ARTICLE

# DISCRETION IN CLASS CERTIFICATION

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## INTRODUCTION

*A district court has broad discretion in deciding whether a suit may be maintained as a class action*. Variations on this phrase populate the class action jurisprudence of the federal courts. The sentiment reflects the equity roots of the representative class proceeding—a history that has been thoroughly

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investigated by leading scholars in the field of civil procedure,[1] structured the work of the committee that drafted modern Rule 23,[2] and has repeatedly been embraced by the Supreme Court as a necessary starting point when interpreting and applying the Rule in modern practice.[3] The power of the federal courts to exercise discretion when deciding whether to permit a suit to proceed as a class action has long been treated as an elemental component of a representative proceeding. It is therefore cause for surprise that there is no broad consensus regarding the nature and definition of this judicial discretion in the certification process. The federal courts have not coalesced around a clear or thorough exposition of the question, and the scholarly literature has not provided a sustained analytical treatment.

Since the adoption of the 1966 amendments to Rule 23, lower federal courts have regularly exercised discretion in a range of modes when presented with requests for class certification. The management of class proceedings is perhaps the most widely acknowledged form of this discretion. The authority of district courts to make judgments about how to structure a complex proceeding—and to decide whether practical obstacles to the fair and accurate adjudication of claims on a class-wide basis make certification inappropriate—is a familiar one that enjoys an explicit textual foundation in Rule 23(b)(3) proceedings.[4] Similarly, district courts sometimes exercise discretion in defining the parameters of the class definition and deciding when subclasses are necessary, often acting independently of any proposals made by the parties.[5] And district courts—frequently acting with the imprimatur of the courts of appeals—have invoked a broad range of considerations to decide when class certification is desirable, appropriate, or

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1 *See generally* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) (tracing the roots of the class action device); Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1858-61 (1998) (examining the device's English antecedents).

2 *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 375-80 (1967) (discussing the equity roots of the class action provision revised and expanded in the 1966 amendments).

3 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 832-41 (1999) (surveying the use of class actions in state equity courts predating the Rules Enabling Act); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997) ("Rule 23, governing federal-court class actions, stems from equity practice and gained its current shape in an innovative 1966 revision.").

4 *See* FED. R. CIV. P. 23(b)(3)(D) (requiring that a district court consider "the likely difficulties in managing a class action" in deciding whether to authorize certification of (b)(3) class actions).

5 The authority to make judgments on such matters is also made clear in the Rule, though the textual basis for considering them sua sponte is more debatable. *See* FED. R. CIV. P. 23(c)(1)(B) (requiring definition of the class for certification); FED. R. CIV. P. 23(c)(5) (permitting the creation of subclasses).

consistent with the underlying substantive law that governs the disputes brought before them. In (b)(3) proceedings, these determinations are often explained as an application of the superiority requirement, and in (b)(2) actions they are sometimes described in terms of the prerequisites for injunctive relief. However, lower courts have also found these forms of discretion to be inherent in Rule 23, requiring judges to consider the impact of substantive law on the certification question without regard to any specific textual mandate.[6]

Three propositions have infused this practice of discretionary class certification. The first is an understanding among judges that the modern class action entails an element of public trust. When a plaintiff comes into court asking to prosecute the claims of numerous people she has never met, she is not asserting a purely personal prerogative. Rather, the plaintiff is requesting that the court employ its authority to initiate a type of proceeding that must be justified with reference to broader public values: the procedural and systemic values embodied in Rule 23 itself, and the policies of the underlying law governing the dispute. Second, class actions entail substantial uncertainty. The question whether claims can be faithfully adjudicated and successfully managed on a classwide basis is often difficult to predict at the inception of a proceeding. And third, this combination of broad public interests and factual indeterminacy sometimes calls for experimentation as courts test the capacity of the class action to facilitate the "just, speedy, and inexpensive" resolution of mass claims.[7]

Because of these realities, discretion in class certification—in particular, the discretion not to certify a class even though the threshold requirements of the Rule appear to be satisfied—serves a vital systemic role. Discretion is a safety valve. It enables district judges to avoid issuing certification orders that would undermine substantive policies or set in motion unnecessary and counterproductive remedies. In the absence of this tool, lower federal courts are left only with a blunt instrument to avoid adverse results in difficult cases: categorical limitations on the threshold conditions of certification, which threaten to constrain class litigation in all types of disputes. At the same time, the discretionary power to decline certification raises legitimate questions about fairness, consistency of application, and the danger that courts will make inappropriate legislative judgments. The courts of appeals have addressed these concerns in a range of cases over the last five decades, and more attention to the limits of these discretionary powers is needed.

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6 *See, e.g.*, Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 643 (6th Cir. 2006) (noting a district court's "inherent power to manage and control its own pending litigation").

7 FED. R. CIV. P. 1.

The recent decision of the Supreme Court in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*[8] makes the need for a systematic examination of these matters more salient. In one of the few passages that garnered a majority of an otherwise fractured opinion, the Court used language that could be read to deprive district courts of any discretion when deciding whether certification is appropriate in a given case[9]—a holding that would upend forty-five years of practice under modern Rule 23. Using language to describe Rule 23(b) that I have found in no other reported decision, the majority explained that "[t]he discretion suggested by Rule 23's 'may' is discretion residing in the plaintiff [and not the district court]: He may bring his claim in a class action if he wishes."[10] The Court did not indicate that it was effecting any radical change, nor did it acknowledge any need to harmonize its assertion with the decades of federal judicial holdings recognizing the discretion of district courts in matters related to certification, including multiple statements by the Court itself.[11] Rather, the majority spoke in a register that suggested it did not believe it was saying anything surprising.

To paraphrase Professor David Shapiro, in a society where revolution is not the order of the day, it would disserve the drafters of the Federal Rules to impute a revolutionary purpose to unremarkable language.[12] A ruling that lower federal courts lack discretion in deciding whether a suit should be certified for class treatment would be revolutionary, and a careful examination of the majority's discussion of Rule 23 in *Shady Grove* makes clear that the ruling calls for no such revolution.

This Article undertakes three tasks. Part I examines the abuse of discretion standard in class certification and its place in broader academic and judicial discussions about the nature of procedural discretion. Part II then sets forth a descriptive account of the discretion that federal courts have understood themselves to possess in class certification proceedings under modern Rule 23, and it attempts to develop a useful taxonomy in describing the different modes in which that discretion has operated. My focus is legal doctrine as manifested in reported judicial decisions, an incomplete source

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8 130 S. Ct. 1431 (2010).

9 *Id.* at 1437-38.

10 *Id.* at 1438.

11 *See, e.g.*, Califano v. Yamasaki, 442 U.S. 682, 703 (1979) ("The certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court.").

12 *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 941-42 (1992) (discussing judicial resistance to change imposed by the plain language of statutes).

for discerning the actual practice of trial courts, but still indispensable in assessing the parameters within which that practice has unfolded. This overview is the product of close analysis of approximately one hundred class action rulings that discuss the nature of discretion in class certification, drawn, in turn, from the review of a larger universe of cases assembled with the help of an invaluable research assistant. I make no claim that the results are comprehensive, but I believe that they make possible a representative account of the range and types of discretion that lower federal courts have understood themselves to possess when considering certification requests.

With this body of material set forth for discussion, Part III provides an argument about the systemic function of discretion in class certification and the institutional implications of different species of discretion in the certification process. Part III also reexamines the *Shady Grove* decision in light of the preceding discussion, asking how much past practice in class adjudication the ruling unsettles. The answer to that question is: not much. *Shady Grove* can be harmonized with the large body of discretionary practice undertaken by lower federal courts in class certification proceedings, and there is reason to hope that this harmonization will prompt more active attention to the nature and boundaries of lower court discretion in class action litigation going forward.

## I. THE ABUSE OF DISCRETION STANDARD IN CLASS CERTIFICATION

The classic discussion of procedural discretion and appellate review in the academic literature comes from Judge Henry Friendly's canonical lecture *Indiscretion About Discretion*.[13] Throughout that essay, Judge Friendly emphasizes the need to distinguish between respective areas of competence and systemic concerns when defining the relationship between trial courts and appellate courts in discretionary matters.[14] Determinations that benefit from "the trial court's superior opportunities to reach a correct result" through direct contact with parties, witnesses, and events are more appropriate recipients of wide discretionary berth, as are those situations that require a balancing of factors "so numerous, variable and subtle that the fashioning of rigid rules would be more likely to impair [the trial judge's] ability to deal fairly with a particular problem than to lead to a just result."[15]

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[13] Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982). Judge Friendly drew upon Professor Rosenberg's important treatment of the issue in Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971).

[14] *See generally* Friendly, *supra* note 13.

[15] *Id.* at 760 (alteration in original) (quoting United States v. McCoy, 517 F.2d 41, 44 (7th Cir. 1975) (Stevens, J.)).

On the other end of his spectrum, Judge Friendly places those cases in which "Congress has declared a national policy and enlisted the aid of the courts' equity powers in its enforcement"—circumstances where "the need for uniformity and predictability demand thorough appellate review."[16] This analytical framework, placing matters that largely concern factual determinations in opposition to matters involving substantive legal policy, is now regularly incorporated into discussions about judicial discretion. The distinction tracks and expands upon the terms "primary discretion" and "secondary discretion" that Professor Rosenberg had earlier introduced into the literature and that are still in use.[17]

It is worth noting how Judge Friendly uses this analytical framework in his published lecture. The Judge saw courts exhibiting a lack of appreciation for the substantive policy implications of their procedural rulings. But this did not lead him to conclude that the ability of courts to exercise judgment should be reduced by more strictly defined legislative rules. Rather, Judge Friendly emphasizes the distinction, often lost, between the overall role of discretion in a judicial system and the prerogative of trial courts, as opposed to appellate courts, in exercising that discretion:

> A good deal of confusion has been generated by failure to distinguish between two uses of the word "discretion." The one with which I primarily concern myself today, namely how far an appellate court is bound to sustain rulings of the trial judge which it disapproves but does not consider to be outside the ball park—a question of the allocation of an admitted power within the judicial system—is quite different from the question whether, as a normative matter, it is wise for lawmakers to insist on rigid rules in the interest of certainty, no matter how harshly these may operate in some cases, and whether it is not better to prescribe accordion-like standards that afford the courts some dispensing powers to accomplish what they perceive to be justice. To say the latter does not necessarily entail that such discretionary power should be vested predominantly in the trial court rather than in the entire judicial system.[18]

*Indiscretion About Discretion* urges an analytical shift toward appellate constraints in the administration of those flexible standards that have substantive policy implications. In Judge Friendly's view, "broad judicial

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16 *Id.* at 783-84.

17 *See* Rosenberg, *supra* note 13, at 637 (defining "primary discretion" as the power of courts to make judgments free from "decision-constraining rules," and "secondary discretion" as a limitation on the error-correcting function of lower courts in a multilevel court system).

18 Friendly, *supra* note 13, at 754-55.

review is necessary" in such cases "to preserve the most basic principle of jurisprudence" that "we must act alike in all cases of like nature."[19]

A year following the publication of his lecture, with his thoughts in this area presumably sharpened by the exercise, Judge Friendly had the opportunity to write his views into law. In *Abrams v. Interco Inc.*, Judge Friendly penned an opinion agreeing with a district court that problems of notice and manageability made a nationwide class inappropriate.[20] Though affirming the denial of certification, the Judge took the occasion to discount the relevance of the abuse of discretion standard to questions of class certification:

> Abuse of discretion can be found far more readily on appeals from the denial or grant of class action status than where the issue is, for example, the curtailment of cross-examination or the grant or denial of a continuance. . . . While no two cases will be exactly alike, a court of appeals can no more tolerate divergence by a district judge from the principles it has developed on this subject than it would under a standard of full review—and this even though the district judge has adduced what would be plausible grounds for his ruling if the issue were arising for the first time. Except to the extent that the ruling is based on determinations of fact . . . or where the trial judge's experience in the instant case or in similar cases has given him a degree of knowledge superior to that of appellate judges, as often occurs, review of class action determinations for "abuse of discretion" [would] not differ greatly from review for error.[21]

Judge Friendly's formulation continues to shape the case law in the Second Circuit, though in a strangely altered form: that circuit now maintains that appellate courts are "noticeably less deferential when the district court has denied class status than when it has certified a class."[22] Why an appellate court should show greater deference in its review of an order granting

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19 *Id.* at 758.

20 719 F.2d 23, 30-31 (2d Cir. 1983).

21 *Id.* at 28.

22 Parker v. Time Warner Entm't Co., 331 F.3d 13, 18 (2d Cir. 2003) (alterations omitted); *see also* Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 225 (2d Cir. 2006) (citing *Parker*, 331 F.3d at 18) ("When reviewing a denial of class certification, we accord the district court noticeably less deference than when we review a grant of certification."), *overruled on other grounds by* Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196 (2d Cir. 2008). The Vermont Supreme Court has politely disassociated itself from this unbalanced formulation of the standard. *See* Salatino v. Chase, 939 A.2d 482, 485 (Vt. 2007) ("We . . . decline to construe Vermont Rule 23 as the Second Circuit construed the analogous federal rule . . . .").

certification than in its review of an order denying certification is not apparent.[23]

Other federal courts of appeals have exhibited a range of approaches when defining the procedural discretion that district courts enjoy in the class certification process. The practice of giving deference on the highly fact-bound components of the certification analysis is widespread and apparently uncontroversial, as Judge Friendly argued it should be. For example, in a 1976 ruling, *Hornreich v. Plant Industries, Inc.*, the Ninth Circuit upheld a district court's denial of certification in a shareholder derivative suit on adequacy of representation grounds.[24] Explaining that "[d]etermination of right to bring a class action . . . is in the considered discretion of the trial court," the Ninth Circuit observed that "the evidence is not wholly undisputed" and "there is a possibility that some of the facts [regarding adequacy] might not in themselves prevent a derivative suit."[25] Nonetheless, the court held that, "when considered in totality, we cannot say that the district court abused its discretion in denying appellant's claim to proceed."[26] Nearly thirty-five years later, the Eighth Circuit employed a similar standard in *Rattray v. Woodbury County*, upholding a district court's finding that a plaintiff's significant delay in seeking class certification had revealed the plaintiff and her lawyers to be inadequate class representatives.[27] "Having worked with counsel for more than a year in this case," the court explained, "the district court has a better vantage point from which to determine whether the delay in moving for certification suggests that [plaintiff's] counsel would not effectively pursue the interests of absent class

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23 The proposition appears to trace back to *Robidoux v. Celani*, 987 F.2d 931 (2d Cir. 1993). *Robidoux* mistakenly cites *Abrams* as already imposing this distinction between review of orders granting certification and review of orders denying certification, and it offers no further analysis for why this distinction is appropriate or desirable. *Id.* at 935. There is no basis for such a pro-certification distinction in the text of Rule 23 itself, and any argument that the underlying law in a given case strongly favors certification would have to operate on a substance-specific rather than a trans-substantive basis. *See* Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1067 (2013) (discussing the potential role of the underlying substantive law in shaping the actions of a court in complex litigation).

*Robidoux* also carries forward Judge Friendly's observation that nondeferential review of class certification is warranted where appellate courts "have built a body of case law with respect to class action status." 987 F.2d at 935. That is a defensible approach to appellate review of certification decisions (though not the only one, as the cases in this Part demonstrate), but it offers no support for a distinction between appellate review of certification grants and review of certification denials, as the *Robidoux* court seemed to believe.

24 535 F.2d 550, 552 (9th Cir. 1976).

25 *Id.*

26 *Id.*

27 614 F.3d 831, 836-37 (8th Cir. 2010).

members."[28] Appellate courts have shown similar deference to district courts on questions of manageability, provided that the trial judge's ruling is undergirded by a careful examination of the issue,[29] and on questions of commonality and predominance when the necessary judgments involve a close examination of ambiguous facts.[30]

Appellate courts have also given deference on certification questions that implicate broader issues of procedural or legislative policy—the types of cases for which Judge Friendly argued that trial courts should have circumscribed authority. In one recent ruling, *Shook v. Board of County Commissioners of El Paso*,[31] the Tenth Circuit embraced this species of deference in unusually explicit terms. The case involved a 23(b)(2) action for injunctive relief filed on behalf of mentally ill inmates in a Colorado county jail who alleged unconstitutional confinement conditions and inadequate care.[32] The trial judge refused to certify, finding that the breadth with which the plaintiffs had defined the class presented difficulties in crafting a standard of care applicable to all class members and introduced too many questions that would depend upon members' individual circumstances.[33] The appellate court found these to be acceptable grounds for the district court's denial of class certification, despite substantial room for disagreement about its conclusions. In affirming the denial of class certification, the Tenth Circuit explicitly reserved the possibility that another district court might come to a different conclusion in a future case, stating"[w]hile we very well may have made a different decision had the issue been presented to us as an initial matter, and while other district courts perhaps could have chosen, or could choose, to certify similar classes, we cannot say that the district court's assessment was beyond the pale."[34] In reviewing the obstacles to certification

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28 *Id.* at 836; *see also* De Leon-Granados v. Eller & Sons Trees, Inc., 497 F.3d 1214, 1220-21 (11th Cir. 2007) (affirming the district court's certification and deferring to its decision to delay resolving a dispute about the adequacy of the named representatives until a fuller factual record was developed).

29 *See, e.g.*, *In re* Sch. Asbestos Litig., 789 F.2d 996, 998, 1011 (3d Cir. 1986) (expressing "misgivings" about the manageability of a nationwide asbestos abatement suit, but affirming class certification because "[m]anageability is a practical problem, one with which a district court generally has a greater degree of expertise and familiarity than does an appellate court").

30 *See, e.g.*, Mayer v. Mylod, 988 F.2d 635, 640-41 (6th Cir. 1993) (affirming a district court's denial of certification in a securities action, despite some errors of law in framing questions under Rule 23(a), because "the district court is in the best position to determine whether the complaints of investors who rely on different corporate statements are sufficiently similar to warrant class certification").

31 543 F.3d 597 (10th Cir. 2008).

32 *Id.* at 600-01.

33 *Id.* at 602-03.

34 *Id.* at 603-04.

that the trial judge identified, the court acknowledged that "the sorts of problems highlighted by the district court may have been mitigated, or perhaps avoided, by the use of subclasses,"[35] but the Supreme Court has placed the onus of proposing subclasses on the party seeking certification,[36] and the *Shook* court found that the trial court did not abuse its discretion in declining to consider the issue sua sponte.[37] An appellate court's role, the Tenth Circuit found, is to ask "whether the district court's decision 'exceeded the bounds of permissible choice,' a standard that . . . acknowledges the possibility that polar opposite decisions may both fall within the 'range of possible outcomes the facts and law at issue can fairly support.'"[38]

*Shook*'s statement of appellate deference to trial court discretion is one of the broadest I have discovered in a case where certification turns on questions of underlying substantive policy rather than on factual disputes or management problems. But it does not stand alone. Many circuits have found that broad policy considerations call for discretion in the certification decision, often through the mechanism of the superiority requirement, and they have concluded that appellate courts should review such discretion deferentially.

Several such rulings may be found in cases arising under the federal Truth in Lending Act (TILA), a statute that played a significant role in early interpretations of the 1966 version of Rule 23. Under the original version of the Act enacted in 1968, creditors were subject to statutory damages for each instance in which they failed to disclose specified information "to any person"[39]—a provision that opened the door to crushing aggregate liability in some cases. When the dangers of the TILA became apparent, Congress amended the statute to set a $500,000 cap on total recovery in class action proceedings and to give courts leeway to determine appropriate total damages, taking into account "among other relevant

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35 *Id.* at 606.

36 *See id.* at 607 (citing U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 408 (1980)).

37 *See id.* ("While the district court could have *sua sponte* suggested subclassing as a possible solution to Rule 23(b)(2) problems, the Supreme Court has indicated that courts do not bear any obligation to do so . . . ."). As other courts have pointed out, *Geraghty* affirmed the portion of the Third Circuit ruling that required the district court on remand to consider the issue of subclasses. *See, e.g.*, Fink v. Nat'l Sav. & Trust Co., 772 F.2d 951, 961 (D.C. Cir. 1985) ("While the court need not take initiative, *Geraghty* holds, it must weigh the possibility of subclasses or of certifying a narrower class."). "[T]he burden of constructing subclasses"—that is, determining what specific subclasses might resolve potential obstacles to certification—falls exclusively on the parties. *Geraghty*, 445 U.S. at 408.

38 *Shook*, 543 F.3d at 610 (quoting United States v. McComb, 519 F.3d 1049, 1053 (10th Cir. 2007)).

39 15 U.S.C. § 1640(a) (1968), *amended by* 15 U.S.C. § 1640(a) (1976).

factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional."[40] Under these amendments, Congress placed its imprimatur upon the use of the class action to enforce the TILA, but it invited courts to use their judgment in determining appropriate damages and, by implication, whether class treatment was appropriate at all. Congress, in other words, had "declared a national policy and enlisted the aid of the courts' equity powers in its enforcement"—the sort of circumstance that Judge Friendly believed called for "uniformity and predictability" by way of "thorough appellate review."[41]

But several circuits followed a different path, treating district court certification rulings in TILA cases with deference and exhibiting tolerance for a lack of strict uniformity. *Watkins v. Simmons & Clark, Inc.*[42] is one such case. In *Watkins*, the Sixth Circuit reviewed the decision of a district court to deny certification of a class comprising about one thousand customers of a small Michigan retailer who claimed TILA violations in the wording of a retail credit sales contract.[43] The district court found these violations to be only technical in nature, emphasized that customers had suffered no actual damages, and noted that the company had quickly remedied the error after the violation was called to its attention.[44] In light of these facts, the trial judge concluded that "maintenance of the class action . . . [was] an unnecessary overreaction to the violation here" and hence not a superior method of granting relief under Rule 23(b)(3).[45] The Sixth Circuit affirmed, but only because of the deference it believed was due to the district court. "[T]he technical nature of the violations may well argue in favor of the appropriateness of the class action here," the court explained, as class certification might be necessary to call violations to the attention of consumers who would otherwise never learn of them.[46] Characterizing these arguments as "persuasive," the court said that "[w]ere the certification issue before us *de novo* we may very well have certified the class."[47] Reversing the district court's decision, however, would "as a practical matter" constitute a holding that certification is required in all cases, "effectively negat[ing] the

40 15 U.S.C. § 1640(a) (1976).
41 Friendly, *supra* note 13, at 783-84.
42 618 F.2d 398 (6th Cir. 1980).
43 *Id.* at 398-99.
44 *Id.* at 403.
45 *Id.*
46 *Id.* at 403-04.
47 *Id.* at 404.

discretion of a district court to certify a class."[48] The court therefore affirmed, reiterating the general proposition that TILA class actions are "desirable and should be encouraged" and holding that "class certification should be denied only in a case involving technical violations and only where the district court, in the exercise of discretion, believes that certification is unwarranted."[49]

Despite setting forth a broad statement about legislative policy, the Sixth Circuit preserved a role for district courts to exercise discretion in determining when the purposes of the TILA would be furthered by class certification in a given case. Other circuits followed the Sixth Circuit's lead on this point,[50] and, in some cases, TILA rulings on appellate deference were translated to disputes involving other substantive legal regimes.[51]

Of course, appellate courts have also reviewed certification decisions more aggressively in cases implicating substantive law questions or broad disputes over aggregation policy. For example, in the 1970s and 1980s, a number of circuits adopted strong presumptions in favor of class treatment in civil rights cases, and they exercised invasive review when district courts denied certification in circumstances that undermined that substantive commitment.[52] The courts of appeals have also articulated strong aggregation policies in some commercial areas and shown little deference when district courts have failed to enforce those policies. Thus in *Kirkpatrick v. J.C. Bradford & Co.*, the Eleventh Circuit reversed the order of a district court denying class certification on predominance and adequacy grounds in a securities action in which the plaintiffs claimed that a brokerage house had

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48 *Id.*

49 *Id.*

50 *See, e.g.*, Shroder v. Suburban Coastal Corp., 729 F.2d 1371, 1377-78 (11th Cir. 1984) (affirming the district court's denial of certification in a case involving approximately five hundred home purchasers given documents by a title company alleged to contain TILA violations and giving the district court discretion to determine when a class action is a "superior" remedy in cases involving technical TILA violations).

51 For example, the decision of the Eleventh Circuit in *Shroder* played a role in another Eleventh Circuit case, *Hines v. Widnall*, involving alleged violations under Title VII of the Civil Rights Act of 1964. 334 F.3d 1253, 1254-55 (11th Cir. 2003). The Eleventh Circuit affirmed a denial of certification based on a lack of typicality, emphasizing that "whether, in reviewing the record de novo, we would certify the class is of no consequence" and that the district court's conclusions about typicality were "within the range of permissible choice and thus not a clear error of judgment." *Id.* at 1257.

52 *See, e.g.*, Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 487 (5th Cir. 1982) (articulating a strong presumption "in favor of making [the class procedure] available to litigants when possible" in a student civil rights case); Coley v. Clinton, 635 F.2d 1364, 1378 (8th Cir. 1980) (insisting that Rule 23(b)(2) "must be read liberally in the context of civil rights suits," and that "[t]his principle of construction limits the district court's discretion").

circulated misleading information concerning an oil and gas fund that later collapsed.[53]

The appellate court began by reversing the district court on a merits question, finding that plaintiffs were entitled to pursue a fraud-on-the-market theory based on a common course of misleading statements issued by the fund and its agents.[54] Rather than remanding for reconsideration of the predominance analysis in light of this revised standard, the appellate court found that "[i]n view of the overwhelming number of common factual and legal issues presented by plaintiffs' misrepresentation claims . . . the mere presence of the factual issue of individual reliance could not render the claims unsuitable for class treatment."[55] The Eleventh Circuit determined that it was appropriate to set a uniform policy on aggregation where the complaint "alleges a single conspiracy and fraudulent scheme against a large number of individuals" and it constrained the discretion of trial courts to deny certification in such cases.[56] The court also found that the district court had applied an erroneous standard in assessing the adequacy of the named plaintiffs to represent the class.[57] Here, in contrast, it did remand for a new determination by the district court after correcting the adequacy standard, explaining that "[i]n contrast to the more strictly legal questions presented by the [fraud-on-the-market and predominance issues], the adequacy of class representation is primarily a factual issue that is best left for determination by the district court."[58]

Finally, Antonin Scalia had an opportunity to speak about the relationship between trial and appellate courts in matters relating to discretion and class certification in a dispute that he heard while a judge on the D.C. Circuit. The views he expressed in that case are an important point of reference in assessing the decision he later authored in *Shady Grove*, as Part III explains. In *Fink v. National Savings & Trust Co.*, the D.C. Circuit, per Judge Abner Mikva, reversed several rulings of a district judge in an ERISA dispute.[59] On the question of class certification, Judge Mikva wrote that the trial court had abused its discretion when it denied class certification on typicality and

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53 827 F.2d 718, 720-21, 728 (11th Cir. 1987).

54 *Id.* at 722 ("We cannot agree, however, with the court's rejection of the fraud-on-the-market theory as a basis for class action treatment.").

55 *Id.* at 724-25.

56 *Id.* at 725 (internal quotation marks omitted).

57 The district court required class representatives to "demonstrate . . . that individually they will pursue with vigor the legal claims of the class," a prerequisite that the appellate court found did "not vindicate the policies and purposes of Rule 23" nor the substantive interests of the underlying regulatory scheme. *Id.* at 727.

58 *Id.* at 728.

59 772 F.2d 951, 953 (D.C. Cir. 1985).

adequacy grounds without conducting any hearings or making any findings, despite the presence of substantial and contested factual issues, leaving the appellate court with no meaningful basis to conduct its review.[60] Judge Scalia strenuously objected, arguing that this form of appellate review intruded inappropriately upon the district court's discretionary control over class certification.[61] Reminding the majority "that the District Court has broad discretion in determining whether a suit should proceed as a class action," Judge Scalia offered a different view of the factual record.[62] Certain "undisputed facts" suggested the possibility of defenses peculiar to the named representatives and imperfectly aligned interests within the class, he explained, and these potential obstacles to certification were "more than enough to prevent our finding the District Court's refusal to certify [on typicality and adequacy grounds] an abuse of discretion."[63] The fact that the trial court had not identified these potential obstacles to certification as the basis of its holding did not change the analysis, in Judge Scalia's view.[64] It was enough that the trial court would have been acting within the permissible bounds of its discretion had it relied upon these features of the suit to deny certification.[65] Reversing under those conditions, Judge Scalia said, "represent[ed] . . . a deep encroachment upon the domain of the District Court."[66]

As framed by Judge Scalia, the contested certification questions in *Fink* were rooted in core questions of substantive law and aggregation policy: whether the possibility that the named plaintiffs "might be subject to defenses of estoppel inapplicable to other class members" or "might have significantly different interests" from other class members would authorize a district court to exercise discretion in declining to certify, a decision that would in turn be insulated from invasive appellate scrutiny.[67] His insistence upon the domain of the trial court in such matters places him solidly on the deferential end of the spectrum, contra Judge Friendly's more appellate-centered approach. As Part III explains, that statement of principle would be inconsistent with an excessively broad reading of Justice Scalia's later opinion in *Shady Grove*.

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60 *Id.* at 960.
61 *Id.* at 965 (Scalia, J., concurring in part and dissenting in part).
62 *Id.* at 964-65.
63 *Id.*
64 *Id.* at 965.
65 *Id.*
66 *Id.*
67 *Id.*

## II. AN OVERVIEW OF DISCRETION UNDER MODERN RULE 23

### A. *The Period of Transition Following the 1966 Revisions and Experimentation in the Face of Uncertainty*

In the years following the 1966 amendments to Rule 23, federal courts faced the task of implementing an entirely new type of procedural mechanism and, in the case of Rule 23(b)(3), an entirely new type of proceeding. Of necessity, they engaged in experimentation, becoming acquainted with the operation of the new Rule and determining what types of representative suits would be possible under its provisions. In undertaking this effort, the lower federal courts were exercising a species of discretion, and some of them explicitly described their efforts in that language.

For example, in one federal securities action, *Alameda Oil Co. v. Ideal Basic Industries, Inc.*, filed in 1968, Judge William Doyle of the District of Colorado had to decide whether a class action could proceed over claims of misrepresentation in the merger of two mineral and construction companies.[68] The action carried the potential for "tremendous" damages,[69] and although the court believed "the basic requisites for a class action [we]re satisfied," it had questions about the merits of the fraud claim and concerns about the expense that plaintiffs would assume if the court were "to set all of the class action machinery in motion at [that] time."[70] The court thus decided that it would be "the better part of discretion" to defer notifying class members of the proceeding and begin with "a bifurcated trial on the threshold issues at least before proceeding further."[71] Only if the plaintiffs' claims survived this initial test would they "notify the members of the class and go on from there."[72] The court was candid in saying that it was uncertain about its experiment: "We are aware, of course, that the suggested approach is somewhat innovative, but the Rule 23 procedure itself is new and requires such efforts."[73] As another judge hearing a securities action in the Southern District of New York had explained a few years earlier, the newly revised Rule "added . . . some devices to aid in the management of" class actions, and those tools could "provide[] the flexibility to permit [an] action to proceed" even where a lack of strict uniformity among claimants

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68 326 F. Supp. 98, 100-01 (D. Colo. 1971).
69 *Id.* at 101.
70 *Id.* at 105.
71 *Id.*
72 *Id.*
73 *Id.*

"might have led to a dismissal of a class action under the old rule."[74] And, of course, the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, which imposed some specific constraints on innovation by district courts, arose out of a trial judge's extensive efforts to make sense of the appellate direction it was receiving in crafting an effective and practicable mechanism for recovery in a securities dispute.[75] Lower federal courts hearing class actions in the years immediately following the 1966 amendments necessarily operated in an experimental mode.

Experimentation, in turn, provided the practical and doctrinal knowledge from which the courts of appeals would sometimes craft more constraining rules. A ruling by the Second Circuit in a Rule 23(b)(3) securities class action, issued by a panel that included Judge Friendly, is illustrative. The case, *Korn v. Franchard Corp.*, involved a prospectus issued by the general partners in a real estate venture.[76] Shareholders in the venture alleged that the prospectus contained fraudulent and misleading statements.[77] The district court concluded that typicality, adequacy of representation, and predominance all made certification inappropriate for the issue of shareholder reliance on the prospectus.[78] The court of appeals reversed, finding that "where, as here, there is a single written document charged with important omissions,"[79] the case for certification is so strong that "a district judge could not decide against allowing a class action without abusing his discretion."[80] The court canvassed recent securities rulings presenting similar facts and the approaches those courts had taken to the reliance question, finding a strong presumption that "common questions predominate" in such cases.[81]

> We do not cite these formulations to tell the District Court that it should or must follow any of them. Our purpose is only to show that, though many paths have been taken, the federal courts have concurred in adopting procedures and rules which can reduce the difficulties of showing individual

74 Kronenberg v. Hotel Governor Clinton, Inc., 41 F.R.D. 42, 44-45 (S.D.N.Y. 1966).

75 417 U.S. 156, 161-69 (1974).

76 456 F.2d 1206, 1207 (2d Cir. 1972).

77 *Id.*

78 *Id.* at 1207-08.

79 *Id.* at 1212.

80 *Id.* at 1208.

81 *Id.* at 1213. In a related study, Professor Issacharoff examined the development of the doctrine of reliance in consumer protection law and argued that "the amenability of certain claims to aggregate treatment turns on a clarification of the substantive standards for reliance," concluding that the presence of a formal reliance requirement in the substantive law need not impede class certification in the typical case. Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 TUL. L. REV. 1633, 1636 (2000).

> reliance. . . . It may be, as some recent prophecies have it, that future history will pulverize the current hope of avoiding unduly cumbersome litigation on the reliance phase of these 10b-5 suits, but we are not yet sure enough of that speculation to insist, as a court applying existing Rule 23, that the present course must be sharply revised—at least not on the relatively simple facts of this case.[82]

The court of appeals felt confident enough in the treatment of reliance that had emerged through experimentation in these other cases that it declined to remand the case after correcting the district court's other errors, concluding that it was appropriate in this area of substantive law to impose a legal rule that left little room for trial-level discretion.[83]

As the ensuing years made clear, discretion to experiment cannot amount to a suspension of the Rule's requirements, nor can a trial court defer a robust certification inquiry in the name of experimentation. The 1966 version of Rule 23(c)(1)(C) expressly invited district courts to make "conditional" determinations, and some courts relied upon that language to authorize class actions at an early stage of the proceedings without full confidence that an action was appropriate for class treatment.[84] Even where this use of conditional certification reflected genuine diligence on the part of the trial court,[85] rather than the kind of "certify now and worry later" approach that eventually came under heavy criticism,[86] the practice had the

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82 *Korn*, 456 F.2d at 1213.

83 *Id.* at 1208.

84 *See, e.g.*, Coburn v. 4-R Corp., 77 F.R.D. 43, 46 (E.D. Ky. 1977) ("Determinations of class action are only conditional and may always be altered or amended before a decision on the merits." (citing FED. R. CIV. P. 23(c)(1))); Ridgeway v. Int'l Bhd. of Elec. Workers, Local No. 134, 74 F.R.D. 597, 601, 604 (N.D. Ill. 1977) (relying upon Rule 23(c)(1) to enter a "conditional order" of certification despite potential commonality problems, which could be "winnow[ed] out" at later stages of the proceeding).

85 One prominent example of this is Judge William Schwarzer's opinion in *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24 (N.D. Cal. 1977). Judge William Schwarzer, a noted expert in the fields of procedure and judicial administration, invoked the language of former Rule 23(c)(1)(C) to explain that conditional certification was "nothing more than a tentative determination for procedural purposes" that reserved to the court the opportunity to "determine whether any further proceedings directed to the issue of relief, if any, may be maintained as a class action" and address "such questions as subclassing, notice and intervention." *Id.* at 47.

86 The quoted language is from *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000), a significant ruling that reined in certification practices by trial courts in Texas. For another example of an appellate ruling from the same era in which the court disapproved of the aggressive use of conditional certification, see *Andrews v. AT&T*, 95 F.3d 1014, 1019, 1025 (11th Cir. 1996), *abrogated on other grounds by Douglas Asphault Co. v. QORE, Inc.*, 657 F.3d 1146 (11th Cir. 2011), in which the Eleventh Circuit reversed a district court's certification of a massive worldwide class action against telecom companies for their hosting of 900-number telemarketing programs alleged to constitute illegal gambling. In response to concerns about the management of the proceeding,

capacity to impose settlement pressure on defendants and undermine the interests of plaintiffs in a manner exceeding the legitimate scope of the Rule's authority. The 2003 amendments to Rule 23 therefore eliminated all reference to conditional certification, with the Advisory Committee's note emphasizing that "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met."[87]

Experimentation in class certification, however, is not exclusively an artifact of the period following the 1966 amendments, nor need it indicate that district courts have shown a lack of diligence when resolving tough questions. Lower federal courts have found that discretion to experiment is sometimes necessary when they are presented with novel and intractable litigation challenges. A 1993 decision of the U.S. Court of Appeals for the Fourth Circuit helps make this point. In *Central Wesleyan College v. W.R. Grace & Co.*, an asbestos case arising from the abatement and property damage phase of that decades-long litigation, the Fourth Circuit affirmed a district court's decision to certify a nationwide class under Rule 23(b)(3) of all public and private colleges and universities that owned buildings containing friable asbestos, which federal law required them to remove.[88] There were many liability issues common to the class, but also serious questions about predominance and manageability, coupled with a history of similar litigation in the Third Circuit in a nationwide damages action on behalf of public school districts that gave reason for skepticism.[89] Having recounted that history, the Fourth Circuit noted that it reviewed the district court's

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the district court insisted that it "can and will assemble the resources that [the proceeding] requires," but the court of appeals found this assurance inadequate to meet threshold certification requirements and inappropriate insofar as it suggested certifying without regard to the impact upon judicial economy. *Id.* at 1025.

87 FED. R. CIV. P. 23(c)(1) advisory committee's note to the 2003 amendments. Prior to its amendment, Judge Marvin Frankel foresaw the potential for Rule 23(c)(1)(C) to cause mischief and treated the provision with caution, acknowledging that it "may be a source of some comfort to the judge confronting the pressure to rule in some fashion when he can perceive only dimly or not at all the dimensions of the material facts," but that "we should avoid finding too much comfort in this assurance that there will be time to correct the mistakes." Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 42 (1968).

88 6 F.3d 177, 190 (4th Cir. 1993).

89 *Id.* at 182. The Third Circuit had affirmed the certification of a nationwide class action for compensatory damages in *In re School Asbestos Litigation*, 789 F.2d 996, 998-99 (3d Cir. 1986). Six years later, the Third Circuit reported in a subsequent appeal that "numerous delays" had plagued preparations for trial, and the district court was only prepared to move forward on a trial regarding conspiracy and concert of action that was divided across several trials with discrete groups of defendants "[i]n order to keep trial manageable." *In re* Sch. Asbestos Litig., 977 F.2d 764, 772 (3d Cir. 1992). In that same appeal, the district judge was removed from the case because of an appearance of partiality created by his attendance at a plaintiff-centric conference, creating yet more challenges in bringing the case to trial. *Id.* at 778-88.

ruling "with the caution befitting contemplation of any experimental mechanism."[90] Even so, the court affirmed.[91]

The district court had expressly invoked the conditional certification provision of old Rule 23(c)(1)(C) in its order, a point that the Fourth Circuit emphasized in explaining its affirmance.[92] Some factual questions remained to be answered about the suitability of the named plaintiff to represent the entire class of defendants, questions as to which the district court "defer[red] a final decision" pending later discovery to determine which products were installed in which institutions.[93] Under currently controlling authority, a district court would need to satisfy itself that the requirements of Rule 23 were satisfied prior to certifying the class, with sufficient discovery in the certification hearing to support a "rigorous analysis."[94] That component of the district court's ruling probably does not survive subsequent doctrinal developments.

But the primary role that the Fourth Circuit recognized for experimentation in class certification did not concern the district court's deferral of questions relating to typicality and adequacy. Rather, the greatest source of concern related to the manageability of large asbestos proceedings and the systemic benefit that class certification would provide when measured against other forms of consolidation—questions that lower federal courts were struggling to answer at the time. The Fourth Circuit acknowledged the troubled history of the school district litigation as a cautionary tale but also believed that the district court's certification was based on a reasonable hope that "[l]essons . . . have been learned from the litigation in Philadelphia," and that the suit before it represented "an opportunity to apply" those lessons.[95] That being so, the appeals court held the certification order fell within the district court's "considerable discretion" to employ the class device "to assist in resolving asbestos litigation nationwide and to avoid some of the enormous waste of resources that could accompany individual litigation."[96]

These efforts to apply the class mechanism to property damage claims cannot claim wild success. The Supreme Court's two major statements on

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90 *Cent. Wesleyan Coll.*, 6 F.3d at 183.

91 *Id.* at 190.

92 *See id.* at 186 ("The tentative, limited nature of the conditional certification also counsels in favor of affirmance.").

93 Cent. Wesleyan Coll. v. W.R. Grace & Co., 143 F.R.D. 628, 642 (D.S.C. 1992).

94 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

95 *Cent. Wesleyan Coll.*, 6 F.3d at 186.

96 *Id.* (internal quotation marks omitted).

asbestos litigation did not address property damage claims directly,[97] but the limits they imposed would apply in equal measure in such cases, and the subsequent history of property claims in the federal courts is one of bankruptcy rather than class litigation.[98] Asbestos claims are perhaps the most acute example of what Judge Friendly described as a specific area of substantive litigation in which discretion comes to be constrained by the articulation of controlling principles by appellate courts.[99] Even in such a case, however, discretion to experiment plays a role, providing practical experience with litigation dynamics and an opportunity to explore doctrinal solutions. It is this type of expertise that can eventually make clear the need for constraints upon discretion.

### B. *Management of Class Proceedings*

Rule 23(b)(3) expressly requires the trial court to consider "the likely difficulties in managing a class action"[100] in a proceeding certified under that provision—a requirement normally associated with the workability of a trial and associated liability and damages determinations. Distinct from that type of "manageability" concern is the more prosaic management of the operations of a class proceeding on a day-to-day basis, including the behavior of the participating lawyers and parties. Discretion in this sort of internal management of class proceedings has always been recognized as a necessary feature of modern Rule 23.[101] Judge Marvin E. Frankel explored this proposition in his *Preliminary Observations*, published shortly after the 1966 revisions. In that essay, he introduces his analysis of select provisions of the new Rule in the following terms:

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97 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 864-65 (1999) (holding a (b)(1)(B) mandatory settlement class could not be used to settle asbestos litigation); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628-29 (1996) (rejecting a (b)(3) settlement class used to resolve asbestos litigation).

98 *See, e.g.*, *In re* W.R. Grace & Co., 729 F.3d 311, 314-15 (3d Cir. 2013) (detailing the proliferation of lawsuits against the defendant in *Central Wesleyan College* that ultimately led the company to seek protection and discharge in bankruptcy).

99 *See* Friendly, *supra* note 13, at 754-55 (suggesting that certain areas of law may require "rigid rules" to promote the "interest of certainty").

100 FED. R. CIV. P. 23(b)(3)(D).

101 The Sixth Circuit has suggested a link between the discretion of district courts in matters relating to class certification and "the inherent power [of a trial court] to manage and control its own pending litigation." Beattie v. CenturyTel, Inc., 511 F.3d 554, 559 (6th Cir. 2007). This framing of the issue appears to imply a broad formulation of the deference owed the district court in the exercise of that discretion. *See id.* at 559-60 ("The district court's decision certifying the class is subject to a very limited review and will be reversed only upon a strong showing that the district court's decision was a clear abuse of discretion." (quoting Olden v. Lafarge Corp., 383 F.3d 495, 507 (6th Cir. 2004))).

> The revisions in Rule 23 effective July 1, 1966, effect broad and challenging innovations. The dimensions of the changes cannot possibly be stated in certain detail at this early stage of their existence. The Rule—quite deliberately, I think—tends to ask more questions than it answers. It is neither a set of prescriptions nor a blue print. It is, rather, a broad outline of general policies and directions. As the commentators have said, it confides to the district judges a broad range of discretion. And this means, as you all know so well, not that we're about to get drunk with power, but that we've been challenged to piece out a huge body of procedural common law by giving all the hard labor and creative imagination we can muster for this purpose.[102]

Judge Frankel went on to identify a range of issues, including class notice and the timing of the certification hearing, that would require creativity and adaptability from courts applying the new rule.[103]

These predictions were quickly reflected in the case law. Matters involving the form and content of notice to the class were regularly recognized as requiring discretion on the part of trial courts. In *Gold Strike Stamp Co. v. Christensen*, one of the early appellate rulings under the new Rule, the Tenth Circuit denied a request for mandamus intervention following a district court's order certifying an antitrust class under Rule 23(b)(3) and directing that notice be provided to the class members.[104] Assessing the content of the notice, the appellate court found that the trial judge had included all the information expressly required by Rule 23 along with enough additional guidance to allow class members to make a decision without being overwhelmed with detail.[105] As the court explained, "the Rule places the control of class actions and in particular the issuance of notice to members of the class under the control and thus the discretion of the trial judge," calling for a light hand in any appellate review.[106]

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102 Frankel, *supra* note 87, at 39 (footnote omitted).

103 *See id.* at 40-41 (noting that amended Rule 23 does not specifically address the problems attendant to notice and timing, and calling on judges to answer these questions in the particular circumstances); *see also* Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1601-02 (2003) (describing the period following the 1966 revision to Rule 23 and explaining that "from the start, the rule was heavily laden with discretionary elements").

104 436 F.2d 791, 799 (10th Cir. 1970).

105 *Id.* at 798-99. This balance between pertinent information and clear, concise notice came to be recognized by the Advisory Committee on Civil Rules as a best practice of sufficient importance to warrant codification in the 2003 amendments. *See* FED. R. CIV. P. 23(c)(2)(B) advisory committee's note to the 2003 amendments (specifying an expanded list of requirements for the content of class notice and mandating that notice clearly and concisely state those materials "in plain, easily understood language").

106 *Gold Strike Stamp*, 436 F.2d at 799.

The Supreme Court addressed questions of internal management in *Gulf Oil Co. v. Bernard*, a case involving a broad district court order that limited the ability of class counsel to communicate with the members of a Title VII class.[107] Noting "the potential for abuse" in the powerful forces put in motion by the class mechanism, the Court held that district courts require broad discretion "to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties."[108] When management orders are restrictive or invasive, they must "be based on a clear record and specific findings" indicating a weighing of competing interests, a requirement that the Court found not to be satisfied in the order before it.[109] *Bernard* remains the governing authority concerning restraints on communication with class members, and it is regularly cited by lower federal courts for the broad but bounded discretion that district courts enjoy to manage the processes by which a class action is analyzed and conducted.[110]

### C. *Redefinition of the Class*

The power of a district court to alter the definition or scope of a plaintiff's proposed class is also well established among the lower federal courts. Much less widely appreciated is the imprimatur that the Supreme Court has given to discretionary decisions on such matters. *Califano v. Yamasaki* contains one of the Court's most oft-cited statements on discretion in class certification: "[M]ost issues arising under Rule 23[ are] committed in the first instance to the discretion of the district court."[111] This statement is typically offered as generic authority for the existence of discretion in the certification analysis.[112] The passages from which the sentence is lifted, however, are more specific. The Court in *Yamasaki* recognized two propositions: (1) that district courts presented with a putative nationwide class have

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107 452 U.S. 89, 103-04 (1981).

108 *Id.* at 100.

109 *Id.* at 101-02.

110 *See, e.g.*, *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996) ("The trial court has broad discretion in deciding whether to certify a class, but that discretion must be exercised within the framework of Rule 23." (citing *Bernard*, 452 U.S. at 100)).

111 442 U.S. 682, 703 (1979).

112 *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2562 (2011) (Ginsburg, J., concurring in part and dissenting in part) (citing *Yamasaki* for the proposition that an appellate court should not overturn a district court's certification unless there is an error of law or abuse of discretion); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 477 & n.195 (2013) (citing *Yamasaki* to support the proposition that "[e]ven in the class context, appellate courts are not in the position to provide de novo review of factual evidence, giving their own assessments without regard to the findings of the district court").

the discretion to certify a class of lesser scope, and (2) that courts may take into account systemic considerations not specified in Rule 23 when deciding whether to exercise that discretion.[113]

*Yamasaki* involved a consolidated pair of cases in which recipients of Social Security benefits challenged an effort by the Social Security Administration to recoup overpayments from beneficiaries by withholding future benefits without first granting individual hearings to the affected recipients.[114] In one case, the plaintiffs sought a statewide class action for residents of Hawaii, which the district court certified.[115] In the other, Washington state plaintiffs requested a nationwide class action.[116] The district court granted the request for certification, but it exempted from the class definition residents of Hawaii and of the Eastern District of Pennsylvania (where another proceeding had been initiated), as well as any individuals who "had participated as plaintiffs or members of a plaintiff class in litigation against the Secretary on similar issues."[117]

On appeal, the Secretary argued broadly that class certification was categorically inappropriate under the judicial review provisions of the Social Security Act and, in the alternative, that a nationwide class was inappropriate in a case of the type before the court.[118] The Supreme Court rejected the first argument, imposing a clear-statement rule that requires Congress to exclude class relief expressly if it wishes a statute to exclude the possibility of that tool.[119] The Court treated the second argument as a variation on the first—here, a request for a ruling that a nationwide class is categorically inappropriate under Rule 23 itself in Social Security disputes of this kind—and it rejected that request as well.[120] But it was the categorical nature of the argument that the Court rejected. The underlying challenge to the suitability of such disputes to nationwide class treatment received more sympathetic treatment:

> We concede the force of the Secretary's contentions that nationwide class actions may have a detrimental effect by foreclosing adjudication by a number

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113 *See Yamasaki*, 442 U.S. at 702-03 ("[A] federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate . . . and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts.").

114 *Id.* at 684.

115 *Id.* at 687-88.

116 *Id.* at 689.

117 *Id.*

118 *Id.* at 698-99.

119 *Id.* at 700.

120 *Id.* at 700-01.

> of different courts and judges, and of increasing, in certain cases, the pressures on this Court's docket. It often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts. For this reason, a federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts. But we decline to adopt the extreme position that such a class may never be certified. The certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court. On the facts of this case we cannot conclude that the District Court in [the nationwide case] abused that discretion, especially in light of its sensitivity to ongoing litigation of the same issue in other districts, and the determination that counsel was adequate to represent the class.[121]

Since the significance of this passage to the discretion of certifying courts appears never to have been fully appreciated in the literature, the Court's analysis warrants careful exposition. In explaining its rejection of the Secretary's categorical argument about nationwide classes, the Court emphasized that "[n]othing in Rule 23 . . . limits the geographical scope of a class action that is brought in conformity with that Rule."[122] That is, the Rule offers no express statement imposing such a limitation. Given the posture of the Secretary's claim, the Court could have taken this silence on geography to indicate that the rule gives district courts no power to limit the scope of a plaintiff's putative class action, so long as the suit is "brought in conformity with" the provisions of Rule 23. But the Court did no such thing.

*Yamasaki* recognizes discretion in the district court to determine the appropriate scope of a proposed class proceeding, even in a proceeding that satisfies the express terms of the rule. The Secretary lost his appeal because the district court had not "abused that discretion" given the steps it took to avoid interference with other pending proceedings.[123] In deciding when to permit a nationwide injunctive class, *Yamasaki* explains, district courts should take into account systemic considerations that are unaddressed in the text of Rule 23(b)(2), including the possibility of "improper[] interfere[nce] with the litigation of similar issues in other judicial districts."[124] The

121 *Id.* at 702-03.
122 *Id.* at 702.
123 *Id.* at 703.
124 *Id.* at 702.

question of how to assess the impropriety of such interference in quality and degree in any given case is left to the discretion of future district courts.[125]

*Yamasaki* was a (b)(2) action seeking an injunction, and one portion of the Court's analysis ties its holding to equitable principles concerning the proper scope of injunctive relief, explaining that there is no cause for a categorical prohibition on nationwide class actions in this type of Social Security claim because "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class."[126] The Court allowed for the possibility that a broad class definition in an equitable proceeding might afford relief "more burdensome than necessary to redress the complaining parties,"[127] a circumstance that would call for constraining the class. In other words, a (b)(2) injunctive proceeding might create the prospect of unnecessary burdens on the defendant and provoke systemic concerns about interference with parallel or related court proceedings. These would both be grounds for a district court to exercise discretion in certifying a narrower proceeding than the one proposed by the plaintiff.[128]

Lower federal courts have not generally relied upon *Yamasaki* in exercising discretionary authority to reformulate a plaintiff's proposed class definition. Instead, they have claimed that authority in a wide variety of settings and treated it as a natural extension of their discretion to decide whether to certify at all.

In its most basic form, a court's modification of the class definition can operate to harmonize the certified class with the actual course of the

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125 In a damages class action brought under Rule 23(b)(3), these considerations may form a part of the superiority analysis, which invites the court to consider "the extent and nature of any litigation concerning the controversy already begun by or against class members" and "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." FED. R. CIV. P. 23(b)(3)(B)-(C). No explicit license of this kind appears in Rule 23(b)(2).

126 *Yamasaki*, 442 U.S. at 702.

127 *Id.*

128 Rule 23(c) confirms the authority of a district court to issue orders that "define the class." FED. R. CIV. P. 23(c)(1)(B). There is room for debate as to whether Rule 23(c)(1)(B) is only a housekeeping provision designed to ensure regularity between the class certification order, the litigated proceeding, and any resulting judgment, or whether it confers authority upon the court to shape the class according to its own judgment. *Compare* Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 591-92 (3d Cir. 2012) (applying Rule 23(c)(1)(B) as a housekeeping provision to "provid[e] the parties with clarity and assist[] class members in understanding their rights"), *with* Pyke v. Cuomo, 209 F.R.D. 33, 38-40 (N.D.N.Y. 2002) (employing Rule 23(c)(1)(B) as both a housekeeping provision and an occasion to make judgments about the scope of the class). On either reading, *Yamasaki*'s acknowledgment of extra-textual discretionary considerations is significant for discussions of class scope.

proceedings. In *Barney v. Holzer Clinic, Ltd.*, for example, the Sixth Circuit found that a putative nationwide class action instituted against an Ohio medical clinic was overbroad.[129] The court deemed the nationwide scope of the class unnecessary in light of the narrow population of affected individuals—patients of a clinic that operated only in Ohio and West Virginia—and observed that the trial court and the parties had focused their efforts only on claims by Ohio citizens governed by Ohio law, raising questions about whether the interests of any claimants outside Ohio were properly represented.[130] Nonetheless, rather than reversing the judgment below and decertifying the class, the court deemed it appropriate instead "to amend the class certification so that the class includes the named plaintiffs and those similarly situated"[131]—a sua sponte modification that would "bring[] the formal certification into conformity with the class definition that the parties and the court below believed to have been certified."[132] In a similar ruling issued shortly following the 1966 amendments, a Minnesota district court hearing a constitutional challenge to a property seizure statute rejected the class definition proposed by the plaintiff and adopted a modified definition that solved ascertainability problems and still permitted the core of the plaintiff's challenge to be certified.[133] The court noted: "The fact that plaintiff's definition of the class needed modification does not require dismissal of the class action" because "[a] court can, in its discretion under the Rule, define a class in a manner which will allow utilization of the class action procedure."[134]

Federal courts have also reformulated class definitions in a more aggressive fashion, reshaping the action to resolve problems under Rule 23 and authorize a proceeding that the court deems suitable for representative treatment, even if the resulting action differs significantly from the one proposed by the plaintiff. A ruling by Judge Colleen McMahon of the Southern District of New York offers a useful illustration. In *Maneely v. City of Newburgh*, plaintiff Maneely had been arrested on a misdemeanor charge and subjected to a strip search that he believed to be unjustified.[135] His search allegedly happened pursuant to a city policy of subjecting all arrestees to strip search without regard to whether there was reasonable

129 110 F.3d 1207, 1213 (6th Cir. 1997).
130 *Id.* at 1214.
131 *Id.*
132 *Id.* at 1215.
133 Thomas v. Clarke, 54 F.R.D. 245, 249 (D. Minn. 1971).
134 *Id.*
135 208 F.R.D. 69, 71 (S.D.N.Y. 2002).

suspicion to believe the arrestee possessed contraband or a weapon.[136] Maneely sought to represent a class of arrestees subjected to strip search without cause and to secure damages on their behalf under Rule 23(b)(3).[137] As proposed by the plaintiff, however, the class presented problems of adequacy of representation and class definition, since every arrestee (including Maneely) would require a hearing on the circumstances of his or her arrest to establish that the search was without cause and demonstrate membership in the class.[138] Rather than simply deny certification of the proposed action, however, the court exercised its discretion to certify a different class: "I am not going to certify the class Maneely seeks to represent. Instead, I am going to certify a broader class, but on a narrower issue . . . ."[139] The judge employed the provision for class actions "with respect to particular issues"[140] to certify a class "as to the issue of whether the City of Newburgh maintained a policy of strip searching all pre-arraignment prisoners, with or without having reasonable suspicion to believe that these persons were carrying or concealing weapons or contraband," on behalf of "all persons who were strip searched before arraignment" within a specified time period.[141] If the class prevailed, she explained, arrestees could then assert their damages claims in individual suits.[142]

Judge Shelby Highsmith of the Southern District of Florida also used an aggressive reformulation in a suit challenging GEICO's practice of only reimbursing insured claimants for a portion of their deductible when GEICO succeeded in securing only a portion of the requested recovery from the adverse insurer.[143] Plaintiff Rosemary Powers sought to recover damages under Rule 23(b)(3) on behalf of a nationwide class, but the court found that differences in applicable state law created serious predominance problems and that the plaintiff failed to demonstrate that those problems could be overcome.[144] Acting on its own, however, the court did find that a statewide class would pass muster, and it certified that class sua sponte:

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136 *Id.*

137 *Id.* at 70-71.

138 *See id.* at 76 ("No person could become a member of the class [the plaintiff] proposes to represent . . . until it was determined there was no reasonable suspicion for a search in his individual case.").

139 *Id.*

140 That provision is currently codified at FED. R. CIV. P. 23(c)(4). It was Rule 23(c)(4)(A) in the version of the Rule that Judge McMahon was employing. *Maneely*, 208 F.R.D. at 78.

141 *Maneely*, 208 F.R.D. at 78.

142 *Id.* at 79.

143 *See* Powers v. Gov't Emps. Ins. Co., 192 F.R.D. 313, 315 (S.D. Fla. 1998) (describing GEICO's reimbursement policy).

144 *Id.* at 318-19.

"Powers has not proposed any alternative classes. However, this Court finds that certification of a class comprised of Geico insureds from the State of Florida satisfies all of the requisite elements for certification."[145] The court granted the motion for class certification, but on terms substantially different from those proposed by plaintiff.[146]

Judge John Nixon of the Middle District of Tennessee claimed a similar authority when adjudicating a request for class certification in *Craft v. Vanderbilt University*, a case involving allegations of improper medical experimentation upon pregnant women.[147] Concluding that the class as proposed would exhibit serious manageability problems, Judge Nixon emphasized his "broad discretion in determining whether an action should be certified as a class action."[148] This discretion encompassed a power "to modify or reformulate existing classes in the interest of manageability or other factors bearing upon class appropriateness."[149] He thus decertified the offending portion of the class and replaced it with an individually administered rebuttable presumption for the affected claimants, a mechanism that he believed was indicated by the underlying substantive law.[150]

And in a Title VII action against Wal-Mart alleging racial discrimination against applicants for truck driving positions, *Nelson v. Wal-Mart Stores, Inc.*,[151] Judge Billy Roy Wilson determined that he should not certify a class that included punitive damage claims for fear that res judicata might foreclose compensatory damage claims that individual drivers might wish to pursue, potentially compromising the required commonality of interest among class members.[152] Rather than refuse certification altogether, Judge Wilson acted on his own to sever punitive damages from the class proposal and certify "a class only on the issues of classwide liability and declaratory and equitable relief."[153]

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145 *Id.* at 320.

146 *Id.*

147 174 F.R.D. 396, 400-01 (M.D. Tenn. 1996).

148 *Id.* at 403.

149 *Id.*

150 *Id.* at 403-04.

151 245 F.R.D. 358 (E.D. Ark. 2007).

152 *Id.* at 372-73 (citing Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1078 (2002)) (noting that claims for punitive damages, but not compensatory damages, would likely be barred in subsequent litigation). For a treatment of this species of res judicata concern, see generally Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2005).

153 *Nelson*, 245 F.R.D. at 373 (citing FED. R. CIV. P. 23(c)(4)(A) (current version at FED. R. CIV. P. 23(c)(4))).

Several themes emerge from the body of practice exemplified by these cases involving judicial reformulation of the class definition. First, the discretionary power that federal courts possess to reshape the boundaries and composition of the class is continuous with their power to decide whether to certify at all. Some courts explicitly draw that connection in describing their authority over class definition,[154] and it is a connection necessitated by the practical impact of this form of class management. To restructure a proposed nationwide class into a statewide proceeding, or to refocus the class definition onto a different aspect of the plaintiff's claim, is to change the nature of the proceeding qualitatively. When the plaintiff proposes a class that the court determines cannot be certified, the court has the option of simply refusing. When, instead, the court elects to redefine the class in the ways explored above, that action entails a determination that reformulating the class will better serve the purposes of Rule 23 and the underlying policies of the substantive law than would denying certification altogether. In making that determination, the court issues a discretionary decision as to whether or not a class action should occur.

A second theme is closely related: In cases involving class definition, federal courts view proposed class actions as embodying a significant element of public trust. When a plaintiff and her attorney file a lawsuit seeking to represent a class of people they do not know, it is not their sole prerogative to set the terms on which they will pursue claims on behalf of the class. Rather, they embark upon a representation the nature and terms of which may have to be set by the court.[155] In theory, a named plaintiff could insist upon withdrawing as the class representative when a proceeding is reshaped in ways that she disapproves, but that kind of protest would be self-defeating in most cases, and the ethical responsibilities of class counsel might foreclose such self-regarding caprice.[156] It is not the prerogative of

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154 *See id.* at 365, 373 (framing its power in the certification process by explaining that "[t]he decision whether to certify a class action is left to the sound discretion of the district court" and then severing a portion of the proposed class rather than denying certification altogether).

155 The Second Circuit made a similar observation in an early decision concerning attorney's fees under modern Rule 23. In *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir. 1973), the court explained that a class action does not proceed "through simple operation of the private enterprise system"; rather, "both the class determination and designation of counsel as class representative come through judicial determinations, and the attorney so benefited serves in something of a position of public trust." Several other courts have pointed to this statement by the Second Circuit in describing the particular nature of the ethical and professional duties that class counsel bear in a representative proceeding. *See, e.g.*, Stewart v. Gen. Motors Corp., 756 F.2d 1285, 1294 n.5 (7th Cir. 1985) ("We judges can certainly appreciate that there are times when a public trust resembles indentured servitude, but we are rarely able to alter that situation.").

156 *See* FED. R. CIV. P. 23(g)(4) (stating that class counsel has a duty to fairly and adequately represent the interests of the class); MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(1) (2013)

representative plaintiffs or class counsel to adopt a "my way or the highway" attitude toward a class proceeding. Rather, by filing a proposed class action, plaintiffs and their lawyers initiate a dialogue with the court in which their proposals and preferences are measured against the express requirements and limitations of Rule 23 and balanced against the court's determination regarding the best type of representative proceeding under the governing law.

Third, federal courts have not been limited to the express provisions of Rule 23 when exercising their discretion to alter the scope or definition of a proposed class. Their discretion is not unbounded, of course, and courts frequently employ the underlying substantive law to guide them in deciding questions of definition and scope in class certification, as in the *Craft* and *Nelson* decisions above. But the text of the Rule does not purport to enumerate all the factors that a court might consider in making these determinations. Thus, in *Yamasaki*, the Supreme Court recognized the authority of a court to consider systemic impact when entertaining a proposed injunctive proceeding. That species of concern is expressly authorized for damages actions in the superiority requirement of Rule 23(b)(3) but is not specified in section (b)(2). Even so, the *Yamasaki* Court acknowledged systemic impact as an appropriate extra-textual consideration.

### D. *Discretion Not to Certify*

The discretion not to certify a class—to exercise judgment in deciding whether aggregate treatment is appropriate at all, even if the requirements of Rule 23 are satisfied—is the most consequential form of control that a federal court can exercise in a putative class action proceeding. With the elimination of the conditional certification provision from Rule 23(c)(3)(C) and the Court's recent emphasis on the need for a "rigorous analysis" prior to certification,[157] a court has minimal power to authorize class certification outside the clear boundaries of Rule 23's text. In contrast, the discretion not to certify has formed a significant part of the class action jurisprudence of the federal courts since the enactment of the 1966 revisions to Rule 23. It has found expression in highly influential rulings by the lower federal courts and enjoyed a partial imprimatur from the Supreme Court itself. Some rulings have lodged the discretion not to certify in the superiority requirement for cases filed under Rule 23(b)(3) or in the tradition of discretionary

(limiting ability of counsel to withdraw from representation where doing so would impose a "material adverse effect on the interests of the client").

[157] *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551-52 (2011) ("[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23 have been satisfied . . . ." (internal quotation marks omitted)).

control over equitable relief in (b)(2) actions. Others have not felt the need for such textual positioning, instead relying directly upon the discretion inherent in Rule 23. In many of these cases, courts have based their judgments upon an assessment of the underlying law and the impact that a class action would have upon substantive policies. But courts have also exercised the discretion not to certify in response to litigation dynamics not specifically tied to any substantive legal regime.

The first major ruling to explore substantive law reasons for exercising discretion not to certify, and the most influential opinion of its kind for some years, was Judge Marvin Frankel's decision in *Ratner v. Chemical Bank New York Trust Co.*[158] The defendant in *Ratner* had failed to include a required disclosure on an initial credit card statement concerning the annual percentage rate of interest, and a cardholder brought suit under the TILA seeking to represent 130,000 others under Rule 23(b)(3) and claiming statutory damages of at least $100 per person.[159] The violation was technical in nature—the company had disclosed the rate in other communications, provided the required disclosure on subsequent credit card statements, and corrected the omission on the initial statement when made aware of it.[160] The initial omission was still a violation of the clear terms of the TILA, however, and entitled the plaintiff to summary judgment on the merits.[161] The case also seemed particularly well-suited to class treatment: the omission was identical for all cardholders, there was no requirement to show individual reliance, and the statutory damages provision eliminated any need for individual proof of harm. Many other district courts had previously certified classes in similar TILA disputes.[162]

Judge Frankel denied the request to certify the class in a brief opinion that began with the following summary of reasons:

> (1) there is no affirmative need or justification for such a proceeding in the actual circumstances of the case; and
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> (2) the allowance of thousands of minimum recoveries like plaintiff's would carry to an absurd and stultifying extreme the specific and essentially

158 Ratner v. Chem. Bank N.Y. Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972).

159 *Id.* at 413-14.

160 *Id.* at 414, 416.

161 Judge Frankel addressed the merits at length in a separate reported opinion, *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270, 282 (S.D.N.Y. 1971), granting summary judgment to the individual plaintiff on the merits.

162 *See infra* note 171 and accompanying text.

> inconsistent remedy Congress prescribed as the means of private enforcement.[163]

The "broad and open-ended terms" of the newly revised Rule called for "the exercise of some considerable discretion of a pragmatic nature" in making certification determinations, the court continued, and permitting a massive class-wide remedy for technical violations that had already been corrected would impose "horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant," a result that would be inconsistent with Congress's purpose in enacting the TILA.[164] Invoking the superiority requirement (albeit as something of an afterthought), Judge Frankel declined the request for certification and instead entered judgment on Ratner's individual claim.[165]

*Ratner* had a dramatic impact on TILA litigation and subsequent legislative developments. In one illustrative 1973 case, *Wilcox v. Commerce Bank of Kansas City*, the Tenth Circuit affirmed a district court's denial of class certification in a TILA case involving a broader set of alleged failures to disclose required information in credit card statements, with a total potential liability of over one billion dollars.[166] Relying on Judge Frankel's opinion, the court of appeals rejected the proposition that class actions must be available either always or never for TILA violations. Instead, it authorized a discretionary approach "in view of a congressional confidence in case by case determinations" about the propriety of class certification "by qualified and informed trial judges with a wide general discretion and specific leeway under Rule 23 itself to avoid inferior, unfair or senseless applications" of the statute.[167] A report of the Senate Committee on Banking, Housing and Urban Affairs concerning the amendments to the TILA enacted in 1974 described *Ratner* as the "leading case" on TILA class actions and quantified its impact:

> Prior to the *Ratner* decision on February 14, 1972, the courts affirmed 8 Truth in Lending suits as class actions while denying class action status to 3. Since the *Ratner* case, the courts denied 21 Truth in Lending suits class action status while affirming only one and in that case, only after the plaintiffs amended their complaint to sue only for actual damages.[168]

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163 *Ratner*, 54 F.R.D. at 414.
164 *Id.* at 416.
165 *Id.*
166 474 F.2d 336, 340, 349 (10th Cir. 1973).
167 *Id.* at 344.
168 S. REP. NO. 93-278, at 14 (1973) (Conf. Rep.) (italics added).

The amendments responded to *Ratner*'s use of trial court discretion to avoid industry-destroying liability by imposing a statutory cap of $100,000 on total classwide damages in order to remove the crushing potential of classwide liability and preserve the feasibility of class remedies for private enforcement.[169] Further amendments in 1976 raised the damages cap to $500,000 to ensure that private enforcement would remain a financially viable mechanism for plaintiffs' lawyers.[170] The discretion not to certify that Judge Frankel and others exercised in the early TILA cases did not provoke a congressional rebuke; rather, it initiated a dialogue with Congress that preserved the private remedy under the statute while reducing the need for courts to apply a safety valve.[171]

The TILA cases were the first major occasion where the lower federal courts systematically exercised discretion not to certify under modern Rule 23, but they are not singular. Courts have exercised that prerogative in a range of substantive contexts since the 1966 revisions. In some cases, courts have grounded the decision to deny certification on an assessment of the impact that class treatment would have upon the specific policies reflected in the law underlying the dispute, as in *Ratner* and its progeny. In others, like the widely cited opinion of Judge Posner in *In re Rhone-Poulenc Rorer Inc.*,[172] courts have identified the potential impact of class certification on shared social policies as a basis for exercising discretion in deciding when class certification is advisable without tying their analysis to any particular substantive legal regime. And in still others, courts have invoked institutional principles not directly linked to substantive policy, particularly in cases involving government defendants in which the class device is invoked

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169 *See id.* at 14-15 (noting that the purpose of TILA's civil penalties section "was to provide creditors with a meaningful incentive to comply with the law" but that this purpose could "be achieved without subjecting creditors to enormous penalties").

170 The report of the Committee on Banking, Housing and Urban Affairs regarding the 1976 amendments described the purpose of the increased statutory cap in the following terms:

> The Committee wishes to avoid any implication that the ceiling on class action recovery is meant to discourage use of the class action device. The recommended $500,000 limit, coupled with the 1% formula, provides, we believe, a workable structure for private enforcement. Small businesses are protected by the 1% measure, while a potential half million dollar recovery ought to act as a significant deterrent to even the largest creditor.

S. REP. NO. 94-590, at 8 (1976) (Conf. Rep.).

171 Although the need to apply a safety valve was reduced, it was not eliminated: some district courts continued to exercise discretion not to certify in TILA cases following the 1974 and 1976 amendments in cases where they believed that the purposes of the remedy would be subverted by class treatment. These decisions sometimes received deferential treatment from the courts of appeals. *See, e.g.*, Watkins v. Simmons & Clark, Inc., 618 F.2d 398, 404 (6th Cir. 1980) (holding class certification may be denied even in cases involving only technical violations).

172 51 F.3d 1293 (7th Cir. 1995).

primarily as a tool for ensuring broad compliance. The range is broad and the record deep.

The Supreme Court of the United States has never issued a major holding on the discretion not to certify, but the Court has assumed and relied upon the existence of such discretion. In *Reiter v. Sonotone Corp.*, the Supreme Court confronted an antitrust question regarding the availability of treble damages in consumer lawsuits.[173] The case involved allegations of price fixing in the market for hearing aids that increased the cost of the product, and the plaintiff, a consumer, sought treble damages on behalf of all retail purchasers of the affected devices.[174] The appellate court held that treble damages were unavailable because an individual consumer was not injured in her "business or property" by anticompetitive behavior (a requirement under the statute),[175] but the Supreme Court reversed, finding that "the word 'property' has a naturally broad and inclusive meaning" that necessarily includes a consumer's loss of money when paying inflated prices for goods.[176] The defendants protested that making treble damages available in consumer class actions would "have a potentially ruinous effect on small businesses in particular and will ultimately be paid by consumers in any event," urging the Court to find the remedy wholly unavailable in that category of cases.[177] The Court acknowledged the importance of these concerns but found that the "plain language" of the Clayton Act precluded a holding that consumers were ineligible for treble damages.[178] Nevertheless, as in *Yamasaki*—which was heard in the same Term and handed down nine days after *Reiter*—the Court went on to opine on the important systemic role of federal court discretion in potentially troublesome categories of class proceeding:

> District courts must be especially alert to identify frivolous claims brought to extort nuisance settlements; they have broad power and discretion vested in them by Fed. Rule Civ. Proc. 23 with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions. Recognition of the plain meaning of the statutory language "business or property" need not result in administrative chaos, class-action harassment,

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173 442 U.S. 330, 335 (1979).
174 *Id.*
175 *Id.* at 336.
176 *Id.* at 338-39, 345.
177 *Id.* at 344-45.
178 *Id.* at 345.

> or "windfall" settlements if the district courts exercise sound discretion and use the tools available.[179]

Treble damages in consumer claims need not produce extortion, the *Reiter* Court concluded, because frivolous claimants could be prevented from obtaining windfall class settlements through the "broad power and discretion" that the district court possesses to decide whether and under what conditions to certify a class.[180] Judge Friendly drew upon this passage in *Abrams* when describing the nature of federal court discretion in a consumer class action alleging price fixing,[181] and lower courts have drawn upon *Reiter* when exploring the meaning and application of this discretionary mechanism of control in a variety of cases, many (though not all) involving antitrust disputes.[182]

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179 *Id.* (citations omitted). *Reiter* postdates by five years the Court's ruling in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). The *Reiter* Court apparently deemed it obvious that a district court had discretion to determine whether certification was appropriate where the plaintiff's claims appeared "frivolous," *id.* at 345, a proposition at odds with the received account of *Eisen* as a case prohibiting district courts from basing certification decisions on an initial assessment of the merits. *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316-17 (3d Cir. 2008) (highlighting and rejecting this received account of *Eisen*). *Eisen*'s actual holding was that the district court abused its discretion when it imposed the costs of notice upon the defendant based upon a positive assessment of the merits of the plaintiffs' claims, a procedure that "allow[s] a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it." 417 U.S. at 177. The *Eisen* Court introduced that holding with the broadly worded sentence, now notorious, that "nothing in either the language or history of Rule 23 [] 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." *Id.* The Court has since clarified the limited significance of that language. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551-52 (2011) (noting that rigorous analysis of certification may entail some overlap with the merits).

180 *Reiter*, 442 U.S. at 345.

181 *See* Abrams v. Interco Inc., 719 F.2d 23, 29 (2d Cir. 1983) ("[T]he Court [in *Reiter*] emphasized the broad power and discretion vested in the courts by Fed. R. Civ. P. 23 . . . .").

182 *See, e.g.*, *In re* Datapoint Corp., 1996 WL 673320, at *2 (Fed. Cir. Nov. 14, 1996) (relying upon *Reiter* to grant a district court broad leeway to decline to certify until and unless it has a high level of confidence that certification of a novel defendant class would be appropriate); Greenhaw v. Lubbock Cnty. Beverage Ass'n, 721 F.2d 1019, 1024 (5th Cir. 1983) (recognizing *Reiter*'s invitation to deny certification in cases involving "frivolous and unmeritorious" claims but affirming the district court in rejecting the argument that denial of certification is warranted solely because class counsel will receive greater compensation than any individual class member), *overruled on other grounds by* Int'l Woodworkers of Am. v. Champion Int'l Corp., 790 F.2d 1174, 1181 n.8 (5th Cir. 1986); Marks v. S.F. Real Estate Bd., 627 F.2d 947, 951 (9th Cir. 1980) (opinion of Larson, J.) (citing the language regarding discretion in *Reiter* as a negative example to the case before him, a consumer antitrust case where defendants argued that the extent of their liability exposure counseled against certification of a class).

Justice Breyer also draws upon *Reiter* in his separate opinions in both *Amchem* and *Ortiz*, although he cites the case out of context, offering *Reiter* as support for an expansive account of a district court's discretion to certify in cases requiring experimentation, rather than as a basis for denying certification in cases calling for a safety valve. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815,

The superiority requirement of Rule 23(b)(3) often serves as the doctrinal home for policy-driven determinations that certification is unwarranted. Indeed, in one price-fixing ruling that predated *Reiter* by several years, *Rutledge v. Electric Hose & Rubber Co.*, the Ninth Circuit affirmed a district court's denial of class certification on superiority grounds, with a brief discussion that identified superiority determinations as lying "in an area where the trial court's discretion is paramount."[183] But courts have exercised this authority in non-(b)(3) actions as well. Consider *King v. Kansas City Southern Industries, Inc.*, a decision by the Seventh Circuit in a securities action alleging violations of federal and state law in the merger of two investment advising entities.[184] One plaintiff sought to certify a class of shareholders under Rule 23(b)(1)(A), arguing that individual actions threatened to generate inconsistent adjudications.[185] The district court refused the certification request, in part due to concerns over the feasibility of notice to the class and manageability of the action, and in part based on its conclusion that an alternative method of relief was available that would better serve the policies underlying the securities laws.[186] The Seventh Circuit affirmed, holding that determinations regarding what "procedure would further the policies underlying [the substantive law]" were an appropriate basis for denying certification and that "[d]etermination of the manageability" of a proposed action is "a matter for the trial court's discretion" in "all class actions," not just actions brought under subsection (b)(3).[187] The district court's decision to refuse a class action in deference to a direct action by the injured funds "was a practical decision within its discretion," the appellate court found, and its finding that "a class action would not best further the underlying policies" in the dispute fell within the proper bounds of its discretion.[188] Throughout the opinion, the Seventh Circuit based its account of the district court's discretion on general principles

868 (1999) (Breyer, J., dissenting) (invoking *Reiter* for the proposition that "district court[s should be allowed] full authority to exercise every bit of discretionary power that the law provides"); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 630 (1997) (Breyer, J., concurring in part and dissenting in part) (suggesting that district courts have broad power to certify class actions under *Reiter* because they are more familiar than the appellate courts with the issues).

183 511 F.2d 668, 673 (9th Cir. 1975).

184 519 F.2d 20, 23-24 (7th Cir. 1975).

185 *Id.* at 25.

186 *See id.* (discussing alternative of a direct action by the funds allegedly injured by the merger, possibly including intervention by individual shareholders).

187 *Id.*

188 *Id.* at 26-27.

of certification under Rule 23, rather than the particularities of any subsection of Rule 23(b).[189]

And then there is Judge Posner's opinion for the Seventh Circuit in *In re Rhone-Poulenc Rorer Inc.*, a nationwide class action brought against manufacturers of blood solid products for failing to guard adequately against the transmission of HIV to hemophiliacs.[190] After a period characterized by increasingly expansive applications of Rule 23 in personal injury and products liability cases, *Rhone-Poulenc* was the first of three cases—along with *In re American Medical Systems, Inc.*[191] from the Sixth Circuit and *Castano v. American Tobacco Co.*[192] from the Fifth Circuit—that marked a significant shift, employing extraordinary forms of review to reject broad classes that had been certified by district courts[193] and spurring the Civil Rules Committee to amend Rule 23 in 1998 by adding a provision for immediate appeal of class certification rulings when deemed appropriate by the circuit courts.[194]

The primary basis that Judge Posner offered for rejecting the district court's certification order through the extraordinary device of mandamus intervention related to the immature nature of the tort claim at issue. Certification of a nationwide class would have forced the defendants to "stake their companies on the outcome of a single jury trial" in a claim that had not yet been tested through "a decentralized process of multiple trials, involving different juries, and different standards of liability"—a way of proceeding that threatened to impose overwhelming pressure to settle even when the defendant is confident on the merits.[195] The majority acknowledged

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189 The en banc Third Circuit conducted a similar analysis in one of the early TILA cases. In *Katz v. Carte Blanche Corp.*, the court reversed a district court's certification of a TILA case and recounted the potential for serious adverse consequences to the defendant if notice was issued to the class regarding a claim of "doubtful validity." 496 F.2d 747, 757-58 (3d Cir. 1974) (en banc). In examining the alternative remedies available to claimants, the court described the role that stare decisis and non-mutual offensive issue preclusion might play in empowering cardholders to establish liability and found that "it is hardly fair to say that the judicial system must insist on res judicata [through class certification] rather than collateral estoppel or stare decisis." *Id.* at 760.

190 51 F.3d 1293, 1296-97 (7th Cir. 1995).

191 75 F.3d 1069 (6th Cir. 1996).

192 84 F.3d 734 (5th Cir. 1996).

193 *AMS* and *Rhone-Poulenc* employed mandamus to conduct their review. *See AMS*, 75 F.3d at 1074; *Rhone-Poulenc*, 51 F.3d at 1294. *Castano* came up by way of a certified interlocutory appeal under 28 U.S.C. § 1292(b). *See* 84 F.3d at 737.

194 *See* FED. R. CIV. P. 23(f) (permitting immediate appeal from the grant or denial of class certification if accepted by the court of appeals); FED. R. CIV. P. 23(f) advisory committee's note to the 1998 amendments (describing the change).

195 *Rhone-Poulenc*, 51 F.3d at 1299. *But see* Samuel Issacharoff, *Assembling Class Actions*, 90 WASH. U. L. REV. 699, 710 & n.57 (2013) (discussing the "blackmail effect" described by Judge Posner and noting disagreement about the magnitude of the problem in modern class litigation).

"the district judge's commendable desire to experiment with an innovative procedure for streamlining the adjudication of th[e] mass tort,"[196] but it found that the use of a centralized nationwide class action in an immature tort case where claims were capable of being litigated on an individual basis, coupled with problems in the definition of the liability standard and the disaggregation of common and individual issues, rendered the certification order an abuse of discretion even on the extraordinarily deferential standards of mandamus review.[197]

Judge Posner wrote in *Rhone-Poulenc* as though his analysis was largely sui generis, but his opinion is of a piece with the antitrust and securities rulings described above: an exercise of judicial discretion declining to certify a broad class action on the basis of a conclusion that aggregate litigation would undermine important substantive policy values. *Rhone-Poulenc* is not as careful as some of those earlier precedents in identifying the specific source of the substantive policies that counsel against class treatment. Judge Posner invokes general concerns regarding premature comprehensive adjudication of novel liability questions without ascribing those concerns to any particular body of state law,[198] and the extraordinary posture of mandamus review raises important questions about the propriety of the majority's action. But in other respects, *Rhone-Poulenc* is quite similar to earlier rulings that denied class certification to avoid undermining substantive law. As in *Kansas City Southern Industries*, the majority in *Rhone-Poulenc* operated outside the scope of the superiority requirement when it ruled that individual actions would better serve the tort policies implicated in the case than would a broad class proceeding, a mode of analysis that traces back to *Ratner* and the TILA cases.[199] And in acknowledging the proper role of experimentation in the aggregate treatment of novel claims along with the necessary limits upon such experimentation, the court joined a conversation that began in the earliest post-1966 class action rulings and that eventually produced such reforms as the 2003 amendments to Rule 23 that eliminated

196 *Rhone-Poulenc*, 51 F.3d at 1297 (internal quotation marks omitted).

197 *Id.* at 1304.

198 *See* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 67-68 (2010) (describing Judge Posner's assertions about "the danger of adjudicating an immature tort in a nationwide class action" as "incomplete").

199 The district judge in *Rhone-Poulenc* had proceeded exclusively on the authority of Rule 23(c)(4) to certify a class "with respect to particular issues" and the Seventh Circuit never cites or discusses the superiority provision in its analysis. 51 F.3d at 1297. Judge Rovner, in dissent, criticized the majority for this feature of its analysis, calling instead for a strict account of judicial discretion in the certification decision limited to factors expressly authorized by the Rule. *Id.* at 1307-08 (Rovner, J., dissenting).

conditional certification.[200] Judge Posner's opinion has played a larger role than some of those earlier precedents in shaping later discussions about substantive law and the discretion not to certify, but it did not originate those discussions.

The discretion not to certify also finds expression in cases where the district court's reasons for skepticism over the propriety of a class proceeding relate to broader litigation dynamics rather than specific substantive policies. The Fourth Circuit has offered one of the strongest statements of the discretion not to certify in this mode. In *Lowery v. Circuit City Stores, Inc.*, the appellate court affirmed the decision of a district court to decertify a Title VII pattern and practice claim that alleged racial discrimination against African-American workers at the Virginia headquarters of a major retailer.[201] After initially finding that the requirements of Rule 23 were satisfied and certifying the class, the trial court concluded that class treatment of the particular claims before it would be inefficient, unmanageable, and cumbersome.[202] It also developed concerns that the plaintiffs' proposal to try the question of punitive damages on a classwide basis before conducting individual hearings on actual harm, compensatory damages, and employee-specific defenses could result in an overestimation of the egregiousness of defendant's conduct and hence an excessive damages award.[203] Efficiency and a fair estimation of damages are not enumerated as specific considerations in Rule 23(b)(2), under which the plaintiffs were proceeding,[204] but the Fourth Circuit insisted upon the prerogative of district courts to factor such concerns into the certification decision nonetheless:

> Rule 23 states that an action "may" be maintained as a class action if the listed requirements are met. The Rule does not say that, once the requirements are met, the district court "must" certify and maintain the suit as a class action. . . . [W]e have previously held that district courts have broad discretion in deciding whether to certify a class. This broad discretion necessarily

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200 *See supra* Section II.A.

201 158 F.3d 742, 753-54, 768 (4th Cir. 1998), *vacated*, 527 U.S. 1031 (1999), *aff'd in pertinent part*, 206 F.3d 431 (4th Cir. 2000).

202 *Id.* at 753-54.

203 *Id.* at 758-59.

204 The Fourth Circuit noted that such concerns might fairly be comprised within the (b)(3) factors relating to superiority and, while disclaiming any intent to import those factors wholesale into subsection (b)(2), held "that in appropriate circumstances a district court may exercise its discretion to deny certification if the resulting class action would be unmanageable or cumbersome." *Id.* at 758 n.5.

The use of Rule 23(b)(2) in an action seeking broad punitive and compensatory damages does not survive the Court's decision in *Dukes*. *See* 131 S. Ct. 2541, 2557 (2011) (holding that claims for individualized monetary relief are not appropriate for certification under subsection (b)(2)).

> implies that the district court may appropriately consider factors other than those listed in Rule 23 in determining whether to certify a class action. . . . [T]he district court has such broad discretion to certify a class because it is intimately familiar with such practical and factual intricacies of the suit.[205]

I have not discovered a judicial interpretation of the permissive language of Rule 23 that more directly calls into question the Court's apparent treatment of the issue in *Shady Grove* than this one. The substance of the *Lowery* court's interpretation, however, represents the dominant sentiment among the lower federal courts throughout the post-1966 period. Similarly, lower federal courts have regularly claimed discretion to deny certification in cases involving uncertainty over the enumerated requirements of Rule 23 when their analysis produces indeterminate results and requires the exercise of judgment about the workability of a class proceeding. Thus, cases where the parameters of a class definition are "inherently nonspecific" and leave doubt about the ascertainability of class membership have led courts to claim broad discretion in denying class certification—one among many possible examples.[206]

Litigation against government officials has also produced a line of cases that assert a distinct justification for judicial discretion to deny class certification despite a complaint's seeming compliance with the provisions of Rule 23. In cases involving requests for injunctive relief against government defendants, the proposition that a class action might be an unnecessary form of relief has been formally adopted by a number of federal circuits as a basis for denying class treatment, often under the rubric of a "necessity requirement." The doctrine has its origin in another influential ruling by Judge Friendly in *Galvan v. Levine*, a case involving a New York policy that targeted workers of Puerto Rican origin for the denial of unemployment benefits.[207] A three-judge panel tried the claims of two individual Puerto Rican plaintiffs, found the challenged policy unconstitutional, and enjoined its further enforcement, a result that the state accepted.[208] The panel denied the plaintiffs' request to certify a class on behalf of all similarly affected

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205 *Lowery*, 158 F.3d at 757-58 (citations omitted).

206 *See* Miller v. Krawczyk, 414 F. Supp. 998, 1000 (E.D. Wis. 1976) (denying certification of a class purporting to represent employees "who presently reside or desire to reside outside of Milwaukee County" in challenging a residency requirement for civil service employment); *see also* 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1785 (3d ed. 2005 & Supp. 2013) (collecting cases regarding determinations whether class actions should be certified).

207 490 F.2d 1255, 1257 (2d Cir. 1973).

208 *Id.* at 1260.

workers, however, and the plaintiffs appealed from that denial.[209] The Second Circuit affirmed and suggested that class certification was generally unnecessary in cases involving facial constitutional challenges to government policies:

> [I]nsofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality, at least for the plaintiffs. . . . [W]hat is important in such a case for the plaintiffs or, more accurately, for their counsel, is that the *judgment* run to the benefit not only of the named plaintiffs but of all others similarly situated, as the judgment did here. The State has made clear that it understands the judgment to bind it with respect to all claimants; indeed even before entry of the judgment, it withdrew the challenged policy even more fully than the court ultimately directed and stated it did not intend to reinstate the policy.[210]

A number of other circuits have adopted some version of this necessity requirement, but most have emphasized that the doctrine is discretionary—not automatic—and must be administered with careful attention to the enforcement dynamics of particular disputes.[211] There have been occasions when lower federal courts have denied class treatment in such cases and government officials have then failed to come into general compliance after losing on the merits, justifying the certification of a broad remedial class in subsequent proceedings.[212]

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209 *Id.*

210 *Id.* at 1261 (citations omitted).

211 *See, e.g.*, Dionne v. Bouley, 757 F.2d 1344, 1356 (1st Cir. 1985) (recognizing the discretion of federal courts to "deny Rule 23(b)(2) certification where it is a formality or otherwise inappropriate" but emphasizing the need for attention to "situations where a class certification under Rule 23(b)(2) will arguably be unnecessary, but where other considerations may render a denial of certification improper"); Duprey v. Conn. Dep't of Motor Vehicles, 191 F.R.D. 329, 339 (D. Conn. 2000) (explaining that "whether to apply the necessity doctrine is a matter committed to the sound discretion of the district court" and finding that a defendant's refusal to concede the commonality and typicality of the class claims indicates a likelihood that the defendant will resist voluntary compliance militating in favor of class certification if otherwise appropriate).

212 For example, in *Bermudez v. U.S. Department of Agriculture*, plaintiffs challenged the federal food stamp program's refusal to provide retroactive adjustments to welfare recipients whose benefits were found to have been wrongfully withheld. 490 F.2d 718, 719-20 (D.C. Cir. 1973). Earlier suits challenging the same policy had been initiated in other courts, which had denied nationwide class treatment on the strength of the assumptions that "the federal government would voluntarily rescind the policy" and that "the precedential value of the judgment would make a class action unnecessary." *Id.* at 724. "Neither of these hopes [was] fulfilled," so the district court in *Bermudez* determined that class relief had become necessary, and the court of appeals affirmed. *Id.* at 724-25.

As with many of the cases involving the discretion not to certify, courts vary in the textual justifications they offer, if any, for this necessity doctrine. Thus, the First Circuit has explained that it "prefer[s] not to speak of a 'necessity requirement.'"[213] Instead, it has adopted a reading of Rule 23(b)(2)'s language requiring injunctive relief that is "*appropriate* respecting the class as a whole"[214] to mean that a classwide injunction is not "appropriate" when it appears unnecessary to achieve broad remedial compliance.[215] In contrast, Judge Leon of the D.C. District Court recently disclaimed any need for specific textual justification in exercising the discretion not to certify in a suit against a government defendant, explaining that "[e]ven though the proposed classes satisfy the eligibility criteria in Rule 23, the Court may nevertheless deny class certification based on other relevant considerations" and may "tak[e] account of factors not expressly delineated in Rule 23."[216] The judge found this species of discretion to be particularly well-suited for facial constitutional challenges to government policies in which the court believes that a single decree will provide relief to all affected individuals.[217]

Finally, some decisions have recognized discretion not to certify in damages actions where the remedial justification for a class action is unclear. One early influential case of this type, *Kamm v. California City Development Co.*, involved a dispute in which investors claimed fraud by promoters of a real estate development scheme.[218] By the time the plaintiffs requested class certification, California public authorities had already initiated an enforcement proceeding against the developers in which they secured an injunction that prohibited further deceptive practices and negotiated a settlement requiring the defendants to offer restitution to injured parties.[219] Investors who chose to reject those offers of restitution could still pursue their claims, and the class representatives sought to advance these claims on an aggregate basis.[220] The district court invoked the superiority requirement to deny the request for certification, finding that the alternative remedy available under the state settlement rendered it unnecessary to permit parties who rejected

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213 *Dionne*, 757 F.2d at 1356.

214 FED. R. CIV. P. 23(b)(2) (emphasis added).

215 *Dionne*, 757 F.2d at 1356.

216 Mills v. Dist. of Columbia, 266 F.R.D. 20, 22 (D.D.C. 2010).

217 *See id.* at 22-23 ("[T]he relief sought by the named plaintiffs by virtue of their facial challenge affords sufficient protection to the proposed class members . . . thereby making class certification in this particular context wholly unnecessary.").

218 509 F.2d 205, 207 (9th Cir. 1975).

219 *Id.* at 207-08.

220 *Id.* at 208.

the offer of restitution to pursue private remedies on an aggregate basis.[221] The Ninth Circuit found this ruling to be an appropriate exercise of discretion, emphasizing the "[s]ignificant relief" already realized by the investors and the likelihood that a class action would "duplicate and possibly to some extent negate" the work already undertaken in the state proceedings.[222] *Kamm* continues to be cited in discussions about the propriety of class certification of damages claims in the aftermath of regulatory enforcement proceedings.[223]

## III. ANALYZING THE ROLE OF DISCRETION IN CLASS ACTION LITIGATION

My primary purpose in this Article is a descriptive one. The topic of discretion in class certification has received inadequate attention in the scholarly and judicial literature with no systematic account of the types of discretion that courts have actually exercised since the 1966 revisions to Rule 23. The overview and taxonomy that I set forth above is far from complete, but I believe that it provides a framework within which more useful analysis can develop.

My normative goals are more limited. The cases discussed above encompass a broad range of liability policies and litigation contexts, and it would require a dedicated and sustained treatment to advance any well-supported argument about the proper role of a court's discretion in any one of them. That said, I am convinced that the judicial devices described throughout this Article must be available as potential tools in any successful system of class litigation. In this Part, I offer some further observations about the systemic nature of discretion in class certification: its inevitability in the administration of aggregate proceedings, and some of the elements of class action doctrine that can serve as counterweights to the exercise of discretion by lower federal courts. I also address the impact of *Shady Grove* on this system of discretion—an impact that is considerably more modest than the Court's arresting language in that opinion might first lead one to assume.

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221 *Id.* at 209.

222 *Id.* at 212.

223 *See, e.g.*, *In re* Conseco Life Ins. Co. LifeTrend Ins. Sales & Mktg. Litig., 270 F.R.D. 521, 533 (N.D. Cal. 2010) (distinguishing *Kamm* in an injunctive class action presenting liability theories distinct from those pursued by regulators); Thornton v. State Farm Mut. Auto Ins. Co., 2006 WL 3359482, at *2 (N.D. Ohio Nov. 17, 2006) (citing *Kamm* in support of "the proposition that state relief coupled with an opportunity to bring individual claims is superior to a class action"); *see also* Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1307, 1314 (9th Cir. 1977) (affirming a district court's denial of class certification in a Title VII action where an earlier consent decree offered a no-fault method of relief).

### A. *The System of Discretion Surrounding Class Certification*

The forms of discretion explored in the previous Parts reveal several unsurprising truths regarding class action litigation. First, there is a significant amount of indeterminacy in the certification of class proceedings, and there are limitations on the ability of strictly defined rules to resolve this indeterminacy.[224] Experimentation is inevitable when courts encounter a request for class certification in a new type of claim involving new types of proof.[225] The discretion to limit the definition of a class to a core set of claims that are particularly well-suited to aggregate treatment, or to constrain the geographic scope of the class so as to limit the impact of certification in uncertain terrain, permits courts to develop a body of knowledge and practice over time from which they can make more confident decisions about certification.[226] As the Tenth Circuit observed in *Wilcox v. Commerce Bank of Kansas City*, "it might be comforting to all of us in a way if each decision on review could clatter out of a slot brightly and clearly minted whenever governing symbols seemed to match, without the necessity of pondering over more imponderable but significant indications."[227] But that is not how complex cases usually operate.

Second, the introduction of class certification into a liability scheme can produce unforeseen consequences, and the general presumption that

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224 Professor Kim makes a similar observation in her analysis of discretion among lower courts, admonishing quantitative analysts to engage with legal doctrine when seeking to measure judicial behavior. *See* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 388 (2007) ("Despite the demand of hierarchical precedent, lower federal courts retain a substantial amount of discretion when deciding cases. . . . To some extent that discretion exists because it is unavoidable—legal language is at some point irredeemably indeterminate."); *see also* H.L.A. HART, THE CONCEPT OF LAW 124 (1961) (arguing that legal rules "will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*").

225 The Fifth Circuit made this point in *Castano* when explaining its reason for rejecting a single nationwide class action for claims that the tobacco industry induced its customers to become dependent upon nicotine. *See* 84 F.3d 734, 749 (5th Cir. 1996) ("The primary procedural difficulty created by immature torts is the inherent difficulty a district court will have in determining whether the requirements of [R]ule 23 have been met.").

*Castano*'s analysis of these issues can fairly be characterized as hostile toward the claimants. Indeed, "jeremiad" would be an apt term to describe the tenor of its analysis. The court seemed more interested in foreclosing a nationwide proceeding than in providing guidance for how smaller and more discretely defined class proceedings might fall within the proper bounds of a district court's discretion, creating opportunities for experimentation with aggregate treatment of these novel claims.

226 *See* Friendly, *supra* note 13, at 771-73 (describing the value of allowing appellate courts to develop settled practice over time, and arguing for concomitantly greater appellate constraints on district court discretion in such cases).

227 474 F.2d 336, 348 (10th Cir. 1973).

legislatures enact statutes against the backdrop of an existing procedural landscape is frequently an inadequate response. Indeed, in light of the robust tradition of discretion in class certification reflected in the cases discussed herein, such discretion may fairly be characterized as an established part of that procedural landscape. In cases where the statutory language allows it, the discretion not to certify can operate as a safety valve, permitting courts to explore the available avenues for relief in a series of cases from which they can determine when class treatment is appropriate and, conversely, when broad certification orders threaten to undermine the values sought to be promoted by the legislative scheme. As Professor Burbank and I have argued:

> The history of Rule 23 . . . entails a seventy-year-long discussion of the deeply intertwined relationship between the procedural mechanism that enables aggregation of large numbers of claims for adjudication and the capacity of that mechanism to ossify certain liability rules (in the case of original Rule 23) or to catalyze innovation in the liability policies of the underlying law (in the case of the post-1966 version of the Rule, and particularly Rule 23(b)(3)).[228]

Almost fifty years of experience under modern Rule 23 has produced a now-unavoidable "awareness that in 'procedure' lurks power to alter or mask substantive results."[229] Discretion in class certification must be sufficiently capacious to address those substantive impacts in appropriate cases. Again the Tenth Circuit in *Wilcox*: "[O]ur whole system of justice is importantly geared to the balancing of judgment across variant and numerous circumstances by judges who must be entrusted[,] from the very difficulties of remote comparison and the superior perception of firsthand impression[,] to a wide discretion."[230]

Third, the forms of discretion explored in the Sections above are interconnected. As Section II.C discusses, the power to control the definition or scope of a proposed class—a widely acknowledged and uncontroversial form of judicial control—is not qualitatively distinct from the discretion not to certify. Judge Friendly argued that the forms of procedural discretion that are most directly tied to matters of substantive policy may require the most invasive forms of appellate control, at least once the federal courts have

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228 Burbank & Wolff, *supra* note 198, at 62; *see also* Reiter v. Sonotone Corp., 442 U.S. 330, 344-45 (1979) (identifying the protection of consumers as a primary purpose of the antitrust laws and a guiding principle in the certification of consumer class actions).

229 Burbank & Wolff, *supra* note 198, at 30.

230 474 F.2d at 348.

acquired sufficient experience to have confidence in setting forth constraining rules.[231] But it is not possible to eliminate the more consequential forms of discretion in class certification altogether without threatening the pliability, and hence the viability, of the entire enterprise.

There are dangers associated with robust judicial discretion. The type of trial court discretion that the Tenth Circuit approved in *Shook v. Board of County Commissioners of El Paso*[232] threatens a lack of uniformity in the treatment of requests for certification and an appearance of inconsistency in the rule of law. Discretion in matters with such immediate substantive implications can also turn into a platform for the advancement of policy preferences or the expression of judicial hostility toward particular substantive legal regimes. While the legal realist mindset would assume that the advancement of judicial preferences is unavoidable, discretion in class certification may present more acute dangers on that score.[233] And insofar as the exercise of discretion aims to develop better information about the consequences of class certification in the face of indeterminacy, there is reason to question whether courts tend to overestimate their own expertise and, relatedly, whether the costs of indeterminacy should be addressed by politically accountable actors instead. Professor Bone has developed a general critique of procedural discretion along these lines, and while I

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231 *See* Friendly, *supra* note 18, at 758 (arguing that "broad appellate constraint is necessary" in cases with substantive policy implications "to preserve the most basic principle of jurisprudence" that "we must act alike in all cases of like nature").

232 543 F.3d 597, 603-04 (10th Cir. 2008) (affirming a district court's denial of certification in an institutional reform case for reasons bearing upon remedial policy and predominance, while also acknowledging that "other district courts perhaps could have chosen, or could choose, to certify similar classes").

233 *See, e.g.*, Katz v. Carte Blanche Corp., 496 F.2d 747, 764 (3d Cir. 1974) (en banc) (Seitz, C.J., dissenting) ("The unarticulated major premise of the majority decision is a distaste for class actions, at least in the present context [of a TILA dispute]. I do not believe such distaste, however widely shared, justifies judicial emasculation of Rule 23."); Marcus, *supra* note 103, at 1606 ("The increasing vigor of the federal courts in tailoring the class action and other procedures to handle mass tort litigation has done little to disguise the substantive objective." (footnote omitted)).

Professor Coffee has argued that trial judges are particularly prone to act from institutional self-interest, limiting the rights of parties in service of case management and docket clearing. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1463 (1995) ("[T]he fact of judicial self-interest must be placed at center stage. . . . [T]he least acceptable reform proposals are those that simply increase the discretion of the trial judge. Given such discretion, the right to opt out would soon wither, and litigant autonomy might increasingly become a nostalgic memory." (footnote omitted)).

disagree with his conclusions, the concerns that he identifies require serious attention.[234]

The alternative, however, is to adopt strictly defined rules that avoid unsustainable outcomes in some problematic cases at the cost of foreclosing socially useful class actions in others. In *Amchem*, for example, the Court rejected a massive coordinated effort to employ a settlement-only class action to address the catastrophe of asbestos personal injury litigation.[235] The majority decision was characterized by strict formalism, demanding adherence to prophylactic rules without any allowance for a pragmatic assessment of the value of those rules in the actual case. That approach is appropriate when reviewing adequacy of representation—a structural protection that calls for prophylactic rules designed to guard against conflicts of interest. But it was counterproductive when applied to predominance—a requirement grounded in pragmatism where the need for prophylactic protection is not apparent and the case for a more context-sensitive exercise of discretion is compelling.[236] Similarly, in the early years

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234 *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2002 (2007) (arguing that trial courts lack the competency to tailor procedures to individual cases in a consistently effective manner).

235 *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628-29 (1997) (recognizing that although "a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure," the case before the Court could not be sustained as a class action).

236 *See* Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1106-07 (2013) (criticizing *Amchem* for "equating predominance with class cohesion and then tying class cohesion to the legitimacy of adjudicative representation" and thereby "enlist[ing] predominance to do due process and fairness work as well"); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 802-07 (2013) (discussing the impact of *Amchem*'s rigid approach to predominance on class settlement practices, which makes "courts feel constrained to reject a class settlement because of predominance issues that were irrelevant in the settlement context").

The Court's primary justification for a strict enforcement of predominance in the settlement context was a concern that class counsel would lack leverage in negotiations and that the court would have inadequate information in assessing the fairness of a proposed settlement:

> [I]f a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit of adversarial investigation.

*Amchem*, 521 U.S. at 621 (citations omitted).

I do not dismiss this concern out of hand, but it was clearly misapplied in the asbestos cases, where plaintiff's counsel enjoyed significant leverage through the threat to continue litigating individual asbestos claims on an inventory basis, as indeed they did after the settlement was invalidated. *See* Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After* Amchem *and* Ortiz, 80 TEX. L. REV. 1899, 1912-15 (2002) (describing the dynamics of aggregated inventory litigation

of the TILA, when lower federal courts were presented with class actions that would have imposed crippling liability, sometimes based on minor and technical disclosure infractions,[237] the discretion to assess the propriety of class certification in light of the purposes of the TILA alleviated the intense pressure to restrict Rule 23 in more categorical terms in order to avoid unsustainable results. The *Wilcox* court captures this proposition, as well: "It would be worse in the long run to maim or kill . . . Rule [23] with universal but improvident kindness than to limit on a case by case basis within sound judicial discretion its application to situations offering sensible results."[238]

There are mediating factors in class action doctrine that address some of the concerns raised by the discretion to redefine a class or deny certification. One systemic counterweight to the impact of the discretion not to certify is the Supreme Court's decision in *Smith v. Bayer Corp.*[239] *Bayer* rejected an attempt by the defendant in a products liability case to use a federal court judgment that had denied certification of a proposed statewide class in West Virginia as grounds to enjoin a state court from certifying a class of the same claimants asserting the same claims.[240] The Court found that differences in West Virginia's certification standard meant that the issue resolved in the federal judgment was not the same as that presented in the state court, rendering the relitigation exception to the Anti-Injunction Act unavailable,[241] and also that the putative class members of the uncertified class were never made "parties" to the federal court action and hence were not bound by the judgment in any event.[242] The Court did not reach the question of whether due process would make injunctive enforcement of a denial of certification impossible, resting only on the federal common law of

for asbestos claims). However, unlike the Court in *Amchem*, I view the impact that an inability to certify a litigation class would have upon class settlement negotiations as a matter properly subject to judicial discretion rather than a strict prophylactic rule.

237 The extent to which litigation under the early TILA involved only "technical" violations is disputed. *See* Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 889-90 (2003) (noting that "more than half of TILA litigation in [the pre-1989 era] challenged the accuracy of finance charges 'not a "technicality," but one of the two most fundamental disclosures mandated by TIL[A]'" (quoting KATHLEEN E. KEEST & GARY KLEIN, TRUTH IN LENDING 36 (3d ed. 1995))).

238 474 F.2d 336, 349 (10th Cir. 1973); *see also* Marcus, *supra* note 103, at 1611 (highlighting problems with alternatives to the use of procedural discretion and noting that critics of discretion "seem to concede that the systemic changes that have led to the current situation do not admit of ready cures").

239 131 S. Ct. 2368 (2011).

240 *Id.* at 2382.

241 *Id.* at 2377-79.

242 *Id.* at 2379-82.

preclusion and reserving decision on the power of Congress or the drafters of the Federal Rules to expand the scope of that common law doctrine.[243]

*Bayer* erects a barrier that limits the impact of a federal court's denial of certification, preserving the ability of putative class members to initiate a new action and to convince another court that certification is in fact warranted. To the extent that the doctrine of discretion suggests room for different judgments among lower federal courts in the propriety of class certification, *Bayer* creates space for the exploration of the issue among different jurists. The "principles of comity" counseling adherence to prior rulings that the Supreme Court anticipated among lower federal courts in *Bayer*[244] should operate at their strongest when the initial court determines that a proposed action fails to satisfy strict rule-based requirements for certification, rendering class treatment wholly inappropriate. Where the denial of certification involves the type of judgment that could lead "other district courts . . . [to] choose[] to certify similar classes," as the Tenth Circuit explained the issue in *Shook*,[245] then the restraints of comity are weaker when the same issue is placed before a subsequent court.[246]

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243 *Id.* at 2376 n.7, 2382 n.12. In previous work, I have argued that due process imposes no categorical barrier to the enforcement of a federal court's denial of class certification in subsequent cases, and that a prohibitory injunction against serial attempts to secure certification of the same class in a new court are constitutionally possible and sometimes warranted. *See* Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2109-17 (2008). I gave little attention in that treatment to the antecedent preclusion questions that the Court addressed in *Bayer*. The significance of that component of the analysis was made apparent when the Court provided a comprehensive restatement of the categories and limitations on nonparty preclusion under federal common law in *Taylor v. Sturgell*, 553 U.S. 880 (2008). *See* ALI, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.11 cmt. b (2010) (citing Wolff, *supra*, at 2109-17) (discussing the state of the law after the Court's decision in *Taylor*). The Court's holding in *Bayer* and its conservative treatment of the federal common law implications of the Class Action Fairness Act are both defensible. If Congress were to adopt a comprehensive approach to preclusion in federal class action litigation that included the possibility of preemptive force for denials of class certification, my earlier analysis would still lead me to conclude that due process would impose no categorical barrier.

Given the decision of the Court in *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503-04 (2001), which adopted a strained interpretation of Rule 41(b) in order to avoid the serious problems that would arise under the Rules Enabling Act if a Federal Rule purported to mandate a rule of preclusion, it is surprising that the *Bayer* Court flags "a change in the Federal Rules of Civil Procedure" as one possible response to its holding. *Bayer*, 131 S. Ct. at 2382 n.12.

244 *See* 131 S. Ct. at 2382 ("[W]e would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute.").

245 543 F.3d 597, 603-04 (10th Cir. 2008).

246 The Third Circuit recognized a similar distinction in an early TILA case, entertaining an argument that decisions involving "nondiscretionary reasons for rejecting class action treatment" might be proper subjects for interlocutory review under 28 U.S.C. § 1292(b) whereas denials of certification that "involve[] the exercise of discretion" would not. Katz v. Carte Blanche Corp., 496

Another systemic counterweight is the ability of a district court to control the future preclusive effect of a class action judgment upon the ability of absentees to pursue related individual claims. District courts have the power to impose prospective constraints on the impact of their judgments in order to avoid debilitating conflicts of interest among class members arising from the risk of adverse preclusion consequences.[247] A court presented with a class action that otherwise satisfies the requirements of Rule 23 can employ that power to facilitate certification where doing so is appropriate under the preclusion policies governing the dispute.[248] The decision not to employ that power is, in effect, a discretionary judgment not to certify, whereas the decision to impose preclusion constraints to overcome any conflicts of interest is the affirmative use of discretion to certify a class. Similarly, a court's discretion to redefine a class may preserve the opportunity for class members to obtain the benefits of a representative proceeding despite the bad choices or skewed incentives of their representatives, as in *Maneely v. City of Newburgh*.[249] The power of the court to protect class members from adverse preclusion effects helps to preserve the viability of that option.

### B. *Discretion in Class Certification After* Shady Grove

It remains to ask whether this system of interlocking discretion in class certification, developed over half a century and affirmed or acknowledged by the Supreme Court on several occasions, was abruptly eliminated by the Court's opinion on the Rules Enabling Act in *Shady Grove*.[250] In rejecting the argument that New York CPLR § 901(b) should operate in place of Federal Rule 23 when determining the availability of class relief on a statutory damages claim, the Court described Rule 23 in terms that appear disjunctive with the decades of practice described in the sections above. Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the

F.2d 747, 752-53 (3d Cir. 1974) (en banc). The court ultimately found that the distinction was not controlling in a 1292(b) analysis. *Id.* at 756.

247 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) (1982) (recognizing an exception to the general prohibition against claim splitting when "[t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action"); *see also In re* Vitamin C Antitrust Litig., 279 F.R.D. 90, 115-16 (E.D.N.Y. 2012) (expressly reserving the right of class members to pursue individual damages claims notwithstanding their membership in a class seeking injunctive relief).

248 I have explored these issues at some length in earlier work. *See generally* Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2005).

249 *See supra* notes 141-146 and accompanying text.

250 130 S. Ct. 1431 (2010).

specified criteria to pursue his claim as a class action," the Court asserted—it "provides a one-size-fits-all formula for deciding the class-action question."[251] Responding to Allstate's argument that Rule 23 does not govern the certification question in every case, the majority opined:

> [T]hat is *exactly* what Rule 23 does: It says that if the prescribed preconditions are satisfied "[a] class action *may be maintained*" (emphasis added)—not "*a class action may be permitted*." Courts do not maintain actions; litigants do. The discretion suggested by Rule 23's "may" is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes. And like the rest of the Federal Rules of Civil Procedure, Rule 23 *automatically* applies "in all civil actions and proceedings in the United States district courts," Fed. Rule Civ. Proc. 1. See *Califano v. Yamasaki*, 442 U.S. 682, 699-700 (1979).[252]

Although the Court's language here is broad and its emphatic tone typographically unmistakable, its holding addresses a limited question. The Court's citation to *Yamasaki* in this passage highlights the narrow compass of its interpretation of Rule 23.

The argument that Allstate pursued before the Court, and to which this passage responds, asserted that Rule 23 was inapplicable to the certification question presented in that case—that class actions were wholly unavailable in a suit asserting statutory damages under New York law because Rule 23 did not govern the question, leaving CPLR § 901(b) to control.[253] Reflecting the categorical nature of its position, Allstate attempted to rely upon a distinction between the criteria for certification and the "antecedent question . . . whether the particular type of claim is eligible for class treatment in the first place."[254] In this respect, Allstate was advancing an argument similar to the primary contention urged by the Social Security Administration in *Yamasaki*: that class certification in general, and a nationwide class in particular, was categorically unavailable in actions brought to enforce certain requirements under the Social Security Act.[255] The *Yamasaki* Court rejected those categorical arguments in the portions of its opinion referenced

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251 *Id.* at 1437.

252 *Id.* at 1438 (parallel citation omitted).

253 *See* Brief for Respondent at 10-12, Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010) (No. 08-1008) (arguing that CPLR § 901(b) "categorically precludes class actions" and should apply in a federal diversity case).

254 *Shady Grove*, 130 S. Ct. at 1438.

255 *See* 442 U.S. at 698 (noting the Social Security Administration's argument that class actions should be completely precluded under the relevant statute).

in the passage from *Shady Grove* quoted above.[256] However, as discussed in Section II.C, the *Yamasaki* Court then proceeded to reaffirm the discretion of federal courts to determine whether a nationwide class is appropriate in a given case, taking into account the remedial needs of the plaintiffs, the burdens that a nationwide class might impose upon the defendant, and the broader systemic impact of a class action in light of other remedial proceedings already underway.[257]

The Court's assertion in *Shady Grove* that "[t]he discretion suggested by Rule 23's 'may' is discretion residing in the plaintiff" coupled with its references to the "automatic" and "one-size-fits-all" character of the rule are undeniably jarring.[258] But those assertions respond to an argument about the categorical inapplicability of Rule 23. They do not address the proper application of the Rule in a given case. The Court's rejection of the categorical argument in *Yamasaki* did not render a nationwide class automatically available to any plaintiff who could show that the express requirements of the Rule were satisfied. And the *Reiter* Court's rejection of any categorical prohibition on consumer antitrust class actions was accompanied by a strong affirmation of the "broad power and discretion" vested in district courts "with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions."[259] *Shady Grove*'s holding, too, addresses only a narrow categorical question.

This more limited reading of *Shady Grove*'s treatment of Rule 23(b) seems compelled by the position adopted in dissent by then-Judge Scalia in *Fink v. National Savings & Trust Co.* As discussed above, Judge Scalia insisted "that the District Court has broad discretion in determining whether a suit should proceed as a class action," going so far as to adopt a rational-basis mode of analysis that would uphold a district court's discretionary denial of certification even in the absence of specified reasons so long as some proper basis for doing so could be discerned from the record.[260] To read *Shady Grove* as foreclosing all discretion in the decision to

256 *See id.* at 700 (refusing to recognize that class relief under Rule 23 is unavailable without "clear expression of congressional intent to exempt [the] actions").

257 *See id.* at 702 ("[A] federal court when asked to certify a nationwide class should take care to ensure that the nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts.").

258 130 S. Ct. at 1437-38.

259 Reiter v. Sonotone Corp., 442 U.S. 330, 345 (1979).

260 Fink v. Nat'l Sav. & Trust Co., 772 F.2d 951, 964-65 (D.C. Cir. 1985) (Scalia, J., concurring in part and dissenting in part).

certify would ascribe a fatal inconsistency to Justice Scalia's treatment of the issue.

The limited scope of the Court's holding in *Shady Grove* is further illustrated by the position adopted by Justice Stevens in concurrence and the four dissenters led by Justice Ginsburg, who together formed a majority. All five embrace the proposition that Rule 23 (and any Federal Rule) must be applied with sensitivity to the impact the Rule might have upon the substantive policies of the applicable state law in a given case.[261] Their disagreement, and hence the result in the case, centered on the proper interpretation of CPLR § 901(b), which Justice Stevens did not believe to be a part of the liability policy of New York.[262]

As Professor Burbank and I have argued, there is much to criticize about this style of analysis, which invites non-uniform interpretations of the Federal Rules and threatens to elevate state substantive law over federal substantive law in the Rules Enabling Act hierarchy. The better interpretation would recognize the limited ability of Rule 23 to set substantive aggregate-liability policy in *any* case, requiring that courts applying the Rule always "look to the substantive liability and regulatory regimes of state and federal law in determining whether aggregate relief is appropriate and consistent with the goals of that underlying law."[263] Many lower federal courts have done exactly that.

That difference aside, however, a clear majority of the Justices in *Shady Grove* did conclude that federal courts must make judgments about the propriety of class certification in light of the impact that certification would have upon the underlying substantive law. Thus, despite its broad language, the majority portion of *Shady Grove*'s lead opinion must be understood as addressing only a Rules Enabling Act question: Rule 23's applicability in the face of contrary state procedural authority, which is what Justice Stevens understood CPLR § 901(b) to constitute.[264]

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261 *See Shady Grove*, 130 S. Ct. at 1451 n.5 (Stevens, J., concurring in part and concurring in the judgment) ("I thus agree with Justice Ginsburg that a federal rule, like any federal law, must be interpreted in light of many different considerations, including 'sensitivity to important state interests' and 'regulatory policies.'" (citations omitted)).

262 *See id.* ("I disagree with Justice Ginsburg, however, about the degree to which the meaning of federal rules may be contorted, absent congressional authority to do so, to accommodate state policy goals."); *id.* at 1465 (Ginsburg, J., dissenting) (finding no need to apply Rule 23 because the New York state statute was directed to achieving a substantive result with regard to liability).

263 Burbank & Wolff, *supra* note 198, at 21.

264 *See Shady Grove*, 130 S. Ct. at 1456 (Stevens, J., concurring in part and concurring in the judgment) (concluding that CPLR § 901(b) is procedural and not "sufficiently interwoven with the scope of a substantive right or remedy" to present a Rules Enabling Act problem).

Many lower federal courts discussing the propriety and bounds of class certification in light of discretionary factors, particularly those touching on matters of liability or regulatory policy, have located their analysis in the superiority requirement when an action for damages is proposed under subsection (b)(3), or in the general standards of equitable relief and the proposition that injunctive relief should be "appropriate" when a plaintiff files under subsection (b)(2). No part of the Court's opinion in *Shady Grove* addresses those features of Rule 23. Although it is true that the Court built up a head of rhetorical steam in rejecting Allstate's categorical argument under the Rules Enabling Act, it would be a mistake to read the opinion as speaking in any way to the administration of these provisions of the Rule.

Other courts exercising discretion in class certification, in contrast, have treated this power as inherent in the Rule 23 inquiry—as indeed the Court itself did in *Yamasaki* and *Reiter*—rather than tying discretion to particular provisions of the Rule. In some instances, courts have pointed to the "may be maintained" language of Rule 23(b) as evidence of that inherent discretion.[265] This was an unremarkable proposition before *Shady Grove* introduced confusion about the significance of that language. For the time being, at least, there is room for debate about the status of extra-textual discretion under Rule 23, and federal courts would be well-advised to provide specific textual grounding when a proposed class action requires the exercise of judgment.[266] For example, a ruling on the scope of class certification in an immature tort case, as in *Rhone-Poulenc*, might require a court to provide more specific justification under the superiority requirement of section (b)(3), as the Fifth Circuit did in *Castano*.[267]

In the years since the Court decided *Shady Grove*, the lower federal courts have treated the case almost exclusively as a Rules Enabling Act decision and have given it little attention in the class certification analysis. That response is appropriate. It would be preferable for the Court to clarify the limited scope of its ruling, and better still for it to issue a mea culpa for

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265 *See, e.g.*, Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 47 (N.D. Cal. 1977) ("[T]he Court regards any order at this stage as nothing more than a tentative determination for procedural purposes that the action may be maintained as a class action on behalf of a defined class.").

266 *See, e.g.*, *In re* TWL Corp., 712 F.3d 886, 894-95 (5th Cir. 2013) (quoting language from *Shady Grove* describing Rule 23 as creating "a categorical rule entitling a plaintiff . . . to pursue his claim as a class action" but also reaffirming that a district court has discretion in determining whether the superiority requirement is satisfied).

267 *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 740-41 (5th Cir. 1996) ("[A]t this time, while the tort [of inducing nicotine-dependence] is immature, the class complaint must be dismissed, as class certification cannot be found to be a superior method of adjudication."); *id.* at 746-51 (undertaking an extended superiority analysis).

its loose treatment of the language of Rule 23(b). In the interim, however, there is no cause for lower federal courts to make significant changes to their certification practice under Rule 23 outside of the specific Rules Enabling Act issue that *Shady Grove* addressed.

## CONCLUSION

In his book *How Judges Think*, Judge Posner makes a trenchant case for pragmatism in the administration of complex legal questions. "The core of legal pragmatism," he writes, "is pragmatic adjudication, and its core is heightened judicial concern for consequences and thus a disposition to base policy judgments on them rather than on conceptualisms and generalities."[268] In response to the objection that pragmatic analysis leads to "ad hoc adjudication, in the sense of having regard only for the consequences to the parties to the immediate case," Judge Posner insists that "sensible legal pragmatism tells the judge to consider systemic, including institutional, consequences as well as consequences of the decision in the case at hand."[269]

The drafters of modern Rule 23 understood that they were placing a tool in the hands of the judiciary that would give rise to significant changes in civil litigation, the legal profession, and the content of the underlying law itself. As Professor Kaplan wrote, "[n]ew [R]ule 23 alters the pattern of class actions; subdivision (b)(3), in particular, is a new category deliberately created."[270] The effects of such a paradigm shift were unpredictable at the inception, and the ongoing adjustments necessary to maintain a workable system of class adjudication have never lent themselves easily to specification within the text of the Rule. Rather, lower federal courts have pursued a course of sensible legal pragmatism of the type that Judge Posner endorsed—including, in appropriate cases, "sustaining the authority of the trial court to employ realism and good sense in denying class action status"[271] where doing so is most faithful to the underlying substantive law.

The point of recognizing discretion in class certification is not to restrict the class action as a tool for the private enforcement of public norms. To the contrary, the point is to preserve it. If the class action is to retain its vitality, then the federal judiciary must remember its own history. Lower federal courts have employed a range of tools to authorize class treatment as a means of carrying into effect important statutory and constitutional policies

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268 RICHARD A. POSNER, HOW JUDGES THINK 238 (2008).

269 *Id.*

270 Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 399 (1967).

271 Wilcox v. Commerce Bank of Kan. City, 474 F.2d 336, 347 (10th Cir. 1973).

while employing their discretion to prevent class certification from producing counterproductive and unsustainable results. The Supreme Court exhibited an unfortunate tone deafness to that doctrinal symphony when choosing some of the language with which it responded to the Rules Enabling Act question placed before it in *Shady Grove*. There is reason to believe, however, that any appearance of an anomaly will be short-lived.