Court vacated certification of the class, concluding that, despite the expansive language of Rule 23(b)(1)(B), the rule should be limited to its historical use and no more, especially given the "likelihood of abuse" as evidenced by the asbestos settlement before it.[46] As put by the Court, "[t]he prudent course, therefore, is to presume

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41 *Ortiz*, 527 U.S. at 834 (citing FED. R. CIV. P. 23 Advisory Committee notes to 1966 amendments).

42 *See* Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 186 n.10 (describing Rule 23(b)(1)(B) as a form of "interpleader" designed to prevent races to the courthouse).

43 *Ortiz*, 527 U.S. at 828. Specifically, Fibreboard was involved in separate insurance coverage litigation of asbestos claims made against the company. Fibreboard, the insurer, and the plaintiffs' attorneys agreed to a settlement that created a limited trust to pay off claims while removing the risk that the insurance coverage litigation would result in no coverage. *Id.* at 823–25.

44 *Id.* at 859.

45 *Id.* at 852 n.30.

46 *Id.* at 842.

that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model."[47]

Finally, the *Ortiz* Court was not pleased with the mandatory nature of the proposed Rule 23(b)(1)(B) settlement. Here the Court explicitly characterized the class action as an exception to "the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'"[48] In the Court's view, upholding the class action would raise serious due process concerns because "objectors to the collectivism of a mandatory subdivision (b)(1)(B) action have no inherent right to abstain."[49] According to the Court, failing to provide such a right to abstain would run afoul of "our 'deep-rooted historic tradition that everyone should have his own day in court.'"[50]

3. Aftermath

In both *Amchem* and *Ortiz*, the Court provided the general contours of the exceptional view of the class action. In fact, the Court in *Ortiz* (1) explicitly identified a "day in court" ideal as an entitlement, (2) identified the class action as an "exception" to that ideal, and (3) concluded that "the burden of justification rests on the exception."[51] Moreover, despite efforts by the Court in both cases to ground the decisions in rule interpretation, the *Amchem* Court implicitly, and the *Ortiz* Court explicitly, considered the "exceptional" view an outgrowth of the law of due process.[52]

Although it lacks the explicitness of *Ortiz*, *Amchem* provides content to what that "day in court" entails. At the very least, the day in court ideal expresses a preference for a separate, tailored hearing on

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47 *Id.*

48 *Id.* at 846 (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)).

49 *Id.* at 846–47.

50 *Id.* at 846 (quoting Martin v. Wilks, 490 U.S. 755, 762 (1989)).

51 *Id.*

52 *Id.*; *see also* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 352 ("The fundamental strength of *Amchem* and *Ortiz* inheres in the subtle revisitation of the law governing due process in the resolution of representative actions.").

every issue of material fact or law that affects a party. This preference is especially strong when the claims are large. The danger of departing from this ideal is inadequate representation caused by either, in the case of *Amchem*, a class member with conflicting interests or, as in *Ortiz*, the class attorney's short-term greed.

Moreover, *Amchem* points to two justified exceptions to this ideal. First, and most obviously, the class action does not conflict with the ideal when issues common to the class predominate, which they did not in the asbestos context. Presumably, if issues are the same for each class member, then a separate hearing on that issue for each class member is unnecessary. This suggests a kind of "outcome determinative" test for the class action that is similar to the one under the *Erie* doctrine. Like in the *Erie* context, under the exceptional view "the outcome of the litigation in the [class action] should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if" the class members filed separate actions on their own.[53] Accordingly, a class action does not run afoul of the "day in court" ideal if the class action would mirror separate actions.

Second, separate hearings may not be required if the claims are too small to give an incentive to a party to bring a lawsuit in the first place. In such circumstances, the ideal is more "theoretic rather than practical."[54] The *Amchem* Court refers to this exception as the "policy at the very core of the class action," as the claims would not otherwise be brought absent the class action.[55]

Ortiz suggests a third exception—when, historically, representative litigation was permitted, as in the case of limited funds.[56] But, as the decision in *Ortiz* makes clear, the Court was not willing to go beyond

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53 Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 109 (1945) ("In essence, the intent of [the *Erie*] decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."); *see also* Hanna v. Plumer, 380 U.S. 460, 467 (1965) (refining "outcome determinative" test, and similarly concluding that "[t]he *Erie* rule is rooted in part in a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in a federal court.").

54 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 616 (1997) (quoting FED. R. CIV. P. 23 Advisory Committee notes to 1966 amendments).

55 *Id.* at 617.

56 *Ortiz*, 527 U.S. at 842.

these historical anomalies. Again, "the burden of justification rests on the exception."[57] After laying down the groundwork of the exceptional view in *Amchem* and *Ortiz*, the Court would start to revisit these historical anomalies.

B. *The Predominance Requirement*

Although the Court in *Amchem* and *Ortiz* signaled its preference for an exceptional view of the class action, both decisions left many questions unanswered. One concerned the meaning of the predominance requirement under Rule 23(b)(3). When, exactly, do common issues "predominate?" Do all of the issues have to be common, or just a substantial amount and, if just some, how many?

The Court in *Amchem* provided two guideposts to the meaning of "predominance." On the one hand, common issues did not predominate in the asbestos litigation at issue in *Amchem* because the litigation involved many large claims with many individual issues. However, consistent with its effort to ground its decision on rule interpretation, the Court also cited the Advisory Committee notes to the 1966 Amendments to Rule 23 to support its conclusion that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."[58]

When life gives plaintiffs' attorneys lemons, they make lemonade. Accordingly, the plaintiffs' bar seized on this language in *Amchem* to argue in favor of class certification in consumer, securities fraud, and antitrust cases. But the exceptional view articulated in *Amchem* and *Ortiz* is hard to square with the view that "predominance is . . . readily met" in such actions. Like mass tort actions, consumer, securities fraud, and antitrust cases typically involve individual issues of damages, all of which are unique to each class member. Nevertheless, after *Amchem*, but before the Court began to revisit class action law beginning in 2009, "individual damage questions" in such litigation did "not preclude a

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57 *Id.* at 846.

58 *Amchem*, 521 U.S. at 625 (quoting FED. R. CIV. P. 23 Advisory Committee notes to 1966 amendments).

Rule 23(b)(3) class action when the issue of liability [was] common to the class."[59]

1. Statistical Evidence

Given the blessing of *Amchem*, litigation outside of the mass tort context continued to use two procedural tools to deal with individual issues like damages. These tools were like the "limited fund" historical anomaly in *Ortiz*—they somehow escaped the gravitational pull of the exceptional view of the class action.

First, prior to *Amchem* and *Ortiz*, lower courts readily accepted the use of statistical methods to determine individual issues in antitrust and securities fraud cases. Such "mechanical" methods could determine damages in the absence of an individual hearing for each class member.[60] Moreover, such methods did not have to accurately determine damages for each class member "where such a formula may be used to eliminate the need for individual proof of damages and thus serve the ends of both justice and judicial economy."[61] Second, in antitrust, consumer, and employment discrimination litigation, lower courts employed bifurcation, which allowed courts to decide common issues like liability collectively and individual issues like damages on an individual class member basis.[62]

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59 6 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 18:27 (4th ed. 2002) (quoted in McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 231 (2d Cir. 2008)); *see also In re* New Motor Vehicles Can. Export Antitrust Litig., 522 F.3d 6, 28 (1st Cir. 2008) (an antitrust case, noting that "[p]redominance is not defeated by individual damages questions as long as liability is still subject to common proof").

60 7 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 22:81 (5th ed. 2011) (observing that, in such cases, the determination of damages is often "a mechanical task involving the administration of a formula"); *see also* Blackie v. Barrack, 524 F.2d 891, 905 (9th Cir. 1975) ("[S]hould the class prevail the amount of price inflation during the period can be charted and the process of computing individual damages will be virtually a mechanical task.").

61 8 NEWBERG ON CLASS ACTIONS, *supra* note 59, § 18:53 (noting that "the court should not reject" class actions in the antitrust context due to inaccurate methods of assessing and distributing damages).

62 *See, e.g.*, 8 NEWBERG ON CLASS ACTIONS, *supra* note 59, § 24:124 ("The majority of courts have held the bifurcation of class liability and relief phases of Title VII suits to be an appropriate means of litigating employment discrimination claims."); *see also In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 145 (2d Cir. 2001), *overruled on other*

Prior to *Amchem* lower courts sought to apply the same statistical and bifurcation procedures to mass tort litigation.[63] However, appellate courts often rejected the use of these procedures out of concern that the procedures would gut the restrictions on class actions,[64] or cause juries in the individual phase to re-examine factual findings in violation of the Seventh Amendment.[65] *Amchem* confirmed that the use of these procedures were impermissible for mass tort class actions, rejecting, for example, the settlement grids devised by the parties to distribute proceeds to the class members.[66]

Yet, at the same time, *Amchem* grandfathered in the use of such procedures for claims outside the mass tort context without articulating a principled reason, other than the legislative history of Rule 23. The size of the claim may appear to be a distinguishing factor, but antitrust and securities fraud claims can be just as large as mass tort claims, if not larger.[67] Indeed, the Private Securities Litigation Reform Act of 1995 (PSLRA)[68] presumes large claims in securities fraud litigation because it

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grounds by In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006) ("In the event that the district court does find conflicts [as to damage calculation] . . . there are a variety of devices available to resolve the problem [including] . . . the possibilities of bifurcating liability and damage trials."); Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (citing *Visa Check*, 280 F.3d at 141) (affirming RICO class certification and suggesting procedural mechanisms available at a later stage for individual issues such as damages and bifurcation). In fact, Rule 23 permits certification as to common issues. *See* FED. R. CIV. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues.").

63 *See, e.g.*, Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 658 (E.D. Tex. 1990) (upholding and applying actual damage multiplier in scheduling of punitive damages); *see also* David Rosenberg, Comment, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695 (1989) (discussing the use of damage grids and sampling in *Dalkon Shield* and *A.H. Robbins* bankruptcy litigation of asbestos claims).

64 Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996) (concluding that issue class actions would "eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.").

65 *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) (Posner, C.J.) (noting concern with reexamination in context of comparative negligence defenses).

66 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (quoting FED. R. CIV. P. 23 Advisory Committee notes to 1966 amendments).

67 John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 309–10, 317 (2010) (noting large size of claims in antitrust and securities fraud litigation).

68 Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

assigns the task of representing the class to a "lead plaintiff" who, among other things, "has the largest financial interest in the relief sought by the class."[69]

As a result of *Amchem*, a new consensus emerged about the predominance requirement, one that represented what can be called a light version of the exceptional view. Under this consensus, the predominance requirement mainly tests "resolvability," or the ability of a court to "craft[] a judgment that specifies the rights of all class members."[70] Predominance is not readily met in mass tort litigation because numerous individual issues prevent the court from effectively resolving the class member's claims in one fell swoop. In contrast, predominance is readily met in cases where the individual issues can be determined mechanically through the use of grandfathered-in statistical or bifurcation methods.[71] In 2010, this "resolvability" interpretation of predominance, along with the grandfathered-in exceptions, would be adopted by the American Law Institute's (ALI) *Principles of the Law of Aggregate Litigation*.[72]

However, the grandfathered-in procedures that made antitrust, securities fraud, and similar non-mass tort litigation resolvable remained in considerable tension with the exceptional view outlined in *Amchem* and *Ortiz*. Specifically, it was unclear why statistical methods that averaged awards were tolerated at all, given that any amount of

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69 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb) (2018); *see also* James D. Cox, Randall S. Thomas & Dana Kiku, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1588–89 (2006) (noting that in passing "lead plaintiff" provisions, "Congress clearly envisioned that various financial institutions—pension funds, insurance companies, and mutual funds—were the most likely types of investors who could combine a large financial stake in the suit's outcome with the sophistication to guide the suit to an appropriate result.").

70 Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1027 (2005).

71 Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 831–32 (1997) (noting this difference: "It is possible to divide the successful and unsuccessful class actions by separating the cases involving economic harms on the one side from personal injuries on the other. Nonetheless, there is something more to be learned from this than simply the distinction between economic harms and personal injuries.").

72 *See* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.01 cmt. c (2010).

averaging or sampling would, in most circumstances,[73] prevent a tailored hearing of individual issues for some class members.

Consequently, the defense bar, sensing this tension, devised new ways of attacking the grandfathered-in statistical procedures used in non-mass tort cases. One particularly effective method of attack was to raise the evidentiary standard for these methods at the class certification stage. A major barrier to this strategy was dicta in an older Supreme Court case, *Eisen v. Carlisle & Jacquelin*, which found that there was "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[74] Some lower courts relied upon this language in *Eisen* to decline scrutinizing the statistical methods proposed to determine individual issues like damages.[75] They did so despite post-*Eisen* precedent requiring a "rigorous analysis" of the certification requirements.[76]

However, many circuits began to accept the view that such a merits inquiry was appropriate when a merits issue "overlap[ped]" with a class certification requirement like predominance.[77] Moreover, by permitting courts to scrutinize the sufficiency of the proposed statistical methods to prove damages, the defense bar also pushed hard, and in many cases successfully, to subject such methods to *Daubert* admissibility review[78] prior to class certification.[79] Given the increased scrutiny of such proof,

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73 The exception, of course, is a situation where averaging or sample evidence is used as circumstantial evidence in an individual hearing. This distinction would have great significance in the Court's reawakening of the class action. *See infra* Sections I.B, II.B.

74 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

75 *See, e.g.*, *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 135 (2d Cir. 2001) ("Although a trial court must conduct a 'rigorous analysis' to ensure that the prerequisites of Rule 23 have been satisfied before certifying a class, 'a motion for class certification is not an occasion for examination of the merits of the case.'"); *see also In re* Initial Pub. Offering Sec. Litig., 227 F.R.D. 65, 93 (S.D.N.Y. 2004) (same) (citing *Visa Check* and *Eisen*).

76 Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982).

77 *See, e.g.*, *In re* Initial Pub. Offering Sec. Litig. 471 F.3d 24, 41 (2d Cir. 2006); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 677 (7th Cir. 2001).

78 *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (outlining standard for admissibility of expert evidence).

79 *See, e.g.*, Am. Honda Motor Co. v. Allen, 600 F.3d 813, 816 (7th Cir. 2010) (per curiam) (concluding that "the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants").

the certification stage was effectively transformed into a trial on the merits, in effect "putting the cart before the horse."[80]

This was the state of the law on predominance when the Court decided *Wal-Mart Stores, Inc. v. Dukes*,[81] a decision that one defense attorney described as "like an 8-year-old's Christmas morning in my office!"[82] The case itself was the perfect storm of the various developments in the law of predominance, even though, ironically, the class action at issue was not a Rule 23(b)(3) class action but a class action under Rule 23(b)(2), which does not have a "predominance" requirement.[83]

In *Wal-Mart*, the plaintiffs alleged that Wal-Mart's hiring and promotion practices violated Title VII because the practices contained excessive subjectivity that resulted in the discrimination of women in pay and promotion decisions.[84] In certifying the class, the district court adopted a unique procedure for determining individual issues of discrimination and pay that combined both statistical methods and bifurcation. In essence, the district court would randomly sample a subgroup of individual cases, decide them, and then use the results to create a grid to determine the damages in all of the other claims, all without affording any of those other claims a separate hearing.[85] This

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80 *In re* New Motor Vehicles Can. Exp. Antitrust Litig., 522 F.3d 6, 32 (1st Cir. 2008) (Torruella, J., concurring in part, dissenting in part).

81 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

82 Russell Jackson, Wal-Mart v. Dukes *Opinion Will Have Far-Reaching Application in Class Action Defense*, JACKSON ON CONSUMER CLASS ACTIONS & MASS TORTS (June 20, 2011), http://www.consumerclassactionsmasstorts.com/2011/06/articles/equitabledeclaratory-relief-cl/walmart-v-dukes-opinion-will-have-farreaching-application-in-class-action-defense [https://web.archive.org/web/20110629133447/http://www.consumerclassactionsmasstorts.com/2011/06/articles/equitabledeclaratory-relief-cl/walmart-v-dukes-opinion-will-have-farreaching-application-in-class-action-defense]. Russell Jackson has since become a plaintiffs' attorney, and thus now supports greater use of class actions. *See Meet Russell Jackson*, JACKSON ADVOCATES LLC, http://jacksonadvocates.com/meet-russell-jackson [https://perma.cc/S9G4-TDR8] (last visited Apr. 4, 2019).

83 *See* FED. R. CIV. P. 23(b)(2). Like Rule 23(b)(1)(B) and Rule 23(b)(3), Rule 23(b)(2) defines a separate category of class actions which are permissible, in this case when the plaintiffs seek "final injunctive relief or corresponding declaratory relief" which applies to "the class as a whole." *Id.* This aspect of the *Wal-Mart* decision is discussed later in this article. *See infra* Section I.C.

84 *Wal-Mart*, 564 U.S. at 344–45.

85 *Id.* at 367.

statistical-bifurcation method was used for the first and only time in *Hilao v. Estate of Marcos*, a class action that preceded *Amchem* and involved human rights claims against the former prime minister of the Philippines, Ferdinand Marcos.[86]

The *Hilao* procedure provided much-needed administrative efficiency in determining damages in *Wal-Mart*, which, at the time, was "the largest employment discrimination lawsuit in American history."[87] Moreover, bifurcation was an accepted practice of employment discrimination cases since the 1970s,[88] and, given that the case was not certified under Rule 23(b)(3), the Court did not have to deal with the issues surrounding the predominance requirement in the aftermath of *Amchem*.

After class certification was affirmed en banc by a bitterly divided Ninth Circuit,[89] the Supreme Court granted certiorari. In deciding the case, the Court brought non-mass tort litigation like employment discrimination litigation closer to the exceptional view of the class action. The *Wal-Mart* Court first blessed the trend, found in most circuits, of permitting merits review at the class certification stage when the merits overlapped with the class certification requirements.[90] Indeed, the Court noted in dicta that *Daubert* hearings on the admissibility of expert evidence were appropriate.[91]

The Court then maneuvered around the lack of a predominance requirement by focusing on the "commonality" requirement, which previously was a lenient requirement that only required a showing that

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86 Hilao v. Estate of Marcos, 103 F.3d 767, 782–87 (9th Cir. 1996).

87 Steven Greenhouse, *Wal-Mart Asks Supreme Court to Hear Bias Suit*, N.Y. TIMES (Aug. 25, 2010), http://www.nytimes.com/2010/08/26/business/26walmart.html [https://perma.cc/7TYT-QH6J].

88 *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 360–61 (1977) (noting that after a "pattern-or-practice" has been found to violate Title VII, "a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief").

89 Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) (en banc), *reversed sub nom.* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

90 *Wal-Mart*, 564 U.S. at 350–51.

91 *Id.* at 354 (noting that "the District Court concluded that *Daubert* did not apply to expert testimony at the certification stage," but concluding that "[w]e doubt that is so.").

at least one issue of law or fact was common to the class.[92] In discussing commonality, the Court wholeheartedly accepted the "resolvability" consensus, quoting an article by one of the reporters of the ALI's *Principles of the Law of Aggregate Litigation* to state that "[w]hat matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."[93]

As for the statistical-bifurcation method, the Court addressed it summarily and brutally. The Court referred to the method pejoratively as "Trial by Formula," and stated that "[w]e disapprove [of] that novel project."[94] The Court noted, in particular, that the method decided claims based on its statistical sampling "without further individualized proceedings."[95] The Court also disapproved of the proposed "Trial by Formula" because "Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."[96] In other words, the Court rejected such sampling because it failed to provide the "further individualized proceedings" mandated by the "day in court" ideal.

2. Bifurcation

The *Wal-Mart* Court put into doubt whether a statistical method could be approved for determining individual issues if it obviated "further individualized proceedings" to decide individual issues like affirmative defenses. The Court, however, left unanswered whether bifurcation remained a viable alternative to provide those individualized proceedings.

Indeed, it is unclear why bifurcation does not make the class action consistent with the exceptional view in *all* cases, including mass torts.

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92 FED. R. CIV. P. 23(a)(2) (only requiring that "there are questions of law or fact common to the class"); *see also* James v. City of Dallas, 254 F.3d 551, 570 (5th Cir. 2001) ("The test for commonality is not demanding. . . . All that is required for each class is that there is one common question of law or fact.") (internal citations omitted). *But see* M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 839–40 (5th Cir. 2012) (noting that *James* v. *City of Dallas* and other "pre-*Wal-Mart* case law" was no longer good law with respect to commonality).

93 *Wal-Mart*, 564 U.S. at 350 (quoting Nagareda, *supra* note 10, at 132).

94 *Id.* at 367.

95 *Id.*

96 *Id.*

This is because bifurcation guarantees the individual hearing on individual issues that the "day in court" ideal demands. Aside from Seventh Amendment Re-examination Clause concerns that are not difficult to address,[97] the antagonism towards bifurcation can be understood by a "property" premise of the "exceptional" view—that the claimholder owns their claim or defense, including the right to control all aspects of their litigation. Accordingly, allowing a party some, but not total, control over the claim is unacceptable.[98]

Nevertheless, the availability of bifurcation remained grandfathered in for antitrust, securities fraud, and consumer cases, but the Court put the plain, non-sampling use of bifurcation into doubt in a case decided two years after *Wal-Mart*, *Comcast v. Behrend*.[99] There, the issue presented squarely asked "[w]hether a district court may certify a class action without resolving *whether the plaintiff class has introduced admissible evidence*, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."[100] In *Comcast*, the plaintiffs alleged that the defendant engaged in anticompetitive conduct in acquiring near total control of the greater Philadelphia consumer cable market and by preventing others from entering that market.[101] The plaintiffs alleged at least four theories supporting an antitrust violation, and provided an expert report showing that both classwide injury and individual damages could be proven on a common basis.[102] However, the district court only accepted one of the four theories, and it was unclear whether the damage methodology could isolate the injuries caused by that particular theory as opposed to the others.[103]

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97 In particular, issues of liability concern the defendant's decision-making processes before the tort occurred, while the issue of damages concerns the effect of the tort on the plaintiffs after the tort occurred. This difference in time could serve as a guide in bifurcating issues. *See* Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1874–81 (2015) (noting this distinction); Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1072–74 (2012).

98 Again, this premise is discussed in more detail below. *See infra* Section I.C.

99 Comcast Corp. v. Behrend, 569 U.S. 27, 34–41 (2013).

100 *Id.* at 39–40 (Ginsburg, J. & Breyer, J., dissenting). The question presented would actually transform substantially before the Court decided the case. *See id.*

101 *Id.* at 30–31 (majority opinion).

102 *Id.* at 30–32.

103 *Id.*

As noted earlier, under existing precedent, common proof of individual damages was unnecessary in an antitrust class action because, among other things, a court could simply bifurcate the proceedings and determine damages on an individual basis at a later stage. However, both the plaintiffs and Comcast conceded that common proof of individual damages was necessary in this case, which forced the Court to address the sufficiency of the proof at the class certification stage despite precedent to the contrary.[104]

The *Comcast* Court ultimately vacated class certification and remanded, concluding that the expert methodology for determining individual damages failed to show which of the potential theories of liability caused the damages to the class members.[105] In so concluding, the Court stated matter-of-factly that "[w]ithout presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class."[106] The majority made no mention of the fact that bifurcation was a potential way of dealing with individual issues in the antitrust context, and thus put the grandfathered-in status of bifurcation into doubt.

In dissent, Justice Ginsburg, joined by Justice Breyer, sought to preserve the grandfathered-in status of bifurcation for antitrust claims. The dissent, in particular, cited a plethora of cases and sources, including the dicta in *Amchem*, to support the conclusion that the existence of individual damages issues in antitrust cases does not prevent the certification of a class action.[107] Moreover, the dissent pointed to the parties' concession on common proof of individual damages to show that the Court "breaks no new ground" on whether the predominance requirement requires a showing that all issues, including individual damages issues, must be proven on a common basis.[108]

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104 *Id.* at 30 (noting that this was "uncontested"); *see also id.* at 41 (Ginsburg, J. & Breyer, J., dissenting).

105 *Id.* at 38 (majority opinion).

106 *Id.* at 34.

107 *Id.* at 41 (Ginsburg, J. & Breyer, J., dissenting) (citing sources and concluding that "[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal").

108 *Id.*

Accordingly, the dissent concludes that "[t]he Court's ruling is good for this day and case only."[109]

Despite their limitations, both *Wal-Mart* and *Comcast* brought the Court's jurisprudence much closer to the exceptional view of the class action. In essence, the Court, without deciding conclusively, cast significant doubt on (1) whether *any* statistical methods that obviate a party's day in court are permissible; and (2) whether bifurcation is a viable procedure to preserve one's day in court. Because of both decisions, *Amchem*'s dicta about antitrust, securities fraud, and consumer litigation appeared to be on its last legs, and this emboldened the defense bar to seek the death blow.

3. The "Fraud-On-The-Market" Presumption

One doctrine that has been resistant to the *Wal-Mart/Comcast* trend is the "fraud on the market" presumption. The presumption, first articulated by the Court in *Basic Inc. v. Levinson*, permits a district court to presume that the class members relied upon an alleged fraud or misrepresentation as long as the security was traded on an efficient market.[110] The presumption was created to make it easier to certify securities fraud class actions, because, in the absence of the presumption, "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would" prevent class certification because "individual issues then would . . . overwhelm[] the common ones."[111]

As in other contexts involving the predominance requirement, the defense bar sought to attack the fraud-on-the-market presumption by increasing the evidentiary standard for its use at the class certification stage. In *Erica P. John Fund, Inc. v. Halliburton Co.*,[112] for example, the Fifth Circuit concluded below that any invocation of the fraud-on-the-market presumption required proof by the plaintiffs at the class certification stage of "loss causation," insofar as any invocation of the presumption requires at least some initial proof that the alleged

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109 *Id.* at 42.

110 Basic Inc. v. Levinson, 485 U.S. 224, 241–47 (1988).

111 *Id.* at 242.

112 563 U.S. 804 (2011).

statement caused a loss.[113] The Court rejected this requirement because loss causation "has nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the-market theory."[114]

Similarly, in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, the defendant argued that evidence of materiality was necessary to establish the fraud-on-the-market presumption.[115] The Court again rejected this proposed requirement, concluding that the materiality requirement was both an element of the merits and an issue that was common to the class. Accordingly, "[a]s to materiality, therefore, the class is entirely cohesive: It will prevail or fail in unison," and thus proof of materiality is unnecessary to show that "*questions* common to the class predominate."[116] Moreover, the Court cited the PSLRA, which did not address the fraud-on-the-market presumption, as evidence that "Congress rejected calls to undo the fraud-on-the-market presumption of classwide reliance endorsed in *Basic*."[117]

Notably, in *Amgen*, the majority opinion written by Justice Ginsburg pushed back a bit against the "resolvability" interpretation of predominance. She noted that "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class."[118] Moreover, the majority opinion noted that requiring proof of a merits issue like materiality prior to class certification "would have us put the cart before the horse," echoing a position expressed by dissenters in the lower courts.[119]

The pushback by Justice Ginsburg is unsurprising given that she was the author of *Amchem*, and thus the author of the *Amchem* dicta concluding that antitrust, securities fraud, and consumer class actions readily meet the predominance test.[120] It also explains the Court's weak

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113 *Id.* at 811–12.

114 *Id.* at 813.

115 Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 459 (2013).

116 *Id.* 459–60.

117 *Id.* at 475–76.

118 *Id.* at 460.

119 *Id.* at 460; *see also In re* New Motor Vehicles Can. Exp. Antitrust Litig., 522 F.3d 6, 32 (1st Cir. 2008) (Torruella, J., concurring in part, dissenting in part) (same).

120 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997).

defense of the fraud-on-the-market presumption. Rather than defend it on the merits, Justice Ginsburg used the *Ortiz* tactic of employing history and statutory interpretation to grandfather-in the presumption.

Unchastened, the defendant in the earlier *Halliburton* case next challenged the fraud-on-the-market presumption directly as against "congressional intent and . . . subsequent developments in economic theory."[121] Although the Court allowed for the presumption to be rebutted at the class certification stage, it declined to get rid of the presumption entirely.[122] The Court, in particular, noted that "[b]efore overturning a long-settled precedent, however, we require 'special justification,' not just an argument that the precedent was wrongly decided."[123] In cases like *Wal-Mart* and *Comcast*, the Court displayed a growing willingness to revisit anomalies to the exceptional view. However, in the *Halliburton* cases, as in *Ortiz*, there remained certain historical anomalies that the Court was not yet willing to revisit.

C. *Due Process*

In articulating its nascent exceptional view of the class action, the Court in *Amchem* and *Ortiz* also left unanswered a second set of issues relating to due process. If, according to *Ortiz*, mandatory class actions take away a party's "inherent right to abstain" from the collectivism of the class action, then could a mandatory class action ever be permitted?[124]

1. Injunctive Relief

The exceptional view of the class action strongly suggests that the answer to the above question is "no," although the Court did not answer these questions conclusively prior to 2009. However, one case decided just prior to *Amchem* and *Ortiz*, *Ticor Title Insurance Co. v. Brown*,

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121 Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 269 (2014).

122 *Id.* at 279.

123 *Id.* at 266 (citing Dickerson v. United States, 530 U.S. 428 (2000)).

124 Ortiz v. Fibreboard Corp., 527 U.S. 815, 846–47 (1999).

suggested that the Court was at least aware of the issue.[125] In *Ticor*, the Court examined a class action of title insurance claims certified under Rule 23(b)(2), which, again, only applies to claims for classwide injunctive or declaratory relief.[126] Although the claims in *Ticor* sought injunctive and declaratory relief, the claims also sought monetary damages. Because Rule 23(b)(2) class actions, like Rule 23(b)(1)(B) class actions, do not require the court to give class members a right to opt out, a class action was certified without such opt out rights.[127] The claims were then tried and judgment was entered. A group of absent class members who did not object to class certification prior to judgment then argued that they had a constitutional right to an opt out under the Due Process Clause, as well as a right to opt out under the Rules themselves.[128]

In a per curiam decision, the Court avoided both issues, finding (1) the parties were precluded by the judgment from attacking class certification under the Rules; and (2) answering the constitutional issue would not be wise if it turned out that class certification was improperly granted, resulting in the Court reaching a constitutional question that it did not necessarily have to answer.[129] In dissent, Justice O'Connor, joined by then-Chief Justice Rehnquist and Justice Kennedy, disagreed with the Court's ducking of the constitutional issue, pointing out that, "[u]nless and until a contrary rule is adopted, courts will continue to certify classes under Rules 23(b)(1) and (b)(2) notwithstanding the presence of damages claims."[130]

Justice O'Connor was indeed right that, following *Ticor*, Rule 23(b)(2) class actions would continue to be certified that included claims for damages or similar monetary relief. Indeed, lower courts found further support for such hybrid class actions for injunctive relief/damage relief by implication. The Advisory Committee notes to

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125 511 U.S. 117 (1994).

126 FED. R. CIV. P. 23(b)(2).

127 *See* FED. R. CIV. P. 23(c)(2)(A) (providing that, for classes certified under 23(b)(1) and (b)(2), the court "may," but not must, "direct appropriate notice to the class," and further is not required to provide class members an opportunity to opt out); *see also Ticor*, 511 U.S. at 120–21.

128 *Ticor*, 511 U.S. at 120–21.

129 *Id.* at 122.

130 *Id.* at 124 (O'Connor, J., dissenting).

the 1966 Amendments to Rule 23 state that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or *predominantly* to money damages," implying that claims for money damages may be present in a Rule 23(b)(2) so long as they do not predominate.[131] Moreover, Title VII contains a make whole provision that entitles plaintiffs to backpay, which, though monetary in nature, is considered an equitable remedy akin to injunctive relief.[132] Taken together, some circuits began to permit the certification of Rule 23(b)(2) injunctive relief class actions asserting Title VII claims that also included claims for backpay.[133]

This is how the plaintiffs in *Wal-Mart* avoided the predominance requirement of Rule 23(b)(3). In moving to certify a class, the plaintiffs sought to certify a class under Rule 23(b)(2) seeking "injunctive and declaratory relief, lost pay, and punitive damages," but not "any compensatory damages on behalf of the class."[134] The district court certified the Rule 23(b)(2) class with some modifications, allowing the certification of backpay claims "*except that* class members for whom there is no available objective data documenting their interest in challenged promotions shall be limited to injunctive and declaratory relief with respect to plaintiffs' promotion claim."[135]

In *Wal-Mart*, the Court rejected the certification of the backpay claims under Rule 23(b)(2)[136] and, in doing so, made some headway in answering some of the questions left unanswered in *Ticor*. The Court first noted that the Rule 23(b)(2) only applies when the remedy is "indivisible," again citing an influential article by the reporter to the

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131 Amendments to Rules of Civil Procedure, *supra* note 25, at 102; *see also* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 411 (5th Cir. 1998) (citing FED. R. CIV. P. 23 Advisory Committee notes to 1966 amendments on this point).

132 *See* Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 170 (N.D. Cal. 2004); *see also* Gotthardt v. Nat'l R.R. Passenger Corp., 191 F.3d 1148, 1152–55 (9th Cir. 1999) (recognizing that backpay is equitable relief); *Allison*, 151 F.3d at 415 ("Back pay, of course, had long been recognized as an equitable remedy under Title VII."); Eubanks v. Billington, 110 F.3d 87, 92 (D.C. Cir. 1997) ("[I]t is not uncommon in employment discrimination [(b)(2)] cases for the class also to seek monetary relief in the form of back pay or front pay.").

133 *See, e.g.*, *Allison*, 151 F.3d at 425; *see also* Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001) (permitting monetary claims based on "ad hoc balancing").

134 *Dukes*, 222 F.R.D. at 141.

135 *Id.* at 188.

136 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011).

ALI's *Principles of the Law of Aggregate Litigation* for this principle.[137] Moreover, citing *Ortiz*, the Court relied upon "historical models on which the Rule was based" to conclude that Rule 23(b)(2), which was modeled on civil rights cases involving injunctive relief, did not contemplate certification of claims for individualized relief.[138]

Finally, the Court noted that the structure of Rule 23(b) demonstrated that only claims involving indivisible remedies like injunctions, declaratory relief, and limited funds were entitled to mandatory class actions. In contrast, claims for more individualized, divisible relief required "[t]he procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out."[139] The fact that backpay claims are "equitable" in nature, was, in the Court's view, "irrelevant," because "[t]he Rule does not speak of 'equitable' remedies generally but of injunctions and declaratory judgments."[140]

At first glance, the Court in *Wal-Mart* suggests a type of grandfathered-in enclave of mandatory class actions that do not require the notice and opt-out rights provided by Rule 23(b)(3) class actions. Accordingly, to the extent the exceptional view of the class action requires a party to retain an "inherent right to abstain" from the collectivization of the class action, that right is subject to historically accepted exceptions like civil rights cases and, as identified in *Ortiz*, true limited fund cases.[141]

However, the *Wal-Mart* Court did provide a strong hint that the Court was willing to revisit this grandfathered-in enclave in the future. In discussing the mandatory nature of a Rule 23(b)(2) class action, the Court stated the following:

> [Rule] (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (*rightly or wrongly*) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action

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137 *Id.* (citing Nagareda, *supra* note 10, at 132).

138 *Id.* at 361.

139 *Id.* at 362.

140 *Id.* at 365.

141 Ortiz v. Fibreboard Corp., 527 U.S. 815, 846–47 (1999).

> predominantly for money damages we have held that absence of notice and opt-out violates due process. *See Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812, 105 S. Ct. 2965, 86 L. Ed.2d 628 (1985). While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.[142]

Here the Court sends a signal that it is not completely convinced that mandatory class actions are justified in the context of claims for injunctive and declaratory relief under Rule 23(b)(2). Although the Court parrots the "indivisibility" justification for the differential treatment, it adds a caveat, "rightly or wrongly," that strongly hints that it is open to rethinking the wisdom of that justification.

2. Monetary Remedies

In the above passage, the *Wal-Mart* Court also stated matter-of-factly that, as a matter of due process, a class action "predominantly for money damages" requires the provision of notice and opt out rights for class members. The Court had never held this before, not even in *Ortiz*.

Although the Court cited *Phillips Petroleum Co. v. Shutts* as support for this proposition, the *Shutts* Court only held that the provision of notice and opt out rights was sufficient for a state court to exercise personal jurisdiction over absent class member plaintiffs.[143] Although the *Shutts* Court discussed opt out rights as a "minimal procedural due process protection," the case was never read so broadly as to require, as a matter of constitutional law, that all class actions "predominantly" involving monetary remedies require notice and opt out rights.[144] Admittedly, the Court in *Ticor*, decided after *Shutts*, addressed the far broader issue of whether "absent class members have a constitutional due process right to opt out" even in class actions where the claims are not predominantly for monetary damages. However, in analyzing (or, more accurately, avoiding) the issue, the *Ticor* Court

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142 *Wal-Mart*, 564 U.S. at 363 (emphasis added).

143 472 U.S. 797, 811–12 (1985).

144 *Id.*

failed to even cite *Shutts*, and it is safe to say that, prior to 2011, no one thought that *Shutts* had this due process implication.[145]

This would not be the first time in 2011 that the Court would cite *Shutts* for the proposition that class actions involving monetary remedies require the provision of notice and an opportunity to opt out. In *AT&T Mobility LLC v. Concepción*, an arbitration case decided two months before *Wal-Mart*, the Court cited *Shutts* for the proposition that "[f]or a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and *a right to opt out of the class*."[146] In fact, in *AT&T*, the Court used *Shutts* to expand beyond court-oriented litigation, stating that "[a]t least this amount of process would presumably be required for absent parties to be bound by the results of arbitration."[147]

In another case decided in 2011, *Smith v. Bayer Corp.*, the Court addressed whether a party could be enjoined from filing a class action when a class action filed by a different party in a different court was denied certification.[148] The Court concluded that the party could not be enjoined[149] without addressing the party's argument that "based on [*Shutts*], . . . the District Court's action violated the Due Process Clause."[150]

However, the *Bayer* Court did suggest some sympathy to this due process ground by stating that "[w]e have repeatedly 'emphasize[d] the fundamental nature of the general rule' that only parties can be bound by prior judgments,"[151] and that allowing for nonparty preclusion outside the context of Rule 23 "would "recogniz[e], in effect, a common-law kind of class action . . . shorn of [Rule 23's] procedural

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145 *See* Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 120–21 (1994).

146 AT&T Mobility LLC v. Concepción, 563 U.S. 333, 349 (2011) (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985)) (emphasis added).

147 *Id.*

148 564 U.S. 299 (2011).

149 Although this holding is a natural extension of the exceptional view, it was still contrary to some case law permitting such preclusion in some contexts. *See* Kevin M. Clermont, *Class Certification's Preclusive Effects*, 159 U. PA. L. REV. PENNUMBRA 203 (2011) (discussing this caselaw).

150 *Smith*, 564 U.S. at 308 n.7.

151 *Id.* at 313 (citing Taylor v. Sturgell, 553 U.S. 880, 898 (2008)).

protections."[152] In essence, the *Bayer* Court's reasoning suggests that Rule 23 is commensurate with due process requirements, and these include Rule 23(b)(3)'s right to an opt out. Indeed, in support of these propositions the Court cited *Taylor v. Sturgell*, a preclusion case where the Court again invoked the "deep-rooted historic tradition that everyone should have his own day in court."[153] It should therefore come as no surprise that the *Bayer* Court, at the very least, acknowledged *Shutts* as a possible ground for this view of due process, even if it did not address the issue.

3. Individual Defenses

Finally, this strong suggestion that due process requires class actions involving monetary remedies (and maybe all remedies) to provide notice and opt out rights dovetails with the Court's rejection of statistical methods discussed earlier. Again, as noted above, the *Wal-Mart* Court rejected the proposed "Trial by Formula" because it would prevent the defendants from asserting individualized affirmative defenses against certain plaintiffs.[154] In both situations, the Court strongly implies that parties are entitled to control their claims or defenses.

This line of reasoning in *Wal-Mart* was foreshadowed by the insistence by many lower courts in earlier decisions on some proof at the certification stage that all of the class members were, in fact, injured.[155] Such a "proof of classwide injury" requirement achieved the practical goal of ensuring that there were no uninjured members of the class, a goal that would later resurface as a certification requirement that the class members are "ascertainable."[156] More importantly, proof of

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152 *Id.* at 315 (internal quotation marks omitted) (first and last alteration in original) (quoting *Taylor*, 553 U.S. at 901).

153 *Taylor*, 553 U.S. at 892–93 (quoting Richards v. Jefferson County, 517 U.S. 793, 798 (1996)).

154 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011).

155 For a discussion of this case law, see Sergio J. Campos, *Proof of Classwide Injury*, 37 BROOK. J. INT'L L. 751 (2012).

156 *See, e.g.*, Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 593–94 (3d Cir. 2012) (concluding that the ascertainability requirement protects the rights of both plaintiffs and defendants).

classwide injury implicated due process concerns—"actual injury cannot be presumed, . . . [because] defendants have the right to raise individual defenses against each class member."[157]

Despite the Court's decisions in *Wal-Mart*, *AT&T*, and *Bayer*, the Court failed to address squarely the issue of whether due process required party control of claims and defenses. Nevertheless, some members of the Court found outlets to express their due process views. Most notably, in *Philip Morris USA Inc. v. Scott*, the defendant sought a stay on a judgment pending disposition of its petition for certiorari.[158] The case involved a state law class action of fraud claims against cigarette manufacturers, and the defendant sought review of a class action order that, among other things, did not require the class members to prove reliance on the fraud.[159] Accordingly, "the court eliminated any need for respondents to prove, and denied any opportunity for applicants to contest, that any particular plaintiff who benefits from the judgment" relied upon the alleged fraud.[160]

Because the case was not a federal class action, it did not implicate Rule 23, and thus, in addressing the petition for a stay, Justice Scalia was free to opine on the due process issues directly. In granting the stay, and only writing for himself, Justice Scalia pithily summarized the exceptional view of the class action, stating that a stay was warranted because the case "implicates constitutional constraints *on the allowable alteration of normal process in class actions.*"[161] Justice Scalia, in particular, registered his disgust with the lower court's proceedings because "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action."[162] A better statement of the exceptional view of the class action could not have been made, and it is no surprise that these words come from Justice Scalia, who authored the *Wal-Mart*, *AT&T*, and *Comcast* decisions. Despite the

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157 McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 232 (2d Cir. 2008) (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 191–92 (3d Cir. 2001)). This concern is discussed in more detail in the following Section. *See infra* Section I.D.1.

158 561 U.S. 1301 (Scalia, Circuit Justice 2010).

159 *Id.*

160 *Id.* at 1303.

161 *Id.* at 1302–03 (emphasis added).

162 *Id.* at 1303.

granting of the stay, the Court did not grant certiorari in the case.[163] Nevertheless, in his grant of the stay, Justice Scalia demarcated a line in the sand on how he viewed the class action.

4. An Existential Threat to the Class Action

Indeed, when viewed as a whole, *Wal-Mart*, *AT&T*, and *Comcast* demonstrate that the "exceptional" view of the class action poses an existential threat to the class action itself. If the claim or defense is truly an entitlement (indeed, one's "property")[164] then, under the Due Process Clause, it cannot be deprived without due process of law.

Arguably there is no deprivation when the class action procedure mirrors the outcome of an individualized procedure, and thus a class action does not run afoul of due process if it does not materially differ from a separate action. However, to the extent there is a deprivation, something is needed to justify it.

Very subtly, the Court in the *Wal-Mart* and *Comcast* line of cases ignored, or forgot, the purposes for using the class action so that a justification cannot emerge. Admittedly, the Court in *Wal-Mart* mentioned that the class action provides an "economical" method of resolving common issues.[165] But, just a month before deciding *Wal-Mart*, the Court in *AT&T* suggested that class procedures actually complicate matters, leading to a "procedural morass."[166] Indeed, in all of its class action decisions decided after 2009, the Court has mentioned the "policy at the very core"[167] of the class action—increasing the leverage of plaintiffs to litigate small claims—in only two cases.[168] By not

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163 Philip Morris USA Inc. v. Jackson, 564 U.S. 1037 (2011) (mem.).

164 *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) (holding that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause") (citing Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306 (1950)).

165 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 n.5 (2011).

166 AT&T Mobility LLC v. Concepción, 563 U.S. 333, 348 (2011).

167 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

168 Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042, 2054 (2017) (Kennedy, J.) ("The very premise of class actions is that 'small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'") (quoting *Amchem*, 521 U.S. at 617); Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 478 (2013) (Ginsburg, J.) (same) (citing *Amchem*, 521 U.S. at 617). Justice Ginsburg also cited this "core policy" in

articulating any benefit of the class action, the Court has cast the class action as an exception with no justification.

D. *Procedure and Substance*

The exceptional view of the class action can be understood as simply a view about the class action. However, in a number of different contexts, the Court has used the exceptional view of the class action, and the day in court ideal on which it is based, to influence its interpretation of areas of law outside of the class action context. Indeed, the Court has used the day in court ideal to influence the scope of substantive law itself. In other words, the exceptional view is part of a larger view in which function follows ideal form.

1. Rules Enabling Act

In rejecting the "Trial by Formula" proposed by the plaintiffs in *Wal-Mart*, the Court noted that the procedure would not allow Wal-Mart "to litigate its statutory defenses to individual claims."[169] Curiously, however, the Court did not identify this as a due process concern, but a concern with the Rules Enabling Act.[170] Specifically, the *Wal-Mart* Court wrote that the class action cannot prevent Wal-Mart from litigating its defenses against individual class members "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'"[171] In support of its conclusion, the Court cited *Ortiz*, which made a similar point about the mandatory nature of the proposed Rule 23(b)(1)(B) class action of asbestos claims.[172] There, in invoking the Rule Enabling Act, the *Ortiz* Court

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dissent in *Stolt-Nielsen*. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 699 (2010) (Ginsburg, J., dissenting) ("When adjudication is costly and individual claims are no more than modest in size, class proceedings may be 'the thing,' *i.e.*, without them, potential claimants will have little, if any, incentive to seek vindication of their rights.") (citing *Amchem*, 521 U.S. at 617).

169 *Wal-Mart*, 564 U.S. at 367.

170 28 U.S.C. § 2072 (2018).

171 *Wal-Mart*, 564 U.S. at 367 (quoting 28 U.S.C. § 2072(b)).

172 *Id.*

emphasized "the tension between the limited fund class action's pro rata distribution in equity and the rights of individual tort victims at law."[173]

By invoking the Rules Enabling Act, the Court in both *Wal-Mart* and *Ortiz* did not appeal to an independent requirement of due process. Instead, in both instances the Court looked to the substantive law itself to support its insistence on party control over claims and defenses. In essence, the Court concluded in both cases that the claims and defenses created by the substantive law are "preexisting right[s],"[174] which the Rules cannot "abridge, enlarge, or modify."[175] As it so happens, the existence of state tort law monetary remedies (as in *Ortiz*) and affirmative defenses under Title VII (as in *Wal-Mart*) also comport with the exceptional view of the class action. Both imply a preference by the substantive law for tailored hearings on individual issues such as damages or defenses.

The Court outlined a much stronger version of the exceptional view of the class action in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, which it decided the year before *Wal-Mart* and foreshadowed the Court's goal in bringing class action law closer to the exceptional view.[176] There, the Court addressed whether the Rules Enabling Act prohibits the use of Rule 23 for state law claims when there exists a state law prohibition on class actions for the same claims.[177]

In *Shady Grove*, Justice Scalia, writing for a plurality, concluded that Rule 23 does not violate the Rules Enabling Act given such circumstances because, following prior precedent, the Rule "really regulates procedure," and is thus valid regardless of its impact on substantive rights.[178] But in making this conclusion, Justice Scalia conceptualized Rule 23 as simply a "joinder" device that combined

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173 Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999).

174 RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 84 (2007) (arguing against the use of mandatory class actions in mass tort litigation since "the delegation made in the [Rules Enabling] Act must stop short of the legislative power that Congress might wield to alter preexisting rights.").

175 28 U.S.C. § 2072(b) (2018).

176 Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393 (2010).

177 *See id.*

178 *Id.* at 410 (plurality opinion) ("We have held . . . and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure."); Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) (concluding that a rule does not violate the Rules Enabling Act if it "really regulates procedure").

individual claims, and, furthermore, stated that Rule 23 is valid under the Rules Enabling Act "at least insofar as [the Rule] allows *willing* plaintiffs to join their separate claims against the same defendants in a class action."[179] Here, Justice Scalia suggests that a mandatory class action of *unwilling* plaintiffs may be considered an "abridge[ment], enlarge[ment], or modif[ication of] any substantive right."[180]

In both *Ortiz* and in *Wal-Mart*, the Court identified specific features of the law that might be "abridge[d]" by the class action. In contrast, Justice Scalia's general statement in *Shady Grove* that Rule 23 is valid so long as it is nonmandatory, suggests a much stronger conception of the day in court ideal. In essence, Justice Scalia's aside strongly suggests that the exceptional view is not an implication of some or most substantive laws, but that *all* substantive laws import the day in court ideal.

2. Arbitration

The Court has also expressed a stronger conception of the exceptional view of the class action in its arbitration cases, where the Court addressed whether an arbitration agreement can permit (or prohibit) class action procedures.

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, decided the same year as *Shady Grove*, the Court addressed whether an arbitrator can interpret a contract to include a class action-like procedure despite the contract's silence on the issue.[181] Justice Alito, writing for a majority, concluded that an arbitrator interpreting an arbitration clause as implicitly allowing class actions violates the Federal Arbitration Act (FAA).[182] The majority did so despite the fact that an arbitrator's interpretive decision can only be vacated under the FAA if "[an] arbitrator strays from interpretation and application of the

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179 *Shady Grove*, 559 U.S. at 408 (plurality opinion) (emphasis added); *see also* Adam N. Steinman, *Our Class Action Federalism* Erie *and the Rules Enabling Act After* Shady Grove, 86 NOTRE DAME L. REV. 1131, 1164 (2011) (highlighting Justice Scalia's caveat).

180 28 U.S.C. § 2072(b) (2018).

181 *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

182 *Id.* at 685 ("An implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate.").

agreement and effectively 'dispense[s] his own brand of industrial justice.'"[183]

In the majority's view, the arbitrator "impose[d] its own policy preference" because "class action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it."[184] Class action arbitration does so in three ways: (1) rather than decide a single dispute, the arbitrator "instead resolves many disputes between hundreds or perhaps even thousands of parties," which would undermine the confidentiality of the proceedings; (2) "[t]he arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well;" and (3) "the commercial stakes of class-action arbitration are comparable to those of class-action litigation."[185]

In essence, the *Stolt-Nielsen* Court concluded that parties to an arbitration clause implicitly consented to the day in court ideal, such that one cannot presume a deviation from that ideal. Indeed, in support of its conclusion that the arbitrator lacks authority to interpret a silent contract to implicitly permit class arbitration, the Court quoted *Ortiz*'s statement that "'the burden of justification rests on the exception' to the general rule that 'one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'"[186] Thus, the day in court ideal is unavoidable, even in a contract designed to avoid the normal procedures of civil litigation.

The Court reached a similar result in two later arbitration cases involving provisions *barring* class action procedures. In *AT&T*, the Court addressed whether the FAA allows for California state law to hold as unconscionable a provision in an arbitration agreement that class procedures (both in arbitration and in civil litigation) cannot be used.[187] The Court, in a majority opinion written by Justice Scalia, concluded that such a state law is pre-empted by the FAA because a state law

183 *Id.* at 671 (alterations in original) (citations omitted).

184 *Id.* at 675, 685.

185 *Id.* at 686.

186 *Id.* (emphasis omitted) (quoting Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999)).

187 *See* AT&T Mobility LLC v. Concepción, 563 U.S. 333, 336 (2011).

invalidating a class action waiver would frustrate the purposes of the FAA.[188]

Citing *Stolt-Nielsen*, the Court first noted that class action procedures frustrate many of the advantages of arbitration "as a structural matter: [c]lasswide arbitration includes absent parties, necessitating additional and different procedures, and involving higher stakes."[189] As a result, class arbitration "makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[190] It also increases procedural formality, and "greatly increases risks to defendants."[191] In other words, for the *AT&T* Court, a state law imposing the availability of class action procedures in arbitration would frustrate arbitration itself. Whereas the Court in *Stolt-Nielsen* embedded the day in court ideal in the parties' agreement, the Court in *AT&T* embedded the day in court ideal into the very definition of "arbitration" under the FAA.

Shortly after deciding *AT&T*, the Court decided *American Express Co. v. Italian Colors Restaurant*, which concerned whether a *federal law* could invalidate a class action waiver in an arbitration agreement.[192] Specifically, the Court addressed whether a class action waiver would frustrate the enforcement of federal antitrust law, particularly for claims that are too small and costly to litigate.[193] The Court, unsurprisingly, concluded that federal antitrust law did not carry that implication.

In particular, the *Italian Colors* Court noted that there is no federal statutory law explicitly requiring the class action treatment of federal antitrust claims, concluding that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[194] Moreover, the Court concluded that Rule 23 does not provide such an entitlement because "such an entitlement, invalidating private arbitration agreements denying class adjudication, would" violate the Rules Enabling Act.[195] After pointing "to the usual rule that litigation is

188 *See id.* at 346–47.

189 *Id.* at 347–48 (citing *Stolt-Nielsen*, 559 U.S. at 686).

190 *AT&T Mobility*, 563 U.S. at 348.

191 *Id.* at 350.

192 *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231 (2013).

193 *Id.* at 231–32.

194 *Id.* at 233.

195 *Id.* at 234 (citing 28 U.S.C. § 2072(b) (2018)).

conducted by and on behalf of the individual named parties only," the Court concluded that antitrust policy cannot frustrate an "agree[ment] to arbitrate pursuant to that 'usual rule,' and it would be remarkable for a court to erase that expectation."[196] The day in court ideal struck again.

The *Italian Colors* Court further rejected the application of the judge-made rule that an arbitration agreement will not be enforced if it prevents "the 'effective vindication' of a federal statutory right."[197] In essence, the *Italian Colors* Court concluded that "[t]ruth to tell, our decision in *AT&T Mobility* all but resolves this case."[198] In particular, in embedding the day in court ideal into the very definition of arbitration under the FAA, the *AT&T* Court "specifically rejected the argument that class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system.'"[199] Thus, in *Italian Colors*, the Court not only further embedded the day in court ideal into the very definition of arbitration, but it also put into doubt the one justification for class actions that the *Amchem* Court considered the class action's "policy at the very core"—the vindication of small claims that would not otherwise be brought.[200]

3. Article III

As shown above, the Court's view of the day in court ideal, which has informed its exceptional view of the class action, has also informed its procedural law in the Rules Enabling Act and arbitration contexts. The same is true of Article III. For example, is a class action moot under Article III if, prior to certification of the class, the representative party's claim is moot? Under the exceptional view, and as indicated by *Smith v. Bayer*, an uncertified class action is not a class action at all, but just an individual action that has no preclusive effects on nonparties.[201] It

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196 *Id.*

197 *Id.* at 235.

198 *Id.* at 238.

199 *Id.* (citing AT&T Mobility LLC v. Concepción, 563 U.S. 333, 351 (2011)).

200 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

201 Smith v. Bayer Corp., 564 U.S. 299, 315 (2011) ("Neither a proposed class action nor a rejected class action may bind nonparties.").

follows that if the class representative of an uncertified class action has a moot claim, then there is no other party interest that keeps the class action alive.

The Court was presented with this issue in *Genesis Healthcare Corp. v. Symczyk*, which concerned whether a "collective action" under the Fair Labor Standards Act (FLSA) was moot because the representative plaintiff received, but rejected, a settlement offer that would have satisfied her entire claim.[202] There, the plaintiff had conceded that her claim was moot, and no other plaintiff opted into the action, as required under the FLSA.[203] Accordingly, the Court concluded that the action was moot because the plaintiff's mooted claim was the only one before the Court.[204]

In affirming the case as moot, the majority in *Symczyk* distinguished the case from class actions certified under Rule 23.[205] The Court noted that in FLSA collective actions, the employees only "become parties . . . by filing written consent with the court."[206] In contrast, upon certification of a Rule 23 class action, "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by [the named plaintiff]."[207] Nevertheless, the Court did suggest that a similar Rule 23 class action would also be moot. In particular, the Court noted in a footnote recent precedent holding that "[an] interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim."[208]

This suggestion in *Symczyk* flies in the face of older precedent, which held that a party can appeal the denial of class certification, despite having a moot claim, "so long as [the class representative]

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202 Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 69 (2013).

203 *Id.* at 72–73; *see also* 29 U.S.C. § 216(b) (2018) (permitting "collective actions" in which the plaintiff asserts the claims of herself and all "other employees similarly situated," but further providing that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").

204 *Symczyk*, 569 U.S. at 72–73.

205 *Id.* at 74–75.

206 *Id.* at 75.

207 *Id.* at 74 (alteration in original) (quoting Sosna v. Iowa, 419 U.S. 393, 399–402 (1975)).

208 *Id.* at 78 n.5 (quoting Lewis v. Cont'l Bank Corp., 494 U.S. 472, 480 (1990)).

retained an economic interest in class certification."[209] While inconsistent with prior precedent, the Court's suggestion in *Symczyk* is perfectly consistent with the day in court ideal. When there is no class action, there is no class action, and, in such situations, the "usual rule" applies.[210]

4. Substantive Law

As shown above, the Court has used the day in court ideal and its corollary, the exceptional view of the class action, to guide its interpretation of the Rules Enabling Act, the FAA, and Article III. However, all three areas are largely, if not completely, procedural, and thus it is perhaps not surprising that the Court would allow the day in court ideal to influence its views in those areas. The Court, however, has also used the day in court ideal to influence its interpretation of *substantive* law. Specifically, the Court has used the ideal to define, and in some cases limit, the rights protected under substantive law.

This can be seen in *Wal-Mart Stores, Inc. v. Dukes*, where the Court very subtly transforms Title VII law to fit within the confines of the day in court ideal. In *Wal-Mart*, the plaintiffs alleged that Wal-Mart's hiring and promotion practices contained excessive subjectivity, which, they alleged, resulted in Wal-Mart discriminating against women in violation of Title VII.[211] The plaintiffs alleged a Title VII "disparate treatment pattern-or-practice" claim, which requires a showing of discriminatory intent, rather than a "disparate impact" claim, which would only allege that Wal-Mart's otherwise nondiscriminatory conduct had the effect of discriminating against women.[212]

The plaintiffs' claim, in essence, was: (1) that Wal-Mart gave its store managers excessive discretion to make pay raise and promotion decisions; (2) that this discretion resulted in the differential treatment of

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209 Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332–33 (1980).

210 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 234 (2013) (Rule 23 was "designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.") (quoting Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979)).

211 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 344–45 (2011).

212 *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 334, 336 n.16 (1977); *see also Wal-Mart*, 564 U.S. at 345–46.

women; (3) that Wal-Mart knew about it; and (4) that Wal-Mart "refus[ed] to cabin its managers' authority."[213] In other words, the plaintiffs sought to establish a discriminatory "pattern or practice" based upon the *absence* of any formal criteria for pay and promotion decisions, combined with other centralized policies and "a strong and uniform 'corporate culture.'"[214]

Lower courts have previously accepted this excessive discretion theory of disparate treatment and have considered it a common policy for purposes of class certification.[215] Such courts have concluded that, just like an explicitly sexist pay and promotion policy, a policy that lacked any guidelines could knowingly result in women being discriminated against in violation of Title VII. Indeed, the Supreme Court has acknowledged that "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class . . . if the discrimination manifested itself . . . in the same general fashion, such as through entirely subjective decisionmaking processes."[216]

A common discriminatory policy based on excessive discretion, however, can be difficult to see, particularly in the context of an individual case. After all, "excessive discretion" is simply another way of saying that there is the absence of a common policy. This point was made forcefully by Justice Kennedy during oral argument:

> It's—it's hard for me to see that the—your complaint faces in two directions. Number one, you said this is a culture where Arkansas knows, the headquarters knows, everything that's going on. Then in the next breath, you say, well, now these supervisors have too much

213 *Wal-Mart*, 564 U.S. at 344–45.

214 *Id.*

215 *See, e.g.*, Shipes v. Trinity Indus., 987 F.2d 311, 316 (5th Cir. 1993) ("Allegations of similar discriminatory employment practices, such as the use of entirely subjective personnel processes that operate to discriminate, satisfy the commonality and typicality requirements of Rule 23(a)."); Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 292 (2d Cir. 1999), *overruled on other grounds by In re* Initial Pub. Offering Sec. Litig., 471 F.3d 24 (2d Cir. 2006).

216 Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982).

> discretion. It seems to me there's an inconsistency there, and I'm just not sure what the unlawful policy is.[217]

Similarly, during oral argument, Justice Scalia remarked that:

> I don't—I'm getting whipsawed here. On the one hand, you say the problem is that they were utterly subjective, and on the other hand you say there is a—a strong corporate culture that guides all of this. Well, which is it? It's either the individual supervisors are left on their own, or else there is a strong corporate culture that tells them what to do.[218]

According to both Justice Kennedy and Justice Scalia, excessive discretion is the antithesis of a common policy. Either Wal-Mart directed the pay and promotion decisions or, by granting discretion to lower-level managers, it did not.

This confusion arises from the fact that both justices were seeking to put the plaintiffs' "excessive discretion" claim into the box of the day in court ideal. Under the day in court ideal, an individual adjudication looks at how the conduct of the defendant injured the plaintiff. But both justices were struggling to find out what that conduct actually was. If it was the independent conduct of the store managers, then it was the managers who did the discrimination in the absence of evidence that this discretion was somehow controlled by the employer. Indeed, how could Wal-Mart assert an individual defense if the only thing being challenged is a local store manager's decision that was, as a matter of policy, *not directed* by Wal-Mart at all?

The *Wal-Mart* plaintiffs sought to show a nexus between the individual decisions of the store managers and Wal-Mart by presenting evidence that, among other things, Wal-Mart's "strongly imbued culture" was used "to guide managers in the exercise of their discretion."[219] This may have been a smart move on the part of the plaintiffs' attorneys to sway the Court, but it was by no means a necessary move. Lower courts have found such a nexus simply from the

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217 Tr. Oral Argument at 27–28, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2010/10-277.pdf [https://perma.cc/2A4Q-DN7W].

218 *Id.* at 29.

219 Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 153 (N.D. Cal. 2004).

existence of discretion at all levels, concluding that a "subjective, decentralized system of decisionmaking" can be common to a class if such decision-making is "uniform throughout the country and [is] promulgated by the national corporate office."[220]

An employer can discriminate from excessive discretion alone if one looks beyond the day in court ideal, to how such discretion affects not just the parties in an individual case, but others outside the case. As put by Justice Breyer during oral argument,

> Is the—is the common question of law or fact whether, given the training which central management knew . . . given the facts about what people say and how they behave, many of which central management knew, and given the results which central management knew or should have known, should central management under the law have withdrawn some of the subjective discretion in order to stop these results?[221]

Put another way, Wal-Mart may not have caused the decisions made by its store managers, either in a formal or informal, "cultural" sense. But Wal-Mart may have known what the aggregate result would have been and may have intended to produce that result. Here the only causal nexus Wal-Mart would need to effectuate discrimination is to simply deploy the excessive discretion.

In its decision, however, the *Wal-Mart* Court set aside what may be called this third, "deliberate indifference" possibility because this possibility is difficult to fit within the day in court ideal. Such a possibility would require a statistical analysis of the cases as a whole to get a sense of whether an employer tried to discriminate by, in effect, looking the other way. Although such evidence could be presented in the context of an individual case, it would, of necessity, require the Court to look beyond the case and embed aggregate, statistical proof within the context of an individualized adjudication.[222] This is the very

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220 *See, e.g.*, Morgan v. United Parcel Serv. of Am., Inc., 169 F.R.D. 349, 356 (E.D. Mo. 1996) (noting that "UPS personnel policies are uniform throughout the country and are promulgated by the national corporate office. These policies include the subjective, decentralized system of decision-making which the plaintiffs allege is discriminatory.").

221 Tr. Oral Argument, *supra* note 217, at 36.

222 *See* Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1109–10 (2010) (defining "embedded aggregation" as when "[a]n aggregate dimension, in

statistical proof that the Court would castigate as a "Trial by Formula" later in the opinion.[223]

Indeed, the Court made clear its distaste for such aggregate proof by rejecting the "nexus" evidence presented by the plaintiffs in support of commonality. Among other things,[224] the Court rejected the statistical evidence presented of gender bias because, even if it showed bias, "almost all of [the store managers] will claim to have been applying some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store."[225] But the fact that the store managers may provide different, innocent explanations in an individual case does not disprove Wal-Mart's alleged common discriminatory conduct. Wal-Mart, in fact, may have been counting on the aggregate effect of such imperfect, innocent discretionary decision-making to effectuate its discrimination. But considering that possibility would require the Court to not view each case in isolation, but as part of a whole, and the day in court ideal does not permit the Court to do that.

The Court ensures its preservation of the day in court ideal by insisting that the "commonality" requirement of Rule 23 requires not only a showing of common questions, but also that the plaintiffs' claims can be resolved with "common answers."[226] As noted earlier, this move, in part, was designed to adopt the "resolvability" interpretation of the "predominance" requirement percolating through the lower courts during this time.[227] But it also had the effect of requiring a party seeking class certification of a Title VII claim to assert the "same injury" rather than the same violation, or, more precisely, that the parties were discriminated by an express policy that one could point to in each and every individual case.[228] As put by the Court, "[o]ther than the bare existence of delegated discretion, respondents have identified no

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short, is 'embedded' doctrinally within what appears to be an individual lawsuit. That aggregate dimension, in turn, gives rise to demands for binding effect of a commensurately aggregate scope.").

223 *Wal-Mart*, 564 U.S. at 367.

224 The Court also rejected, in an almost summary fashion, the anecdotal evidence and corporate culture expert testimony presented by the plaintiffs. *Id.* at 354–59.

225 *Id.* at 357.

226 *Id.* at 349–50 (quoting Nagareda, *supra* note 10, at 131–32).

227 *See supra* Section I.B.1.

228 *Wal-Mart*, 564 U.S. at 348–50; *see also* Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34, 39–40 (2011).

'specific employment practice'—much less one that ties all their 1.5 million claims together. Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice,"[229] even if Wal-Mart intended to produce that very result.

Although this ruling in *Wal-Mart* is couched in terms of Rule 23's "commonality" requirement, it can also be read as a restriction in the kinds of disparate treatment claims one can assert under Title VII, both as a formal matter and a practical matter.[230] More importantly, this restriction can only be understood as a way to reconcile "excessive discretion" claims with the day in court ideal, and thus demonstrates that, for the Court, function does indeed follow form.

II. AN ALTERNATIVE AWAKENS

The Court's decisions in *Wal-Mart*, *Comcast*, and *Italian Colors* signaled that it was willing to move the law of class actions closer to the exceptional view and even imperil the class action altogether. Accordingly, when, in the October 2015 term, the Court granted certiorari to three class action cases, there was a general consensus that the cases would provide opportunities for the Court to close the gap even further.[231]

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229 *Wal-Mart*, 564 U.S. at 357.

230 *See* Stephanie S. Silk, Note, *More Decentralization, Less Liability: The Future of Systemic Disparate Treatment Claims in the Wake of* Wal-Mart v. Dukes, 67 U. MIAMI L. REV. 637, 654 (2013) ("Given the nature of modern discrimination, the Court's rejection of the *Dukes* plaintiffs' evidence will not only have far-reaching consequences for plaintiffs seeking class certification, but also for individual plaintiffs seeking redress for employment discrimination under a theory of disparate treatment. Interestingly, many scholars discussing the *Dukes* decision have focused on its impact on Title VII liability rather than on the issue of class certification."); *see also* Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 990–92 (2014) (discussing impact of *Wal-Mart* on systemic disparate treatment claims, noting that "[i]t may be the case that the Supreme Court is incapable of seeing discrimination other than in its most blatant forms").

231 *See, e.g.*, Alison Frankel, *Class Actions Face Crucible in Next Supreme Court Term*, REUTERS (June 9, 2015), http://blogs.reuters.com/alison-frankel/2015/06/09/class-actions-face-crucible-in-next-supreme-court-term [https://perma.cc/P9KD-4C2J] ("By this time next year, class action lawyers could be looking back with nostalgia and regret at the good old days when they only had to worry about *Wal-Mart v. Dukes* and *Comcast v. Behrend*.").

But no one foresaw the death of Justice Scalia[232] and what a profound impact his death would have on the Court's class action jurisprudence. In hindsight, that impact was obvious—Justice Scalia, after all, authored the majority opinions in *Wal-Mart*, *Comcast*, and *Italian Colors*. But the impact was nevertheless significant. Although the seeds of a different view emerged slightly before his death in his very last class action case, *Campbell-Ewald Co. v. Gomez*,[233] they only fully bloomed in the two decisions issued immediately after his passing—*Tyson Foods, Inc. v. Bouaphakeo*[234] and *Spokeo, Inc. v. Robins*.[235] Indeed, it is in *Tyson* where the Court very subtly, but unmistakably, departs from the exceptional view, and thus casts a new light on both *Campbell-Ewald* and *Spokeo*.

A. *The Predominance Requirement*

As noted earlier, prior to the October 2015 Term, the Court interpreted the predominance requirement of Rule 23(b)(3) class actions to require class actions that can be accurately resolved in a collective manner.[236] This "resolvability" interpretation of the predominance requirement was designed to protect the integrity of the day in court ideal at the heart of the Court's exceptional view of the class action. Insofar as parties are entitled to an individualized "day in court" to assert their claims and defenses, a class action cannot take away that entitlement absent great justification.[237] Consequently, in the absence of such a justification, the class action is tolerated to the extent that it "resolves" cases in exactly the same way as they would be resolved through individualized, separate actions.

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232 Liptak, *supra* note 3.

233 Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016).

234 Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016).

235 Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).

236 *See supra* Section I.B.

237 Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686 (2010) ("'[T]he burden of justification rests on the exception' to the general rule that 'one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'") (quoting Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999)).

Accordingly, as emphasized in *Wal-Mart*, efforts to use statistical evidence of nonparties to conclusively determine damages in individual cases were disfavored as a "Trial by Formula" that failed to provide "further individualized proceedings."[238] More importantly, in *Comcast*, the Court suggested, without holding so, that a party seeking to certify a class action cannot satisfy the predominance requirement if the party cannot propose a common method of accurately determining each plaintiff's damages.[239]

In granting certiorari in *Tyson Foods, Inc. v. Bouaphakeo*, the Court was presented with an opportunity to solidify *Comcast's* dicta into law. The Court granted certiorari on two questions, the first directly implicating both *Wal-Mart* and *Comcast*:

> Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample[.][240]

In *Tyson*, the plaintiffs, all meat processing workers at a Tyson Foods plant in Iowa, sought to certify a class action seeking overtime pay owed to them for the time spent "donning and doffing" protective gear.[241] Although both the FLSA and Iowa state law entitled the workers to overtime for time worked in excess of forty hours a week, Tyson failed to keep records of their donning and doffing times.[242] Thus, to prove both the amount of time spent "donning and doffing" as well as any overtime pay that would result, the plaintiffs relied upon *Anderson v. Mt. Clemens Pottery Co.*, a 1946 case in which the Supreme Court

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238 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011).

239 Comcast Corp. v. Behrend, 569 U.S. 27, 34–36 (2013).

240 Petition for a Writ of Certiorari, Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146, 2015 WL 1285369 (Mar. 19, 2015).

241 Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1041–42 (2016). The plaintiffs sought to certify both a "collective action" for their claims under the federal FLSA and a separate Rule 23 class action for similar claims under Iowa state law. *Id.* at 1042.

242 *Id.* ("At no point did Tyson record the time each employee spent donning and doffing.").

permitted parties to use "representative evidence" to prove overtime in the absence of time records.[243]

As indicated by the question presented, *Tyson* concerned whether the plaintiffs could use "representative evidence" to prove damages in a class action, and thus implicated *Wal-Mart*. Like the proposed "Trial by Formula" in *Wal-Mart*, the "representative evidence" used by the plaintiffs was based on an expert sampling of the donning and doffing times of representative workers to determine an average time that would apply to all members of the class.[244] The plaintiffs then employed a different expert to use this average to determine what percentage of the class qualified for overtime.[245]

The case also implicated *Comcast*. By definition, the representative evidence could not determine with perfect accuracy the amount of time spent donning and doffing by each individual class worker. It was at best an approximation that was in conflict with the dicta in *Comcast* mandating a common method for accurately determining damages. Accordingly, the Court in *Tyson* had an opportunity to decide conclusively that a class action cannot satisfy the predominance requirement if it uses averaging methods to determine individual issues, a result strongly implied by both *Wal-Mart* and *Comcast*.

The Court, however, declined to take that opportunity. As put by Justice Kennedy, who wrote the majority opinion, "[o]ne way for respondents to show . . . that the sample relied upon here is a permissible method of proving classwide liability is by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action."[246] Accordingly, because the Court in *Mt. Clemens* permitted representative evidence in individual actions, the Court concluded that such evidence was equally permissible in a class action.[247]

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243 *Id.* at 1046–47; *see* Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 686–88 (1946).

244 *Tyson*, 136 S. Ct. at 1043 (noting that the expert "conducted 744 videotaped observations and analyzed how long various donning and doffing activities took. He then averaged the time taken in the observations to produce an estimate of 18 minutes a day for the cut and retrim departments and 21.25 minutes for the kill department.").

245 *Id.* at 1043–44.

246 *Id.* at 1046.

247 *Id.* at 1047.

At first glance, the Court's conclusion about the permissibility of representative evidence is consistent with the exceptional view of the class action. Again, under the exceptional view, a class action is tolerated only insofar as it does not deviate from what would occur in an individual action. Accordingly, a class action that employed representative evidence for such FLSA claims is permissible because the class action would not deviate from an individual action where the same evidence was permissible. This may explain why Chief Justice Roberts ultimately agreed with the majority's conclusion that the representative evidence was permissible because it satisfied "the same standard of proof that would apply in any case."[248]

Understood in this way, *Tyson* does not depart from the exceptional view, but is simply an extension of it. As the Court noted when distinguishing *Tyson* from *Wal-Mart*,

> While the experiences of the employees in *Wal-Mart* bore little relationship to one another, in this case each employee worked in the same facility, did similar work, and was paid under the same policy. *As Mt. Clemens confirms*, under these circumstances the experiences of a subset of employees can be probative as to the experiences of all of them.[249]

Although the Court tries to distinguish the two cases based on the dissimilarity among claims in *Wal-Mart*, the real distinction is that the workers in *Tyson* could rely upon *Mt. Clemens* while no apparent equivalent existed for the workers' Title VII claims in *Wal-Mart*.

B. *Entitlement to a "Day in Court"*

Although the *Tyson* decision on representative evidence appears to be consistent with the exceptional view of the class action, other aspects of the decision reveal its true nature as a departure from that view. As noted earlier, the exceptional view considers individualized adjudication an *entitlement* that cannot be taken away through the use of the class action absent great justification. In *Wal-Mart*, for example, the Court rejected the proposed "Trial by Formula" because it did not permit Wal-

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248 *Id.* at 1051 (Roberts, C.J., concurring).

249 *Id.* at 1048 (majority opinion) (emphasis added).

Mart to assert individualized defenses, and "a class cannot be certified on the premise that Wal-Mart will not be *entitled* to litigate its statutory defenses to individual claims."[250]

Similarly, implicit in the *Comcast* Court's insistence that the predominance requirement requires a common method of accurately determining damages is that procedures like bifurcation, which would allow individual adjudication only as to damages, are insufficient. If a party is entitled to full, individualized adjudication, then it is entitled to all of it, not some of it. Indeed, the dissent in *Comcast* was spurred, in part, to emphasize that this aspect of the *Comcast* decision was dicta, and thus did not prohibit the use of bifurcation in other cases.[251]

This entitlement aspect of the exceptional view, and the day in court ideal upon which it is based, largely explains Tyson's litigation strategy. After certification of the class action in *Tyson*, the case proceeded to trial, but Tyson continued to insist that class certification was inappropriate. For that reason, Tyson did not challenge the admissibility of the plaintiffs' representative evidence of donning and doffing because, in Tyson's view, "the varying amounts of time it took employees to don and doff different protective equipment made the lawsuit too speculative for classwide recovery."[252] Indeed, Rule 23 permits a court to revisit certification of a class action if turns out that certification was unwarranted, a point Tyson emphasized throughout the litigation.[253]

In addition, at some point during the proceedings, the plaintiffs in *Tyson* proposed a bifurcation procedure so that individual damage issues could be determined on an individual basis. Tyson, however, rejected the bifurcation proposal, and chose not to propose an alternative bifurcation procedure.[254] Although the reasons for that rejection are murky from the record, at bottom the rejection stems from Tyson insistence that *no* class procedure should be used, and existing

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250 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011) (emphasis added).

251 Comcast Corp. v. Behrend, 569 U.S. 27, 41–42 (2013) (Ginsburg, J. & Breyer, J., dissenting) (citing sources and concluding that "[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal.")

252 *Tyson*, 136 S. Ct. at 1044.

253 FED. R. CIV. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment.").

254 *Tyson*, 136 S. Ct. at 1044.

case law up to that point certainly supported that claim of entitlement. Indeed, the Court's insistence in *Comcast* on an accurate common method of determining individual damages put into doubt whether bifurcation could be permissibly used *at all* in a class action.[255]

If, under the exceptional view, a party is entitled to a "day in court," then it follows that Tyson had no obligation to accept anything less than its full entitlement. But in *Tyson* the Court implied that Tyson may have had some duty to accept a half-loaf. For example, while the Court noted that the representative evidence may be flawed, "Petitioner, however, did not raise a challenge to respondents' experts' methodology under *Daubert*; and, as a result, there is no basis in the record to conclude it was legal error to admit that evidence."[256] This is in direct conflict with *Comcast*. As Justice Thomas pointed out in dissent, *Comcast* held that a failure to challenge the admissibility of evidence "does not preclude defendants from 'argu[ing] that the evidence failed to show that the case is susceptible to awarding damages on a class-wide basis.'"[257]

The Court also suggested, without deciding, that Tyson may have had an obligation to consider the bifurcation proposal. In a variation of the second question presented, Tyson contended that the class contained uninjured parties, and thus a class action was not appropriate unless the plaintiffs could provide "some mechanism to identify the uninjured class members prior to judgment."[258] This was a potential problem in the case, as the jury returned a puzzling result. Although the jury accepted the average donning and doffing times determined by the plaintiffs' first expert, it did not fully accept the percentage of overtime

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255 4 NEWBERG ON CLASS ACTIONS, *supra* note 60, § 11:7 (noting that after the Court's decisions in *Wal-Mart* and *Comcast*, "courts have struggled with the extent to which the decisions affect the continued viability of bifurcated liability/damage class action trials").

256 *Tyson*, 136 S. Ct. at 1049.

257 *Id.* at 1060 (Thomas, J., dissenting) (quoting Comcast v. Behrend, 569 U.S. 27, 33 n.4 (2013)).

258 *Id.* at 1049. The original second question presented concerned whether a class action could be certified if the class contains uninjured parties, raising Article III standing concerns. Petition for a Writ of Certiorari, Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016) (No. 14-1146), 2015 WL 1285369 (Mar. 19, 2015). However, Tyson conceded that "[t]he fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured." *Tyson*, 136 S. Ct. at 1049 (citing Brief for Petitioner at 49, *Tyson*, 136 S. Ct. 1036 (2016)).

pay determined by the plaintiffs' second expert.[259] This resulted in an aggregate award that was half of what was proposed.[260] Tyson argued, correctly, that it was far from clear how the award was going to be distributed so that uninjured parties do not, in fact, recover, a point that was echoed by Justice Roberts in concurrence.[261]

The Court concluded that because the jury award had not yet been disbursed, "[w]hether that or some other methodology will be successful in identifying uninjured class members is a question that, on this record, is premature."[262] But the Court went further and suggested, without deciding, that "this problem appears to be one of petitioner's own making" because Tyson rejected the plaintiffs' proposed bifurcation procedure.[263] The Court thus remanded the case to the district court, instructing the court to determine "[w]hether, in light of the foregoing, any error should be deemed invited."[264]

In suggesting that Tyson may have "invited" its own problems, the *Tyson* Court sharply departs from the exceptional view. This is because the entitlement to individualized procedures that sunk the "Trial by Formula" procedure in *Wal-Mart* simply evaporates in *Tyson*. Indeed, the Court in *Tyson* suggests that insisting on one's entitlement to a day in court could actually be detrimental to one's case, as *inviting* error rather than *preventing* the error of the class action itself.

C. *Substance and Procedure*

Tyson's departure from the exceptional view is fully revealed when one considers a short, but profound aside made in the case. In stating that "representative evidence" was permissible in a class action, the *Tyson* Court further observed that prohibiting such representative evidence in a class action "would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any

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259 *Tyson*, 136 S. Ct. at 1044.

260 *Id.* ("The jury more than halved the damages recommended by [the second expert].").

261 *Id.* at 1053 (Roberts, C.J., concurring) ("Given this difficulty [in identifying noninjured class members], it remains to be seen whether the jury verdict can stand.").

262 *Id.* at 1050.

263 *Id.*

264 *Id.*

substantive right.'"[265] It later reiterated that prohibiting representative evidence in a class action "would have violated the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action."[266] Although the Court did not elaborate further on this observation, it nevertheless reveals *Tyson* to be a true departure from the exceptional view, and situates the Court's other two class action cases decided during the October 2015 term, *Campbell-Ewald* and *Spokeo*, within that departure.

In the October 2009 term, the year the Court began to refashion the law of class actions, Justice Scalia, writing for a plurality, concluded in *Shady Grove* that a Rule 23 class action was permissible under the Rules Enabling Act so long as the plaintiffs were "willing."[267] There, Justice Scalia strongly implied that the day in court ideal not only entitles a party to an individualized proceeding, but that a Rule 23 class action that takes away such a proceeding from an *unwilling* party would "abridge, enlarge, or modify [a] substantive right" in violation of the Rules Enabling Act.[268] Accordingly, at the heart of Justice Scalia's view in *Shady Grove*, and the exceptional view of the class action in general, is that the day in court ideal is more than a preference, it is a "substantive right" that the class action has the potential to put in danger.

Given this aspect of *Shady Grove*, the Rules Enabling Act observation in *Tyson* is odd. The *Tyson* Court presumes that if representative evidence is permitted in an individual action, then it should be permitted in a class action. But if a "day in court" is the relevant "substantive right" for Rules Enabling Act (indeed, the very core of the day in court ideal), then the Court would at least have questioned the propriety of representative evidence even in individual cases. After all, the use of representative evidence, at least as used in *Tyson*, necessarily involved the use of evidence from one case to

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265 *Id.* at 1046.

266 *Id.* at 1048.

267 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 408 (2010) (plurality opinion).

268 28 U.S.C. § 2072(b) (2018). For a fuller discussion of *Shady Grove*, see *supra* Section I.D.1.

determine the outcome in a completely different case, a method that repulsed the Court in *Wal-Mart*.[269]

In addition, the *Mt. Clemens* rule was not textually imposed, but an interpretive gloss on the FLSA, and thus the Court was by no means compelled to keep that interpretation. As noted above, the Court has been more than willing to bend substantive law to fit the day in court ideal.[270] Indeed, Justice Thomas, writing in dissent in *Tyson*, criticized the majority for not only misinterpreting *Mt. Clemens*, but relying "on *Mt. Clemens* . . . given that decision's shaky foundations."[271]

The *Tyson* Court's Rules Enabling Act observation makes sense if one does not situate the "substantive right" in the right to an individualized adjudication, but in the right to overtime pay guaranteed by the FLSA. The Court subtly signaled this shift in discussing *Mt. Clemens*:

> The Court in *Mt. Clemens* held that when employers violate their statutory duty to keep proper records, and employees thereby have no way to establish the time spent doing uncompensated work, the 'remedial nature of [the FLSA] and the great public policy which it embodies . . . militate against making' the burden of proving uncompensated work 'an impossible hurdle for the employee.'"[272]

Here the Court not only relied upon the evidentiary rule set forth in *Mt. Clemens*, but the view of the relationship between procedure and substance that informed that rule. Rather than view procedure as a right in itself, the Court suggests, quoting *Mt. Clemens*, that certain procedures have to give way if they would violate the "remedial nature of [the FLSA] and the great public policy which it embodies."[273]

This shift in the relevant "substantive right" is further supported by the Court's other statements concerning representative evidence in

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269 It is worth noting that any attempt to prove a counterfactual will necessarily require using representative evidence of others, so the Court's disgust in *Wal-Mart* is misplaced. *See* Jonah B. Gelbach, *The Triangle of Law and the Role of Evidence in Class Action Litigation*, 165 U. PA. L. REV. 1807 (2017).

270 *See supra* Section I.D.4 (discussing disparate treatment claims under *Wal-Mart*).

271 *Tyson*, 136 S. Ct. at 1057 (Thomas, J., dissenting).

272 *Id.* at 1047 (majority opinion) (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946)).

273 *Id.*

general. In *Shady Grove*, the plurality suggested that an individualized adjudication was a "substantive right" in any context. In contrast, the *Tyson* Court pointed out that the permissibility of using representative evidence "will depend on the purpose for which the sample is being introduced and on the underlying cause of action."[274] This context-specific approach suggests that the permissibility of using representative evidence may change with the substantive right at issue. It follows that the relevant substantive right is not a trans-substantive right to a day in court, but will depend on the substantive law at issue in a given case.

The *Tyson* Court's shift in the relevant "substantive right" also explains the Court's view that *Tyson* may have "invited error" by failing to consider bifurcation and failing to challenge the admissibility of the representative evidence at trial. If the substantive right is an entitlement to a "day in court," then *Tyson* could not have possibly invited error—it was merely asserting its right to a day in court. But if the right is, instead, the right to overtime pay, then the insistence on individualized procedure looks less like an assertion of rights and more like an effort to manipulate procedures to avoid liability.[275]

Indeed, the very source of the "representative evidence" rule in *Mt. Clemens* was the employer's own failure to keep records, that this failure "'militate[s] against making' the burden of proving uncompensated work 'an impossible hurdle for the employee.'"[276] Accordingly, the Court in *Mt. Clemens*, and now in *Tyson*, views individualized procedures not as an ideal to be protected but, at least in this context, a procedure capable of causing its own mischief. In other words, the *Tyson* Court not only failed to consider the day in court an entitlement, but considered it a *problem* in certain contexts.

Understood in this way, *Tyson* upends the exceptional view of the class action. Rather than view the class action as an exception to an idealized day in court entitlement, the majority in *Tyson* held that the class action can be a solution to the dysfunctional consequences of the day in court entitlement in this context. Thus, the *Tyson* Court strongly implies that the day in court ideal is not an ideal at all, and that all

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274 *Id.* at 1049.

275 *See* Sergio J. Campos, *Changing Course*, 65 KAN. L. REV. 1025, 1047 (2017) (making the same point).

276 *Id.* at 1044 (citing *Tyson*, 136 S. Ct. at 1047).

procedures should be measured by how well they effectuate the policies of the underlying substantive law.

Indeed, understanding *Tyson* in this way provides a lens for understanding the Court's positions in both *Campbell-Ewald* and *Spokeo*, the two cases that served as bookends to *Tyson* last term. *Campbell-Ewald Co. v. Gomez*, Justice Scalia's last class action case, concerned a class action brought by recipients of unsolicited text messages against the marketers who sent them.[277] In *Campbell-Ewald*, the Court squarely addressed the issue hinted at in *Symczyk*—whether an unaccepted offer of judgment to the class representative prior to class certification made the proposed class action nonjusticiable.[278] Although the thrust of *Symczyk* suggested that the answer was yes, the Court nevertheless hesitated, concluding that the class representative had standing because the offer was unaccepted, and thus, there remained a live controversy.[279] According to the Court, an offer to settle did not moot the case because "[u]nder basic principles of contract law, Campbell's settlement bid and Rule 68 offer of judgment, once rejected, had no continuing efficacy."[280]

Much has been made of *Campbell-Ewald*'s dicta suggesting that "the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount."[281] This dicta suggests that the decision in *Campbell-Ewald*, at best, stalls the inevitable result that a defendant can moot a class action with an unaccepted offer.

But more important is the majority's response to the dissent's argument that allowing standing here "transfers authority from the federal courts and 'hands it to the plaintiff.'"[282] The dissent, authored by Chief Justice Roberts and joined by Justices Scalia and Alito, pointed out

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277 Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 667 (2016).

278 *Id.* at 667–68.

279 *Id.* at 671.

280 *Id.* at 670.

281 *Id.* at 672; *see also* Seamus C. Duffy, Campbell-Ewald—*The 'Offer of Judgment' Saga Continues*, LAW360 (June 13, 2016, 11:29 AM), https://www.law360.com/articles/805845/campbell-ewald-the-offer-of-judgment-saga-continues [https://perma.cc/X6ZS-T9EK] (noting that, because of this dicta, "[t]his won't be the last word on offers of judgment in class actions").

282 *Campbell-Ewald*, 136 S. Ct. at 672.

that Gomez, the representative plaintiff, was offered all that he was seeking, and that "[a]lthough Gomez nonetheless wants to continue litigating, the issue is not what the plaintiff *wants*, but what the federal courts may do."[283] The *Campbell-Ewald* majority responded by citing precedent in a different context in which the Court rejected an attempt to use a settlement to withdraw a judgment under appellate review to "relieve[] [the defendant] from [an] adverse decision."[284] Just as the Court "rejected this gambit," the Court rejected the attempt made by Campbell-Ewald "to avoid a potential adverse decision, one that could expose it to damages a thousand-fold larger than the bid Gomez declined to accept."[285]

Although this response is brief, it is also in line with the departure from the exceptional view seen in *Tyson*. Like in *Tyson*, the majority in *Campbell-Ewald* recognized that adherence to the day in court ideal may have adverse consequences and may lead to strategic manipulation. Thus, just as an insistence on asserting individualized proof may allow an employer to avoid paying overtime, the insistence on a "live" controversy could have the effect of allowing a defendant to prevent "a would-be class representative [from being] accorded a fair opportunity to show that certification is warranted."[286] Indeed, although commentators have discussed the potential for defendants to use settlement offers to "pick off" class representatives for some time,[287] this is the first time the Court cited this possibility in deciding a case. While the Court in *Symczyk* mentions this "pick off" strategy, it did not inform the reasoning of its holding.[288]

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283 *Id.* at 682 (Roberts, C.J., dissenting).

284 *Id.* at 672 (majority opinion) (citing U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 25 (1994)).

285 *Id.*

286 *Id.*

287 *See* Daniel A. Zariski, Leonard J. Feldman, Malaika M. Eaton & Darin M. Sands, *Mootness in the Class Action Context: Court-Created Exceptions to the "Case or Controversy" Requirement of Article III*, 26 REV. LITIG. 77 (2007) (discussing cases in which the court has responded to pick off strategies).

288 Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 70 (2013) (noting that, on appeal, the Second Circuit concluded that the case was not moot because "calculated attempts by some defendants to 'pick off' named plaintiffs with strategic Rule 68 offers before certification could short circuit the process, and, thereby, frustrate the goals of collective actions.").

A similar de-emphasis on ideal procedures and a concomitant sensitivity towards substantive law can be seen in *Spokeo, Inc. v. Robins*.[289] In *Spokeo*, the purported class representative sought relief for damages caused by inaccurate information about the representative disseminated by *Spokeo* in violation of federal law.[290] Like *Campbell-Ewald*, *Spokeo* concerned whether the class representative had Article III standing, with the Ninth Circuit concluding that the representative had standing because his injury was particularized as to him.[291]

In a majority opinion authored by Justice Alito, the *Spokeo* Court disagreed, concluding that while the representative alleged a particularized injury, he did not necessarily allege a "concrete" injury.[292] The *Spokeo* Court noted, in particular, that while Congress is empowered to define injuries, the Court must independently determine whether the injuries in fact caused harm, noting that "[a] violation of [the federal statute's] procedural requirements may result in no harm."[293]

At first glance, the *Spokeo* Court does not seem all that sensitive to the effectuation of substantive law. In reversing the Ninth Circuit on standing, the majority undermined private enforcement of the federal law at issue, or at least slowed it down.[294] But like in *Tyson* and *Campbell-Ewald*, the majority displays sensitivity to the objectives of substantive law that is not possible under the exceptional view. Specifically, *Spokeo* emphasizes and reaffirms "Congress' role in identifying and elevating intangible harms," suggesting a deference that is missing in cases like *Wal-Mart* or *Italian Colors*, where the Court squeezed federal rights through the filter of the day in court ideal.[295]

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289 136 S. Ct. 1540 (2016).

290 *Id.* at 1544.

291 *Id.* at 1544–45.

292 *Id.* at 1548–49.

293 *Id.* at 1550.

294 *See id.* at 1556 (Ginsburg, J., dissenting) (noting that "I therefore see no utility in returning this case to the Ninth Circuit to underscore what Robins' complaint already conveys concretely: Spokeo's misinformation 'cause[s] actual harm to [his] employment prospects'").

295 *Id.* at 1549 (majority opinion).

D. *The Functional View*

Taken together, *Tyson*, *Campbell-Ewald*, and *Spokeo* not only depart from the exceptional view of the class action, but provide the outlines of an alternative, functional view of the class action. This alternative view has three features that are in direct contrast to the features of the exceptional view.

First, under this alternative, functional view, there is no ideal procedure. Accordingly, there is no preference for the day in court ideal that serves as the foundation of the exceptional view. In fact, under this functional view, procedures can be seen as either useful or harmful depending on the circumstances. The same individualized procedures that the Court sought to elevate in *Wal-Mart*, *AT&T*, and *Comcast* were recognized as having potentially harmful consequences in *Tyson* and *Campbell-Ewald*. Conversely, the class action is not seen as an "exception" in need of justification, but stands on equal footing with other procedures. In other words, the class action is not per se "exceptional" the way it is under the exceptional view.

Second, under this functional view, the parties are not entitled to an idealized procedure, or any other procedure. Instead, the parties are only entitled to a procedure that effectuates the rights at issue in a given context. This is most clearly seen in *Tyson*, where the Court invoked *Mt. Clemens* to support the use of representative evidence and class proceedings because the normal process of individualized adjudication would result in the employer not having to pay overtime. It follows that a party is *not* entitled to a procedure if the procedure, no matter how ubiquitous, would undermine the objectives of the substantive law. Accordingly, the procedures that a party is entitled to will depend on the context—on what the *Tyson* Court called the "purpose for which the [the procedure] is being introduced and on the underlying cause of action."[296] In sum, this functional alternative would not pose an existential threat to the class action, but would embrace the class action as a potentially useful tool in the right context.

Third, under the functional view, no view of procedure defines the scope or content of substantive rights. Instead, the Court stays, for the most part, agnostic as to substantive rights, as suggested by the Court's

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296 Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1049 (2016).

decision in *Spokeo*. Consequently, the Court would not use any procedural picture as a prism to understand substantive rights, or define certain procedures *as* the substantive right. Instead, the Court will look at the substantive law itself and defer to the objectives the law has chosen. Even in this deference, the Court would be empowered to shape procedures to ensure that these rights are effectuated.

III. THE UNCERTAIN PATH AHEAD

A. *Recent Cases*

Although the three class action cases decided during the October 2015 term provide support for a functional alternative, the Court is by no means compelled to adopt this view. Indeed, one can imagine the Court limiting *Tyson* to its holding that procedures in a class action are permitted if they are permitted in an individual case. Doing so would preserve both the exceptional view and the other "grandfathered in" deviances that characterized the Court's approach to class actions prior to the 2015 Term.

The Court appears to be taking this path given its most recent class action decisions. One such case, *Microsoft Corp. v. Baker*, concerned the narrow issue of whether an appeals court could exercise jurisdiction to review a denial of class certification in that case.[297] Because a class certification decision, one way or the other, is not a final judgment, a party typically cannot appeal such a decision until a final judgment has been entered.[298] Moreover, in *Coopers & Lybrand v. Livesay*, the Court rejected the "death knell" doctrine, which permitted an appeals court to entertain an interlocutory appeal concerning the denial of class certification if the denial resulted in the "death knell" of the litigation.[299]

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297 137 S. Ct. 1702 (2017).

298 *Id.* at 1706 ("Orders granting or denying class certification, this Court has held, are 'inherently interlocutory,' hence not immediately reviewable under 28 U.S.C. § 1291, which provides for appeals from 'final decisions.'") (internal citations omitted); *see also* 28 U.S.C. § 1291 (2018) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.").

299 437 U.S. 463, 466, 470 (1978).

But given the impact a class certification decision can have on both the viability of the plaintiffs' claims[300] and the defendant's potential liability,[301] in 1998 the Rules Advisory Committee promulgated Rule 23(f).[302] Rule 23(f) permits a party to seek permission from the court of appeals to file an interlocutory appeal of a class certification decision.[303] Rule 23(f) itself does not articulate the standard an appeals court must use in reviewing such a petition. However, the notes accompanying passage of Rule 23(f) noted that whether an appeal is permitted is within "the sole discretion of the court of appeals."[304]

In *Microsoft*, the plaintiffs sought certification of claims arising from an alleged defect in Xbox 360 consoles manufactured by Microsoft.[305] The actual case was preceded by prior litigation asserting the same defect, but that litigation settled when class certification was denied.[306] This case was subsequently filed after an intervening Ninth Circuit decision made class action law more favorable for the plaintiffs, but the district court struck the class allegations, concluding that the prior class certification denial controlled.[307] Consistent with Rule 23(f), the representative plaintiffs sought permission to appeal the denial,[308] but the court of appeals denied permission.[309]

The representative plaintiffs then did something creative. They agreed to voluntarily dismiss their claims with prejudice, thereby allowing a final judgment to be entered in the case.[310] Thereafter, the

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300 *Id.* at 473 (noting that the death knell doctrine "may enhance the quality of justice afforded a few litigants").

301 *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (entertaining a writ of mandamus challenging the grant of class certification, noting that because of the grant of class certification the defendant "will be under intense pressure to settle.") (citing sources).

302 *See Microsoft*, 137 S. Ct. at 1706.

303 FED. R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule . . . [if] a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.").

304 FED. R. CIV. P. 23(f) Advisory Committee note to 1998 amendment.

305 *Microsoft*, 137 S. Ct. at 1710 ("The named plaintiffs . . . asserted that the Xbox scratched (and thus destroyed) game discs during normal game-playing conditions.").

306 *Id.*

307 *Id.* at 1710–11.

308 *Id.* at 1711.

309 *Id.*

310 *Id.*

representative parties solely appealed the district court's striking of the class action allegations, contending that, if their appeal prevailed, they would have the option to revive their claims in a class action.[311] Although Microsoft stipulated to the voluntary dismissal, they took the position that the representative plaintiffs could not appeal the district court's order.[312] The Ninth Circuit concluded that they had jurisdiction over the representative plaintiffs' appeal and ultimately "held that the District Court had abused its discretion in striking [the] class allegations," taking no position on whether the plaintiffs "should prevail on a motion for class certification."[313]

The *Microsoft* Court concluded that the representative plaintiffs' use of a voluntary dismissal to appeal the district court's order constituted an impermissible end run around Rule 23(f). Justice Ginsburg, writing for the majority, concluded that such a voluntary dismissal would, "even more than the death-knell theory, invite[] protracted litigation and piecemeal appeals."[314] Although the case would be over if the plaintiffs lost on appeal, the Court surmised that "plaintiffs with weak merits claims may readily assume that risk, mindful that class certification often leads to a hefty settlement."[315]

Moreover, because plaintiffs after a voluntary dismissal could appeal as a right, it would "undercut[] Rule 23(f)'s discretionary regime."[316] Here, the Court was particularly influenced by an amicus brief filed by a group of civil procedure scholars that included a member of the Rule Advisory Committee that promulgated Rule 23(f).[317] Finally, the Court noted that the tactic, like the "death knell" doctrine, only

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311 *Id.*

312 *Id.*

313 *Id.* at 1712 (internal quotation marks omitted).

314 *Id.* at 1713.

315 *Id.*

316 *Id.* at 1714 ("Rule 23(f) reflects the rulemakers' informed assessment" and "[t]hat assessment 'warrants the Judiciary's full respect.'") (internal citations omitted).

317 *Id.* at 1709 (citing Brief of Civil Procedure Scholars as Amici Curiae in Support of Petitioner, Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017) (No. 15-457), 2016 WL 1128623, at *12 (Mar. 17, 2016) [hereinafter *Br. of Civil Procedure Scholars*]). One of the authors, Thomas D. Rowe, Jr., "served on the Advisory Committee on Rules of Civil Procedure for the Judicial Conference of the United States during the period when Federal Rule of Civil Procedure 23(f) was considered and adopted." *Br. of Civil Procedure Scholars*, 2016 WL 1128623, at *1.

permitted plaintiffs to appeal, and this "one-sidedness . . . reinforce[s] our conclusion that [it] does not support appellate jurisdiction."[318]

At first glance, the decision in *Microsoft* utilizes a pragmatism that is similar to the Court's decisions in *Tyson* and *Campbell-Ewald*. Just as the Court acknowledged the possibility of "pick off" strategies in *Campbell-Ewald*, the *Microsoft* Court was alert to the way that voluntary dismissal may constitute an end run around Rule 23(f). Indeed, this concern with the Rule 23(f) regime seemingly blinded the majority to the obvious fact that the appeal in *Microsoft* was not interlocutory. Although the plaintiffs could have revived their claims if they won their appeal, that is true of all appeals of judgments against plaintiffs. The concurrence, authored by Justice Thomas and joined by Chief Justice Roberts and Justice Alito, rightly pointed out that a decision is "final" under § 1291 if it "leaves nothing for the court to do but execute the judgment," and "[t]he order here dismissed all of the plaintiffs' claims with prejudice and left nothing for the District Court to do but execute the judgment."[319]

But this concern with pragmatics belies the true nature of the *Microsoft* decision, which is more akin to *Amchem* than it is to *Tyson*. A clue can be found in the author of the opinion, Justice Ginsburg, who also authored *Amchem*. Just as *Amchem* was anchored in an interpretation of Rule 23(b)(3), the *Microsoft* decision is largely an exercise in deference to the designers of Rule 23(f). As the decision itself states, as to interlocutory appeals of class action orders, "Congress chose the rulemaking process to settle the matter, and the rulemakers did so by adopting Rule 23(f)'s evenhanded prescription. It is not the prerogative of litigants or federal courts to disturb that settlement."[320] In deferring the issue rather than tackling it directly, the *Microsoft* Court, at best, is agnostic as to the functional view outlined in *Tyson* and *Campbell-Ewald*.

But deferring to the rulemakers in *Microsoft* may have at least had the advantage of stalling the proponents of the exceptional view from reasserting it. In his concurrence, Justice Thomas agreed that the

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318 *Microsoft*, 137 S. Ct. at 1715 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978)).

319 *Id.* at 1716 (Thomas, J., concurring) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)).

320 *Id.* at 1715.

voluntary dismissal was a "final order," but nonetheless argued that the appeals court lacked jurisdiction over the appeal because the representative plaintiffs lacked Article III standing. In particular, Justice Thomas reasoned that "[w]hen the plaintiffs asked the District Court to dismiss their claims, they consented to the judgment against them and disavowed any right to relief from Microsoft," and "[t]he parties thus were no longer adverse to each other on any claims."[321]

In coming to this conclusion, the concurrence failed to acknowledge, let alone cite, Supreme Court precedent that permitted a representative with a mooted claim to appeal the denial of a class action.[322] This prior precedent is especially significant because, in permitting such mooted parties to appeal, it relied upon the function of the class action as "an evolutionary response to the existence of injuries unremedied by the regulatory action of government."[323] By ignoring this precedent, the concurrence stood ready to reinstall the exceptional view of class action, one that ignored functional concerns and focused on a party's day in court. As put by the concurrence, "[c]lass allegations, without an underlying individual claim, do not give rise to a 'case' or 'controversy.'"[324]

While Justice Ginsburg stalled the re-assertion of the exceptional view in *Microsoft v. Baker*, she may still be a supporter of the view. In *California Public Employees' Retirement System (CalPERs) v. ANZ Securities, Inc.*, another recent class action case decided shortly after *Microsoft v. Baker*, the Court considered whether a statute of repose can be tolled by the filing of a class action.[325] Specifically, the plaintiffs in *CalPERs* were members of a class action filed within the statute of repose, but opted out after the statute had run to file their claims separately.[326]

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321 *Id.* at 1717.

322 Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980).

323 *Roper*, 445 U.S. at 339; *see also Geraghty*, 445 U.S. at 402–03 (1980) (highlighting "[t]he justifications that led to the development of the class action," which "include[d] . . . the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims.") (citing FED. R. CIV. P. 23 Advisory Committee notes to the 1966 amendments).

324 *Microsoft*, 137 S. Ct. at 1717.

325 CalPERs v. ANZ Sec., Inc., 137 S. Ct. 2042 (2017).

326 *Id.* at 2048.

In an older decision, *American Pipe & Construction Co. v. Utah*, the Court concluded that the filing of a class action could equitably toll the statute of limitations of the class members' claims.[327] The *CalPERs* Court, however, concluded that equity cannot be extended to statutes of repose. In a majority opinion written by Justice Kennedy, the author of *Tyson*, the *CalPERs* Court concluded that statutes of repose fundamentally differ from statutes of limitations because statutes of repose "are enacted to give more explicit and certain protection to defendants."[328] Accordingly, equity could not support tolling because "the purpose and effect of a statute of repose . . . is to override customary tolling rules arising from the equitable powers of courts."[329]

In addition, the Court concluded that any concern with parties inundating courts with protective filings of individual suits in class actions is "overstated."[330] Because "the very premise of class actions is that '"small recoveries do not provide the incentive"'" to sue separately, "[m]any individual class members may have no interest in protecting their right to litigate on an individual basis."[331] Despite the nod to the "very premise" of the class action, the *CalPERs* decision, much like the *Microsoft v. Baker* decision, is more a statutory interpretation decision than a class action decision.

However, also like *Microsoft v. Baker*, the *CalPERs* decision is notable for its dissent, this time filed by Justice Ginsburg, the author of the *Microsoft* majority opinion. The dissent, joined by Justices Breyer, Kagan, and Sotomayor, disagreed with the majority's analysis "[g]iven the due process underpinning of the opt-out right," citing *Wal-Mart*.[332] Specifically, "[a]bsent a protective claim filed within [the statute of repose] period, [class] members stand to forfeit their *constitutionally shielded right to opt out* of the class and thereby control the prosecution

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327 414 U.S. 538, 551–53 (1974).

328 *CalPERs*, 137 S. Ct. at 2049.

329 *Id.* at 2051.

330 *Id.* at 2054.

331 *Id.* Not everyone agrees. *See* David Freeman Engstrom & Jonah B. Gelbach, American Pipe *Tolling, Statutes of Repose, and Protective Filings: An Empirical Study*, 69 STAN. L. REV. ONLINE 92, 93 (2017) ("But simple math shows that even if protective filings are made in only a small share of cases where they are possible, the ultimate result would be a substantial spike in litigation in federal courts").

332 *CalPERS*, 137 S. Ct. at 2056 (Ginsburg, J., dissenting) (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 363 (2011)).

of their own claims for damages."[333] By characterizing the right to opt out as a due process right, Justice Ginsburg, as well as the three other justices who signed onto her dissent, clearly signaled that they continue to be strong supporters of an individual's day in court, and thus, ostensibly, supporters of the exceptional view. But, like Justice Thomas's dissent in *Microsoft*, the dissent in *CalPERs* does not have the full backing of the Court.

The most disappointing recent case for the functional view is *Epic Systems Corp. v. Lewis*, decided at the end of the October 2017 term.[334] *Epic* concerns whether class action waivers in employer arbitration agreements violate the National Labor Relations Act (NLRA).[335] Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[336] Moreover, Section 8 of the NLRA prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed" in Section 7.[337] At issue was whether the class action waivers constitute a restriction on the right to "engage in . . . concerted activities" protected under Section 7.

Epic presented a conflict between the policies of the NLRA and the policies of the FAA, which the Court through its class waiver jurisprudence has interpreted as embodying the day in court ideal. As put by the Court in *Italian Colors*, an arbitration agreement containing a class waiver is simply an "agree[ment] to arbitrate pursuant to th[e] 'usual rule,' and it would *be* remarkable for a court to erase that expectation."[338] Accordingly, *Epic* required the Court to make a choice—to honor the substantive rights of the NLRA, as they did with the FLSA in *Tyson*, or to further proliferate the "day in court" ideal that the Court has already embedded inside the FAA. Indeed, the lower courts who have addressed the issue have either focused on functional

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333 *Id.* at 2057 (emphasis added).

334 138 S. Ct. 1612 (2018). *Epic* was a consolidation of three cases raising the same issue, but, as the Court noted, "[t]he three cases before us differ in detail but not in substance." *Id.* at 1619.

335 *Id.* at 1619–21.

336 29 U.S.C. § 157 (2018).

337 *Id.* § 158(a)(1).

338 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 234 (2013).

concerns[339] or have focused on the FAA and its day-in-court underpinnings.[340]

The Court ultimately sided with its existing arbitration jurisprudence, although it did so largely as a matter of precedent. Justice Gorsuch, writing for the majority, first addressed the argument that, under the savings clause of the FAA, a court is not required to enforce an arbitration agreement "save upon such grounds as exist at law or in equity for the revocation of any contract."[341] Arguably, Section 7 of the NLRA represents such a ground. But the Court rejected that argument, noting that the FAA's savings clause "recognizes only defenses that apply to 'any' contract," and, "by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with *one of arbitration's fundamental attributes.*"[342] As in *Italian Colors*, the Court relies upon *Concepción*, stating that "*Concepción's* essential insight remains: courts may not allow a contract defense *to reshape traditional individualized arbitration* by mandating classwide arbitration procedures without the parties' consent."[343] Here again the Court further embeds the "day in court" ideal into its definition of arbitration.

The Court also rejected the argument that the NLRA, passed after the FAA, abrogates the FAA with respect to collective procedures. In particular, the Court concluded that the NLRA and the FAA were not, in fact, in conflict.[344] It did so by interpreting Section 7 narrowly, concluding that the "other concerted activities for the purpose of . . . other mutual aid or protection" language of Section 7 only "serve[d] to protect things employees 'just do' for themselves in the course of exercising their right to free association in the workplace," and not the "courtroom-bound 'activities' of class and joint litigation."[345]

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339 *See* Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1153 (7th Cir. 2016) (concluding that class actions constitute concerted activity because "[c]ollective, representative, and class legal remedies allow employees to band together and thereby equalize bargaining power").

340 *See* D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 360 (5th Cir. 2013) (concluding that such class action waivers are enforceable, as "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA").

341 9 U.S.C. § 2 (2018).

342 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018) (emphasis added).

343 *Id.* at 1623 (emphasis added).

344 *Id.* at 1624.

345 *Id.* at 1625 (quotations omitted).

The Court supported this narrow interpretation of Section 7 by pointing to other provisions of the NLRA that focused on workplace activities like strikes and picketing.[346] It also pointed to other statutes that explicitly address collective procedures, which Section 7 fails to do.

In fact, the Court pointed out that the specific claims at issue were FLSA claims, the same ones at issue in *Tyson*, and that, despite the express collective procedures in the FLSA, no court in the employment context has prohibited class waivers in arbitration.[347] Indeed, the Court highlighted that "this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes," citing, among other cases, *Italian Colors*.[348] The Court even quoted *Italian Colors* for the proposition that Rule 23 was an "exception to the 'usual rule' of 'individual' dispute resolution."[349]

In dissent, Justice Ginsburg sought to counter the Court's interpretation of the NLRA by discussing the history of the Act, emphasizing that "the Court forgets the labor market imbalance that gave rise to . . . the NLRA, and ignores the destructive consequences of diminishing the right to employees 'to band together in confronting an employer.'"[350] The dissent then showed the importance that Congress attached to protecting concerted activities, and further showed how Section 7 has not been limited to the workplace, and has, in fact, been extended to litigation.[351]

The dissent then made an interesting historical point about the scope of the FAA that explains the NLRA's failure to address arbitration procedures. The dissent first noted that the FAA was passed to permit arbitration in commercial disputes where the parties were of roughly equal bargaining power, and that language was added in Section 1 of the

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346 *Id.*

347 *Id.* at 1626 (citing cases); *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991) (permitting arbitration for Age Discrimination in Employment Act claims); NLRB v. Alternative Entm't, Inc., 858 F.3d 393, 413 (6th Cir. 2017) (Sutton, J., concurring in part, dissenting in part) (collecting cases demonstrating that "[e]very circuit to consider the question" has held that the FLSA permits agreements for individualized arbitration).

348 *Epic*, 138 S. Ct. at 1627 (citing cases).

349 *Id.* at 1628 (quoting Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 234 (2013)).

350 *Id.* at 1633 (Ginsburg, J., dissenting) (quoting NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 835 (1984)).

351 *Id.* at 1637–38.

FAA to prevent its application to employment contracts.[352] However, in 2001 the Court subsequently interpreted Section 1 narrowly,[353] and then proceeded to apply the FAA to all employment contracts, with the Court's decision in *Concepción* in 2011 causing an explosion in the use of class waivers.[354] Accordingly, the NLRA was silent on the issue of class waivers when it passed, and the NLRB, in fact, did not address the issue of class waivers in employment arbitration clauses until 2012.[355]

Despite noting that "the Court's Arbitration Act decisions have taken many wrong turns," and that the decisions constitute an "exorbitant application of the FAA,"[356] Justice Ginsburg's dissent did not call into the question the validity of these decisions. Instead, Justice Ginsburg argued that the NLRA does not discriminate against arbitration because "[a]t issue is application of the ordinarily superseding rule that 'illegal promises will not be enforced.'"[357]

Nevertheless, Justice Ginsburg's dissent did lay some groundwork for the functional view that is similar to Justice Kennedy's reasoning in *Tyson*. In particular, Justice Ginsburg signaled some uneasiness with the "exceptional" view by emphasizing the necessity of collective procedures for the claims here, noting that "[e]mployers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations."[358]

There are even glimmers of hope for the functional view in the majority opinion. Despite relying upon *Concepción* and *Italian Colors*, Justice Gorsuch in his majority opinion did not take a forceful stand in favor of the exceptional view. The majority made clear that "no party

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352 *Id.* at 1642–43; *see also* 9 U.S.C. § 1 (2018) ("[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.").

353 *Epic*, 138 S. Ct. at 1644 (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001)).

354 *Id.* at 1644 & n.12 (citing sources).

355 *Id.* at 1644–45.

356 *Id.*

357 *Id.* at 1646 (quoting Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77 (1982)).

358 *Id.* at 1647–48.

has asked us to revisit" this precedent.[359] Instead, the majority opinion has a conservative (small c) bent, appealing not to policy but to the constraints of precedent. Indeed, Justice Gorsuch concluded the majority opinion by writing that "[t]he policy may be debatable but the law is clear."[360]

B. *The Allure of Individualism*

Despite her uneasiness with the "exceptional view" in *Epic*, Justice Ginsburg's dissent in *CalPERs* shows that the "day in court" ideal still has some grip on how she and other justices think about the law of due process. This, combined with Justice Thomas's dissent in *Microsoft v. Baker*, demonstrate that the "exceptional" view is not going away any time soon.

Part of the appeal of the "day in court" ideal is that it identifies a talismanic right that provides an easy answer to difficult procedural questions. In *Microsoft v. Baker*, for example, it is far from clear when a federal court is permitted to exercise appellate jurisdiction over a judgment reached through voluntary dismissal. In the past the Court has not looked kindly at efforts to *avoid* jurisdiction to avoid unhelpful precedent,[361] so it stands to reason that the Court also would not look kindly on efforts to create appellate jurisdiction.[362] Nevertheless, it is far easier to consider the issue of whether the named plaintiffs have a mooted claim or not. Similarly, in *CalPERs*, it is not clear whether statutes of repose are limited by a filed class action. But it is clear whether or not a party had a "day in court" through a right to opt out.

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359 *Id.* at 1630–31 (majority opinion).

360 *Id.* at 1632.

361 *See* U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 26 (1994) (permitting vacatur of judgment on appeal as moot because of a settlement between the parties only when "the public interest would be served by a vacatur") (quoting Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)).

362 One interesting exception is *United States v. Windsor*, where, after a judgment in its favor, the defendant United States declined to defend it on appeal. In a majority opinion written by Justice Kennedy, the Court agreed that the appeal was justiciable given that the United States refused to pay the damages owed to Windsor, the availability of amici to articulate views defending the judgment, and the importance of the issue. *See* United States v. Windsor, 570 U.S. 744, 759–61 (2013).

As an added bonus, this procedural "right" is transubstantive—it applies in all substantive settings, from product defect cases like *Microsoft v. Baker* to securities cases like *CalPERs*.

But I think the primary appeal of the exceptional view is the compelling nature of the "day in court" entitlement. It not only chooses a right for purposes of legal analysis, but chooses a right that is easy to defend in many situations. The idea of a "day in court" evokes the need felt by parties to make sure that their underlying rights are acknowledged and respected by the court. One way to know that one's rights are respected is to afford victims a right to seek redress when those rights are violated.[363] Indeed, such a "day in court" right is akin to the rights of petition and expression protected by the First Amendment, and thus can be understood as an implication of democratic self-government.[364]

Defenders of the class action have pushed back against this exaltation of the day in court by discussing the regulatory objectives of the class action.[365] But by appealing to such abstract, public objectives as a justification, the class action opens itself up to claims that it is an undemocratic procedure promulgated by the courts themselves, and thus cannot obtain the same type of public legitimacy that, for example, a legislatively-enacted administrative scheme can achieve.[366] More importantly, appealing to the group to override the interests of the individual is precisely the evil that the exceptional view fights against.

What is appealing about the functional view at the heart of a decision like *Tyson* is that it takes the premises of the exceptional view

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363 *See* John C.P. Goldberg, *Inexcusable Wrongs*, 103 CALIF. L. REV. 467, 502–03 (2015) ("It is no coincidence that torts are wrongs with victims, and that tort suits are brought by victims. Tort law is largely about victims' rights: the right of potential victims not to be injured, and the right of actual victims to respond to their injury.").

364 Martin Redish is most associated with this view. *See* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 136–37 (2009) (arguing, in the context of class actions, that "the due process version of litigant autonomy grows out of the same constitutional grounding as the First Amendment right of free expression").

365 *See, e.g.*, J. Maria Glover, *A Regulatory Theory of Legal Claims*, 70 VAND. L. REV. 221 (2017); Glover, *supra* note 14; Resnik, *supra* note 14.

366 This view is most associated with the late Richard Nagareda. *See, e.g.*, Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 605 (2008) (arguing that class actions should be designed consistent with "institutional boundaries on regulatory power").

seriously. It does not look to the group to justify a diminution of the rights of the individual, but takes seriously what it means to protect those rights. In doing so, the functional view takes seriously not only the right to be heard, but the primary right that the "day in court" is meant to protect. More importantly, it identifies situations where the "day in court" does more harm than good to that primary right.

By recognizing that a "day in court" can be harmful, the functional view is, at heart, a modern one. The harm that a "day in court" can cause is largely a side effect of the prevalence of mass production. The harm that mass production can inflict calls into question the efficacy of existing procedures because the response to such mass harm requires coordination among victims that a "day in court" can hinder.[367] It is not a coincidence that collective procedures that are exemplified by the class action arose shortly after the dawn of the industrial revolution.[368] Indeed, the class action, like the administrative state in general, began to arise in prominence precisely to deal with modern situations where the "day in court" cannot secure the rights it seeks to protect.[369]

C. *Back to the Future*

In many ways, the law of personal jurisdiction is ground zero for our various understandings of the class action. The "usual rule" that the class action is an "exception" can be traced back to *Pennoyer v. Neff*,

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367 *See* David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEGAL ANALYSIS 305 (2014) (showing the superiority of the class action in dealing with the transaction costs that arise among numerous plaintiffs asserting common issues against a defendant).

368 *See* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004) (discussing this history).

369 *See* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686–87 (1941) (noting that "[a]dministrative law removes the obstacles of insufficient funds and insufficient knowledge by shifting the responsibility for protecting the interests of the individuals comprising the group to a public body which has ample funds and adequate powers of investigation," but, given imperfections in administrative law, the authors "explor[ed] the possibilities of revitalizing private litigation to fashion an effective means of group redress" through class actions); *see also* Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (discussing Rule 23(b)(3) category, which was amended in 1966 to help vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.").

which gave birth to personal jurisdiction law and which has tortured many first-year law students ever since.[370]

It therefore should come as no surprise that *Tyson* relies so heavily on *Mt. Clemens*, which was decided during an era when the Court was much more willing to question classic procedural precedents like *Pennoyer* to address new problems arising from industrialization.[371] In fact, *Mt. Clemens* was decided one year after *International Shoe Co. v. Washington*, where the Court famously sought to modernize the law of personal jurisdiction away from *Pennoyer*'s focus on "presence" within a state to one that took into account the substantive impact and fairness of a court's exercise of jurisdiction.[372] Moreover, four years after *Mt. Clemens*, the Court decided *Mullane v. Central Hanover Bank & Trust Co.*, a case that was, in many ways, a more pointed rebuke of *Pennoyer*.[373]

But *Mullane* is especially relevant here because, like *Tyson*, it contains an entire view of due process within it. Accordingly, *Mullane* shows that, like *Pennoyer* for the exceptional view, the functional view has its own ancestor. *Mullane* involved a New York state statutory scheme authorizing the creation of common trust funds, essentially a trust consisting of other, smaller trusts, allowing the "donors and

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370 For example, in *Italian Colors*, the Court cites *Califano v. Yamasaki* for the proposition that "[The class action is] 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 234 (2013) (quoting Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979)). But this "usual rule" can be traced further back to *Hansberry v. Lee*, where the Court stated matter-of-factly that "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." 311 U.S. 32, 40 (1940). And, of course, in support of this proposition, the *Hansberry* Court cited *Pennoyer v. Neff*. *See id.* (citing Pennoyer v. Neff, 95 U.S. 714 (1877)).

371 Indeed, it is no surprise that a labor case like *Mt. Clemens* provided such procedural innovation. One recent article has argued that the Federal Rules of Civil Procedure itself arose from advances in labor law. *See* Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462 (2017).

372 326 U.S. 310, 316 (1945) (permitting a court to consider "traditional notions of fair play and substantial justice").

373 339 U.S. 306, 312 (1950) (rejecting the petitioner's reliance on the in rem/in personam classifications set forth in *Pennoyer*, concluding that "we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state.").

testators of moderately sized trusts" to achieve the economies of scale of common trust administration.[374] As part of the statutory scheme, New York law permitted the periodic settlement of all claims against the common trust fund trustee, where the "decree in each such judicial settlement of accounts [was] made binding and conclusive."[375] The settlement proceedings would be publicized via newspaper notice, and that was the only notice the parties would be afforded.[376]

At one such proceeding, the court-assigned guardian for the beneficiaries challenged the personal jurisdiction of the state court over the out-of-state absent plaintiffs.[377] But in taking up the case, the Court did not address the issue of personal jurisdiction.[378] Instead, the Court conceived of the issue as one of notice, and stated, consistent with the exceptional view, that "[t]he fundamental requisite of due process is the opportunity to be heard."[379] The Court then ruled that due process only required notice "reasonably calculated" to apprise the absent parties of the proceedings, a ruling that remains the law today.[380]

But, in applying this rule, the *Mullane* Court held that the newspaper notice provided for in the statutory scheme would be sufficient for those contingent interests who did not have a known address. The Court reasoned that requiring more would "dissipate [the] advantages" of common trust fund administration.[381] As for those with known addresses, the Court held that mail notice was sufficient, as the statutory scheme anticipated the mailing of income to these parties.[382]

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374 *Id.* at 307–08 (noting that through the creation of such common fund trusts "diversification of risk and economy of management can be extended to those whose capital standing alone would not obtain such [an] advantage").

375 *Id.* at 309.

376 *Id.* at 309 ("The only notice given beneficiaries of this specific application was by publication in a local newspaper in strict compliance with the minimum requirements of N.Y. Banking Law § 100-c(12).").

377 *Id.* at 311 ("We are met at the outset with a challenge to the power of the State—the right of its courts to adjudicate at all as against those beneficiaries who reside without the State of New York.").

378 The Court would finally address the issue of personal jurisdiction over absent, out-of-state plaintiffs in *Shutts*, the case most cited for the view that an opt out right is a due process right. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

379 *Mullane*, 339 U.S. at 314 (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

380 *Id.* at 314.

381 *Id.* at 317–18.

382 *Id.* at 318.

The Court further noted that "notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all."[383]

Despite echoing the exceptional view in stating that a "fundamental requisite of due process is the opportunity to be heard," the actual holding in *Mullane* contemplated that some parties would not get their day in court. Indeed, in discussing the sufficiency of mail notice, the Court acknowledged and accepted that mail notice posed "reasonable risks that notice might not actually reach every beneficiary."[384] But the *Mullane* Court was comfortable with this result because it did not adhere to the exceptional view. In fact, the *Mullane* Court prefaced its due process analysis by stating that it should consider the "vital interest" the state has in establishing such common fund trusts, concluding that "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified."[385] Thus, the Court in *Mullane* did not consider due process in the abstract, but tailored it to the substantive objectives the procedures at issue were meant to protect.[386] This is also the animating ethos of *Tyson* and the alternative, functional view it presents.

By recognizing those situations where a "day in court" would be absurd, cases like *Mt. Clemens*, *Mullane*, and *Tyson* add a contextual complexity that the "day in court" ideal lacks. But they also bring procedure down to the ground, to ensure that overtime is paid, and that the benefits of common trust administration are available for those with modest trusts. Indeed, the 1966 Amendments to the Federal Rules of Civil Procedure, which resulted in the modern federal class action, were quite explicitly "intended to shake the law of class actions free of abstract categories . . . and to rebuild the law on functional lines

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383 *Id.* at 319.

384 *Id.*

385 *Id.* at 313–14.

386 *See* Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 976 (1993) ("As can be seen most clearly in his unwillingness to impose a requirement of actual notice, [Justice Jackson's] fundamental concern [in *Mullane*] was to render the common trust a viable financial instrument, and for that purpose, he was prepared to compromise certain individualistic values and to allow what I have called a representation of interests.").

responsive to those recurrent life patterns which call for mass litigation through representative parties."[387]

If *Microsoft v. Baker*, *CalPERs*, and *Epic* are any indication, it is unlikely that the Court is ready to resume that approach. By focusing on statutory interpretation, as the majorities did in all three cases, the Court adopted a "minimalism"[388] at odds with the active role in protecting rights envisioned by the Court in *Mt. Clemens* and *Mullane*. And perhaps there are structural reasons for that modesty that justify it.[389]

But decisions like *Tyson* make clear the real human cost of that modesty. Indeed, they reveal the overall emptiness of the exceptional view. The "day in court" is a valuable procedural right, but it is valuable because it protects other underlying rights. Under the exceptional view, however, the "day in court" ideal is used to diminish the very rights that make procedures like a day in court so valuable in the first place.

CONCLUSION

In *Epic*, the Court declined to reassess their allegiance to the "exceptional view" embedded in their arbitration decisions and, to a certain extent, a failure to act is an affirmation of that view. But Justice Ginsburg's dissent in *Epic* provides some hope that functional concerns may again prevail in a future case, that the channel dredged in cases like *Tyson* and *Campbell-Ewald* may one day direct the Court towards a greater appreciation of the functional view. After all, as evidenced by *Mt. Clemens* and *Mullane*, the Court has been awake to functionalism before.

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387 Kaplan, *supra* note 369, at 497.

388 *See* Owen M. Fiss, *The Perils of Minimalism*, 9 THEORETICAL INQUIRIES L. 643 (2008) (criticizing such minimalism).

389 For a good discussion of these structural concerns, see Glover, *supra* note 365, at 266–75.