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Stephen B. Burbank
University of Pennsylvania Law School

Tobias Barrington Wolff
University of Pennsylvania Law School

UNIVERSITY *of* PENNSYLVANIA
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ARTICLE

CLASS ACTIONS, STATUTES OF LIMITATIONS AND REPOSE, AND FEDERAL COMMON LAW

STEPHEN B. BURBANK & TOBIAS BARRINGTON WOLFF†

After more than three decades during which it gave the issue scant attention, the Supreme Court has again made the American Pipe *doctrine an active part of its docket.* American Pipe *addresses the tolling of statutes of limitations in federal class action litigation. When plaintiffs file a putative class action in federal court and class certification is denied, absent members of the putative class may wish to pursue their claims in some kind of further proceeding. If the statute of limitations would otherwise have expired while the class certification issue was being resolved, these claimants may need the benefit of a tolling rule. The same need can arise for those who wish to opt out of a certified class action.* American Pipe *and its progeny provide such a tolling rule in some circumstances, but many unanswered questions remain about when the doctrine is available.*

In June 2017, the Court decided CalPERS v. ANZ Securities*, holding that* American Pipe *tolling was foreclosed to a class member who opted out of a certified class in an action brought to enforce a federal statute (the Securities Act of 1933) that contained*

what the Court labeled a "statute of repose." In June 2018, the Court decided Resh v. China Agritech*, which held that* American Pipe *tolling is not available when absent members of a putative class file another class action following the denial of certification in the first action rather than pursuing their claims individually in subsequent proceedings.*

In this Article we develop a comprehensive theoretical and doctrinal framework for the American Pipe *doctrine. Building on earlier work, we demonstrate that* American Pipe *tolling is a federal common-law rule that aims to carry into effect the provisions and policies of Federal Rule of Civil Procedure 23, the federal class action device. Contrary to the Court's assertion in* CalPERS*,* American Pipe *is not an "equitable tolling doctrine." Neither is it the product of a direct mandate in Rule 23, which is the source of authority, not the source of the rule. Having clarified the status of* American Pipe *tolling as federal common law, we explain the basis on which the doctrine operates across jurisdictions, binding subsequent actions in both federal and state court. We argue that the doctrine applies whether the initial action in federal court was based on a federal or state cause of action—a question that has produced disagreement among the lower federal courts. And we situate* American Pipe *within the framework of the Court's* Erie *jurisprudence, explaining how the doctrine should operate when the putative class action was in federal court based on diversity jurisdiction and the courts of the state in which it was filed would apply a different rule. Finally, we discuss how* CalPERS *should have been decided if the Court had recognized the true nature of the American Pipe rule and if it had engaged the legislative history of the Securities Act rather than relying on labels.*

INTRODUCTION

Federal class actions often raise questions about the application in that setting of rules that were written with litigation involving individual parties in mind. Such questions are of obvious potential systemic importance when they concern rules of jurisdiction—subject matter, personal, or appellate. Litigants may regard as no less important questions that arise from rules that federal courts apply once they have jurisdiction, and the answers may also have systemic importance, even if not obvious. Questions of both types have long been with us, and the Supreme Court has usually, but not always, sought to answer them with due regard to the practical dimensions of litigation from the perspective of both the litigants and the federal judiciary, and to the bearing of such pragmatic considerations on the policies underlying the relevant rules.

The Court confronted such a question when determining statutory diversity of citizenship in class action litigation. It opted to consider only the citizenship of named class representatives, rather than treating a class suit as an amalgam of claims by individuals, an approach that would have excluded most such suits from federal court.[1] Yet, concerned that diversity class actions under amended Rule 23 would overtax the limited resources of the federal

†Burbank is David Berger Professor for the Administration of Justice, and Wolff is Professor of Law, at the University of Pennsylvania Law School. John Leubsdorf provided helpful comments. We thank Greta Wiessner, Penn Law '19, for excellent research assistance.

1 *See* Devlin v. Scardelletti, 536 U.S. 1, 10 (2002) ("[C]onsidering all class members for these purposes would destroy diversity in almost all class actions. Nonnamed class members are, therefore, not parties in that respect."); Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 367 (1921) ("If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented."). The Court has adhered to that rule even after the advent of class actions that are harder to square with traditional representational justifications, as are many that, since 1966, are eligible for certification under Rule 23(b)(3). *See* James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CALIF. L. REV. 1423, 1456 (2007) ("To date, the Court has not seen fit to consider the application of *Cauble* to (b)(3) class actions or to consider why the lower courts have extended the *Cauble* rule.").

judiciary, the Court took care when choosing between existing nonclass models for calculating the amount in controversy required by the diversity statute. The Court's choices, forbidding the aggregation of the claims of putative class members and requiring each of them to satisfy the amount-in controversy requirement, had the purpose and effect of keeping class actions packaging small state law claims out of federal court.[2]

The advent of the modern class action in 1966 proliferated questions of this sort that arose in federal court. The inconsistency of the Court's answers, which alternated between views of the class action as a joinder or representational device, suggests the limitations of theory in a domain that puts in play so insistently the practical interests of litigants and of the institutional judiciary.[3] Moreover, by the late-1990s, when the Court returned to class actions after a long vacation, they had become a focal point of efforts to retrench federal litigation, and thus of partisan and ideological conflict, in Congress.[4] Proponents of federal litigation retrenchment understood that its prospects were best in the increasingly conservative federal courts. The hard-won enactment of the Class Action Fairness Act of 2005,[5] which reflected that understanding,[6] enabled Congress to ship the ideological conflict to the federal courts, where, abetted by migrating interest group pressure, over the

2 *See* Zahn v. Int'l Paper Co., 414 U.S. 291 (1973) (holding that all claims must meet amount-in-controversy requirement); Snyder v. Harris, 394 U.S. 332, 341 (1969) ("There is no compelling reason for this Court to overturn a settled interpretation of an important congressional statute in order to add to the burdens of an already overloaded federal court system."). For the models rejected in these cases, see *Zahn*, 414 U.S. at 305 (Brennan, J., dissenting) ("[P]etitioners make no argument inconsistent with the Court's holding that the theory of 'joint' claims or interests will not support jurisdiction over the nonappearing members of their class. Their contention is rather that a second theory, ancillary jurisdiction, supports a determination that those claims may be entertained."); *Snyder*, 394 U.S. at 353 (Fortas, J., dissenting) ("[I]t is hard to understand why the fact that the alleged claims are, in terms of the old Rule categories, 'several' rather than 'joint,' means that the 'matter in controversy' for jurisdictional amount purposes must be regarded as the $7.81 Mr. Coburn claims instead of the thousands of dollars of alleged overcharges of the whole class, the status of all of which would be determined by the judgment.").

3 *See* Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459, 459 ("Each Term, the Supreme Court faces a wide variety of issues that should require a choice between two models of the modern class action: a joinder model and a representational model. Yet the Court has shown no awareness of the choices it has been making."). David Marcus reframes the post-1966 antinomy in terms of a struggle between an "adjectival conception" and a "regulatory conception." *See* David Marcus, *The History of the Modern Class Action, Part I:* Sturm und Drang*, 1953–1980*, 90 WASH. U. L. REV. 587, 592-97 (2013).

4 *See* Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495, 1510, 1520 (2017) [hereinafter *Class Actions and the Counterrevolution*].

5 Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

6 *See* Burbank & Farhang, *Class Actions and the Counterrevolution*, *supra* note 4, at 1511 ("[The Class Action Fairness Act] channeled class actions into the federal courts, an institutional environment in which more aggressive retrenchment was possible under a transsubstantive Federal Rule.").

subsequent decade it played an ever-growing and more polarizing influence on Supreme Court justices in the Court's class action cases.[7]

One of the questions implicating the view courts should take of class actions that assumed prominence soon after the 1966 amendments to Rule 23 involved the treatment of the claims of absent members of a putative class under the pertinent statute of limitations. Before those amendments, the lower federal courts had reached inconsistent decisions on limitations issues in so-called spurious class actions when individuals seeking to take advantage of a favorable judgment sought to intervene after the limitations period had run.[8] In *American Pipe & Construction Co. v. Utah*, the Supreme Court considered a similar question as to intervention by absent members of a putative Rule 23(b)(3) class action following the denial of class certification. The *American Pipe* Court held that "the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status."[9] That was because a "contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure."[10]

American Pipe itself gave rise to numerous questions, some of which still lack definitive answers more than forty years later. The Court answered one of them in *Crown, Cork & Seal Co. v. Parker*,[11] holding that *American Pipe* tolling is also available to members of a putative class who choose to file individual actions, instead of intervening, after class certification is denied. Another question that arose following *American Pipe* was the subject of a recent Supreme Court decision. In *California Public Employees' Retirement System v. ANZ Securities, Inc.* (*CalPERS*),[12] the Court (5–4) held that *American Pipe* tolling was not available to a member of a putative class asserting claims under section 11

7 *See id.* at 1517-28.

8 *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 449-50 (1974) (discussing conflict among lower court decisions); Joseph J. Simeone, *Procedural Problems of Class Suits*, 60 MICH. L. REV. 905, 938-39 (1962); Barney B. Welsh, Comment, *Class Actions Under New Rule 23 and Federal Statutes of Limitation: A Study of Conflicting Rationale*, 13 VILL. L. REV. 370, 374-82 (1968).

9 *American Pipe*, 414 U.S at 553.

10 *Id.*

11 462 U.S. 345 (1983).

12 137 S. Ct. 2042 (2017). Burbank participated in an amicus brief that sought to estimate the protective filings that plausibly would ensue if the Court affirmed the Second Circuit's decision in *CalPERS*. *See* Brief of Civil Procedure and Secs. Law Professors as Amici Curiae Supporting Petitioner, Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042 (2017) (No. 16-373) [hereinafter "Professors' Amicus Brief"].

of the 1933 Securities Act[13] who commenced a separate lawsuit against the same defendants, raising the same claims, and thereafter opted out of the class, both beyond the governing limitation periods in section 13.[14]

The *CalPERS* Court deemed the one-year bar in section 13 a statute of limitations and its three-year bar a statute of repose, distinguishing them on the ground that statutes of repose "are enacted to give more explicit and certain protection to defendants"[15] and "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time."[16] Noting that the question of tolling is one "of statutory intent,"[17] the Court relied on previous decisions for the conclusion that "the unqualified nature of [a statute of repose] supersedes the courts' residual authority and forecloses the extension of the statutory period based on equitable principles. For this reason, the Court repeatedly has stated in broad terms that statutes of repose are not subject to equitable tolling."[18]

Turning to the nature of *American Pipe* tolling, the Court concluded that "the source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions."[19] The Court reasoned that "[n]othing in the *American Pipe* opinion suggests that the tolling rule it created was mandated by the text of a statute or federal rule. . . . The Court's holding was instead grounded in the traditional equitable powers of the judiciary."[20]

Finally, the *CalPERS* Court addressed petitioner's argument that "dismissal of its individual suit as untimely would eviscerate its ability to opt out." Although acknowledging that this was "an ability this Court has indicated should not be disregarded," the Court dispatched the concern with the observation that "[i]t does not follow, however, from any privilege to opt out that an ensuing suit can be filed without regard to mandatory time limits set by statute."[21]

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13 15 U.S.C. § 77(a) (2012).

14 Section 13 of the Act provides:

> No action shall be maintained to enforce any liability created under [section 11] unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . . In no event shall any such action be brought to enforce a liability created under [section 11] more than three years after the security was bona fide offered to the public.

Id. § 77(m).

15 *CalPERS*, 137 S. Ct. at 2049.

16 *Id.* (quoting CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2183 (2014)).

17 *Id.* at 2050 (quoting Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1232 (2014)).

18 *Id.* at 2051.

19 *Id.*

20 *Id.* at 2051-52.

21 *Id.* at 2053.

We believe that the Court's decision in *CalPERS* is deeply flawed for many of the reasons advanced by the four dissenting justices,[22] as well as many others. Our primary goal in this Article, however, is not to dispute the result in that case (although we do). Rather, we highlight *CalPERS* because the Court's opinion compounds confusion concerning the source, reach, and limits of the tolling rule for federal class actions that originated in *American Pipe*—confusion that the dissent does not dispel. Much of this confusion, we argue, results from the failure to engage seriously the sources of authority for federal law, and to distinguish sources of authority from sources of rules. It has been abetted by a jurisprudence of labels.[23] *CalPERS* suggests, as does the alignment of the Justices,[24] that confusion about sources of authority for federal tolling law may also have been abetted by ideology, whether the distaste of some Justices for the power of Rule 23 to catalyze the enforcement of substantive law and regulatory policy or their predisposition to protect the interests of business.[25] The Court's subsequent opinion in *Resh* took some modest steps away from the erroneous treatment of *American Pipe* as an equitable tolling doctrine, but those steps were partial and imperfect.

Careful attention to the source of the tolling rule applied in *American Pipe* and its progeny, to sources of authority for federal law, and to the distinction between sources of authority and sources of rules, leads us to reaffirm that

22 *See id.* at 2056-58 (Ginsburg, J., dissenting).

23 "The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as '*res gestae*.'" Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 229 (1922). Always unsatisfactory, decision by label is particularly so in the class action context because it is inconsistent with an overarching goal of those who drafted the 1966 amendments to the Federal Rules of Civil Procedure's joinder rules, including Rule 23. *See* FED. R. CIV. P. 23 advisory committee's note to 1966 amendment ("the terms 'joint,' 'common,' etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain"); FED. R. CIV. P. 19 advisory committee's note to 1966 amendment ("The use of 'indispensable' and 'joint interest' in the context of original Rule 19 . . . distracted attention from the pragmatic considerations which should be controlling.").

24 *See CalPERS*, 137 S. Ct. at 2046. The majority included all of the Court's conservative Justices, while all of the liberal Justices were in dissent. This is consistent with recent research, which demonstrates that the "Supreme Court, led by its conservative wing, has issued a series of decisions making the governing legal rules more difficult for those seeking private enforcement through class actions." Burbank & Farhang, *Class Actions and the Counterrevolution*, *supra* note 4, at 1529.

25 *See* Burbank & Farhang, *Class Actions and the Counterrevolution, supra* note 4, at 1517-28. Ideology is the sire of teleology. *See* Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1017-18 [hereinafter *Hold the Corks*] (discussing cases disagreeing whether protection of defendants from stale claims is a policy of statutes of limitations as opposed to statutes of repose). In this light, the fact that many so-called "statutes of repose"—in particular those affecting product liability and medical malpractice suits—were children of the tort reform movement in the 1970s seems relevant. *See generally* Frances E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579 (1981).

the tolling rule announced in that case is a rule of federal common law. We start, in Part I, by providing a detailed analysis of *American Pipe* and its progeny in order to pin down what the Court itself regarded as the source of the tolling rule involved in those cases.[26] We then turn, in Part II, to that rule's source of authority. Federal Rules of Civil Procedure are neither statutes nor the product of judicial power, but they have the capacity of statutes to generate and legitimate exercises of federal judicial lawmaking when necessary to protect provisions and policies that are within their proper domain under the Rules Enabling Act (REA).[27] Rule 23 is not the source of *American Pipe* tolling, but it is the source of the procedural policies that the federal courts are carrying into effect through their authority to promulgate federal common law.[28]

We thus demonstrate that, contrary to a suggestion in *CalPERS*, federal judicial power on limitations issues is not confined to "promot[ing] equity" and "interpret[ing] and enforc[ing] statutory provisions."[29] The existence of positive federal law either providing for or requiring judicial supplementation presents other occasions for federal common law, with potentially different reach and limits than those of the law that federal courts fashion in order to govern their own proceedings. Designed primarily to serve the institutional interests of the federal courts, but having immediate regulatory consequences and, necessarily, collateral effects, the tolling rule emerging from *American Pipe* and its progeny is a rule of federal common law.

In Part III, we assess the reach and limits of the federal common-law rule emerging from *American Pipe* and its progeny. Valid federal common law applies in state courts as well as federal courts when necessary to make its mandate effective. Although Rule 23's direct application is confined to the federal courts, not so a federal common-law rule deemed necessary to protect its policies, provisions, and ultimately the federal courts as an independent adjudicatory system.[30] As we explain in Part III.A, if state courts could

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26 *See infra* text accompanying notes 34–161 (Part I).

27 *See* 28 U.S.C. §§ 2072–74 (2012).

28 *See infra* text accompanying notes 162–200 (Part II).

29 *CalPERS*, 137 S. Ct. at 2051, quoted *supra* text accompanying note 19. The Court's impoverished account of federal judicial power closely tracks Respondents' brief. *See, e.g.*, Brief for Respondents at 29, Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042 (2017) (No. 16-373) [hereinafter Respondents' Brief] ("Indeed, the 'tolling rule' applied in *American Pipe* could not have been anything *other than* a rule of equitable tolling . . . . Where a statute lacks an express command to pause the running of a deadline, a court's only basis for extension is equitable tolling—and only then if it is consistent with the text and purpose of the statute, as *American Pipe* itself recognized."); *see also id.* at 32 ("It would be implausible, to say the least, to suggest that *American Pipe*'s tolling rule was premised on a procedural rule that says exactly nothing about tolling or time limits.").

30 At this point we are still discussing *American Pipe* tolling in a federal question case subject to a federal limitations provision.

disregard the federal tolling rule and apply their own law to a subsequent individual action, the claimant's rights under federal substantive law could be extinguished. Although nothing in federal law requires state courts to recognize tolling in aid of the class action law and policies of other states, pertinent and valid federal common law is binding on state courts under the Supremacy Clause of Article VI.[31]

In Part III.B, we conclude that the federal common law tolling rule emerging from *American Pipe* and its progeny is not restricted to federal question cases involving federal limitations periods. Most controversially, we conclude that *American Pipe* tolling governs in federal diversity class actions even if the law of the state in which the federal court sits as F1 is to the contrary, and that the rule is similarly binding in subsequent litigation brought in state or federal court by a member of the putative or certified class asserting the same claims.[32]

Finally, in Part IV, we consider whether the result in *CalPERS* should have been different if the Court had properly conceived the tolling rule emerging from *American Pipe* and its progeny. Labels did double duty in Justice Kennedy's opinion for the Court, enabling him to take cover behind the notion that "equitable tolling" is never available for statutes of repose and also behind the notion that "statutes of repose" accord special rights that are immune to the considerations that drove the accommodation of limitations law to the class action context in *American Pipe*. This cover enabled him to avoid seriously addressing whether tolling would be inconsistent with the particular limitations/repose provision in the Securities Act. A deeper examination of the structure and history of that provision than the Court undertook demonstrates that the dissent had the better of the argument. In that regard, we return to the observation with which we started. Whether in 1933 or today, such two-tiered provisions, like simple statutes of limitations, are usually constructed on the model of nonclass litigation. Where that is true, if a defendant is given adequate notice of a claim by a putative class member within the longer period, the statutory purposes are served.[33]

I. AMERICAN PIPE TOLLING: SOURCE OF THE RULE

Just as it is best to start with the text when interpreting a federal statute, it is also important to identify the legal basis of a federal judicial decision—whether it rests on the Constitution, a statute, a Federal Rule, judge-made

31 *See infra* text accompanying notes 204–215 (Part III.A).

32 *See* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 50 (2010) [hereinafter *Redeeming the Missed Opportunities*] (noting that it "is a difficult question"); *infra* text accompanying notes 216–277 (Part III.B)..

33 *See infra* text accompanying notes 278–336 (Part IV).

law, or some other source of federal law. Close attention to the Court's opinions in *American Pipe* and subsequent decisions applying its tolling rule enables informed choice among the legal bases that might support that rule. The task is not as daunting as might be imagined, since there are very few Supreme Court decisions that actually engage with *American Pipe*. At the outset, however, it is important to distinguish between (1) alternative legal bases for *American Pipe* tolling and (2) the labels for such bases that have been used by the courts, which include "equitable tolling," "legal tolling," "statutory tolling," and "class action tolling." As will become apparent, all of these labels are ambiguous, if not "obscure and uncertain."[34]

A. American Pipe*: Federal Common Law vs. Federal Rule, and Institutional vs. Equitable Interests*

American Pipe involved antitrust litigation under the Clayton Act, which contains its own limitations provisions.[35] The question was whether, in an action that was timely filed, members of a putative class could intervene after certification was denied and the limitations period had run. The structure of the Court's opinion appears to have escaped many readers. The opinion opens with the observation that "[t]his case involves an aspect of the relationship between a statute of limitations and the provisions of [Rule] 23 regulating class actions in the federal courts."[36] Having stated the facts, in Section I the Court addressed the status of the members of a *certified class* for limitations purposes. After an account of the history of Rule 23(b)(3), including the spurious class action that it replaced, the Court continued:

> Under present Rule 23, however, the difficulties and potential for unfairness which, in part, convinced some courts to require individualized satisfaction of the statute of limitations by each member of the class, have been eliminated, and *there remain no conceptual or practical obstacles in the path of holding that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined*. Whatever the merit in the conclusion that one seeking to join a class action after the running of the statutory period asserts a "separate cause of action" which must individually meet the timeliness requirements, such a concept is simply inconsistent with Rule 23 as presently drafted. A federal class action is no longer "an invitation to joinder" but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions. [Before the

34 FED. R. CIV. P. 23 advisory committee's note to 1966 amendment, *quoted supra* note 23.

35 15 U.S.C. §§ 15(b), 16(b) (2012).

36 Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 540 (1974).

> court granted class certification],[37] the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue.[38]

Having explained the functional differences between the spurious class action and a class action under amended Rule 23, the Court continued:

> Thus, the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs. To hold to the contrary would frustrate the principal function of a class suit because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties—precisely the multiplicity of activity which Rule 23 was designed to avoid . . . where a class action is found "superior to other available methods for the fair and efficient adjudication of the controversy."[39]

The Court concluded Section I by stating and explaining its view that "no different a standard should apply to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed)."[40] The discussion served as a bridge to Section II insofar as it expressly referred to situations in which "the order [is] that the suit shall or shall not proceed as a class action,"[41] the Court deeming potential class members "mere passive beneficiaries of the action brought in their behalf"[42] until that decision is made. The Court then ended its discussion of this issue, and Section I, by refocusing on certified classes: "Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take . . . responsibility with respect to it in order to profit from the eventual outcome of the case."[43] The court

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37 We have omitted language that likely has caused some readers not to grasp the opinion's structure. For, in making the point that a certified class action commences the action for all members of the class, who "st[an]d as parties to the suit until and unless they receive notice thereof and cho[o]se not to continue," the Court starts with "[u]nder the circumstances of this case, where the District Court found that the named plaintiffs asserted claims that were 'typical of the claims or defenses of the class' and would 'fairly and adequately protect the interests of the class.'" *Id.* at 550-51. Of course, in "this case" the class was *not* certified, and typicality and adequacy of representation do not exhaust the requirements for certification.

38 *Id.* (emphasis added) (citations omitted).

39 *Id.* at 551 (emphasis added) (citations omitted).

40 *Id.*

41 The Court noted that "[i]n the present litigation, the District Court found that only seven of the more than 60 intervenors were aware of and relied on the attempted class suit." *Id.* at 551 n.21.

42 *Id.* at 552.

43 *Id.*

added that "as to asserted class members who were unaware of the proceedings . . . the later running of the applicable statute of limitations does not bar participation in the class action and in its ultimate judgment."[44]

The Court began Section II of the opinion by noting that "the District Court ordered that the suit could *not* continue as a class action" and that "the participation denied to the respondents because of the running of the limitation period was not membership in the class, but rather the privilege of intervening in an individual suit."[45] It moved directly to the holding that:

> in this posture, at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status."[46]

In explaining its holding, the Court observed that "[a] contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure," and that "a rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions."[47] The Court concluded that "the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."[48]

The Court then asserted that "[t]his rule is in no way inconsistent with the functional operation of a statute of limitations,"[49] concluding that, in general, a class action tolling rule is consistent with the policies that inform limitations law. The conclusion was general both because the Court's limitations policy analysis was not confined to the particular limitations statute applicable to the intervenors' claims,[50] and also because the Court left room for the lower courts to deny tolling where limitations policies would be

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44 *Id.*

45 *Id.* (emphasis added).

46 *Id.* at 552-53.

47 *Id.* at 553-54.

48 *Id.* at 554. In a footnote, the Court quoted the Advisory Committee Note to Rule 23 to the effect that the limitations question presented by intervenors following denial of certification is "to be decided by reference to the laws governing . . . limitations as they apply in particular contexts." *Id.* at 554 n.24 (quoting FED. R. CIV. P. 23 advisory committee's note to 1966 amendment).

49 *Id.* at 554.

50 *See id.*

subverted, as, for instance when the putative class action did not give a defendant fair notice of a claim subsequently brought on an individual basis beyond the limitations period.[51]

> The policies of ensuring essential fairness to defendants and of barring a plaintiff who 'has slept on his rights' . . . are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.[52]

Finishing Section II, the Court reasoned that "the tolling rule we establish here is consistent with both the procedures of Rule 23 and with the proper function of the limitations statute."[53] Although acknowledging "numerous and trenchant" criticisms of "Rule 23 and its impact on the federal courts," the Court deemed "this interpretation of the Rule . . . nonetheless necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve."[54]

In Section III the Court took up arguments against the tolling rule it adopted, starting with the contention that, "irrespective of the policies inherent in Rule 23 and in statutes of limitations," the federal courts are powerless to extend the limitations period set by Congress "because that period is a 'substantive' element of the right conferred on antitrust plaintiffs and cannot be extended by judicial decision or by court rule."[55] Dispatching reliance on its decision in *The Harrisburg*[56] because that decision "did not purport to define or restrict federal judicial power to delineate [the] circumstances where the applicable statute of limitations would be tolled,"[57]

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51 Acknowledging the possibility that defendants might not have notice of the claims against them if intervenors could raise issues not presented in the class complaint, the Court noted that the problem "will be minimized when, as here, the District Court has already found that the named plaintiffs' claims typify those of the class" and that "under Rule 23(d)(3) 'the court may make appropriate orders . . . imposing conditions on . . . intervenors.'" *Id.* at 555 n.25. Justice Blackmun's concurring opinion also flagged possible abuse of the Court's tolling rule, and, for permissive intervention, suggested that proper exercise of discretion "might preserve a defendant whole against prejudice arising from claims for which he has received no prior notice." *Id.* at 562 (Blackmun, J., concurring).

52 *Id.* at 554-55.

53 *Id.* at 555.

54 *Id.* at 555-56.

55 *Id.* at 556.

56 119 U.S. 199 (1886).

57 *American Pipe*, 414 U.S. at 557.

the Court concluded that the "proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme."[58]

The Court concluded Section III by demonstrating that "[i]n recognizing judicial power to toll statutes of limitation in federal courts [it was] not breaking new ground."[59] Its primary redoubt for that purpose was *Burnett v. New York Central Railroad Co.*,[60] but the Court also referred to cases in which "the statutory period [was] tolled or suspended by . . . conduct of the defendant"[61] involving inducement or fraudulent concealment. According to the Court, "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose."[62]

* * *

Close attention to the operative sections of the Court's opinion in *American Pipe* makes clear that Rule 23 itself was not the source of the tolling rule that emerged from that decision. The Court's historical review does not support the argument that the *American Pipe* tolling rule is an interpretation of Rule 23 in the sense that it is deemed to be prescribed by the Rule.[63] That history appears in Section I of the opinion, where the Court used the problems caused by one-way intervention under the spurious class action to explain some lower courts' refusal to permit tolling, and the changes made in 1966, resolving those problems, to support the conclusion that "the filing of a timely class action complaint commences the action for all members of the class as subsequently determined."[64]

Turning to Section II of the opinion, if Rule 23 could be interpreted directly to prescribe a tolling rule, it should not have been necessary to engage in the policy analysis that dominated the Court's discussion. The sentence beginning "We are convinced that the rule most consistent with federal class action procedure must be"[65] is simply no way to interpret a Federal Rule as the source

58 *Id.* at 557-58 (footnote omitted).

59 *Id.* at 558.

60 380 U.S. 424 (1965).

61 *American Pipe*, 414 U.S. at 559.

62 *Id.*

63 *But see* Chardon v. Fumero Soto, 462 U.S. 650, 664-65 (1983) (Rehnquist, J., dissenting) ("[T]he source of the tolling rule applied by the Court was *necessarily* Rule 23. Any doubt as to this fact is removed by the Court's lengthy discussion of the history, purposes, and intent of the rule."); *infra* text accompanying note 128.

64 *American Pipe*, 414 U.S. at 550.

65 *Id.* at 554.

of a legal prescription, even acknowledging that, by analogy, statutory interpretation and federal common law are different in degree, not in kind.[66] Still harder to view as an interpretation of Rule 23 in that sense is the Court's reference to "the tolling rule we establish here."[67] That's 1974, not 1966. Given all of this, one can forgive the Court for its imprecise reference in the same paragraph to "this interpretation of the Rule,"[68] which must be read in context.

In a footnote in Section III, the Court referred to its "conclusion that a judicial tolling of the statute of limitations does not abridge or modify a substantive right afforded by the antitrust acts."[69] The language used might be deemed relevant because it is reminiscent of the limitations on rulemaking under the REA.[70] It should be recalled, however, that in this part of the opinion the Court was responding to the contention that the Clayton Act's limitation period was "a 'substantive' element of the right conferred on antitrust plaintiffs and cannot be extended or restricted *by judicial decision or by court rule*."[71] The petitioners' reliance on *The Harrisburg* was central to that argument. Having discussed that case, the Court stated: "But the Court in *The Harrisburg* did not purport to define or restrict federal judicial power to delineate circumstances where the applicable statute of limitations would be tolled."[72] Moreover, application of a Federal Rule cannot properly be described as "judicial tolling," and a decision "recognizing judicial power to toll statutes of limitation in federal courts" is not a decision relying directly on Rule 23, which is an exercise of delegated legislative, not Article III judicial, power.[73] Finally, it is doubtful that Rule 23 could validly prescribe a

66 *See* Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity*?, 78 MICH. L. REV. 311, 332 (1980) ("The difference between 'common law' and 'statutory interpretation' is a difference in emphasis rather than a difference in kind.").

67 *American Pipe*, 414 U.S. at 555.

68 *Id*.

69 *Id*. at 558 n.29.

70 *See* 28 U.S.C. § 2072(b) (2012) ("Such rules shall not abridge, enlarge, or modify any substantive right."). Changes in the REA since 1974 are not material for this purpose.

71 *American Pipe*, 414 U.S. at 556 (emphasis added). "The Court was not persuaded by the attempt of the petitioners in *American Pipe* to measure the Court's power to make law 'by judicial decision' according to its power to make law by 'court rule.'" Burbank, *Hold the Corks*, *supra* note 25, at 1028. *See also* China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 1810 (2018) ("Plaintiffs have no substantive right to bring their claims outside the statute of limitations. That they may do so, in limited circumstances, is due to a judicially crafted tolling rule that itself does not abridge, enlarge, or modify any substantive right.") (citing *American Pipe*, 414 U.S. at 558). *But see* Mitchell A. Lowenthal & Normal Menachim Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 GEO. WASH. L. REV. 532, 548 (1996) (failing to note that the argument to which the Court responded pertained to both judicial decisions and court rules).

72 *American Pipe*, 414 U.S. at 557.

73 *See* Mistretta v. United States, 488 U.S. 361, 386 n.14 (1989) (stating that "rulemaking power originates in the Legislative Branch"); Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1683 (2004) [hereinafter *Role of Congress*].

tolling rule under the REA—for statutes of limitations or statutes of repose[74]—and if it could, the Act's supersession clause[75] would render concern about consistency with antecedent statutory limitations periods, such as that contained in the Clayton Act, unnecessary.

To be sure, the Court may have exhibited some confusion about the source of the tolling rule it was creating in *American Pipe,* not always distinguishing between the direct impact of Rule 23 and the independent role of the federal courts in ensuring that important federal policies are carried into effect. Interweaving the language of judicial lawmaking and the language of Rule interpretation was not deft.[76] But the better reading, which is confirmed by subsequent decisions, is that the Court crafted the *American Pipe* tolling rule as federal common law and that its reference to "this interpretation of the Rule" describes its inquiry into the policies associated with Rule 23, not its direct mandate.

Thus, the *CalPERS* Court was correct that *American Pipe* cannot properly be read to mean "that the tolling rule it created was mandated by the text of a statute or federal rule,"[77] and lower courts whose invocation of "legal tolling" or "statutory tolling" reflects attribution of the rule directly to Rule 23 have been mistaken.[78] It is equally clear, however, that the *CalPERS* Court was not correct in asserting that "the Court's holding [in *American Pipe*] was instead grounded in the traditional equitable powers of the judiciary."[79] Indeed, the implausibility of the assertion is revealed by the first sentence of the opinion in *American Pipe*: "This case involves an aspect of the relationship between a statute of limitations and the provisions of [Rule] 23 regulating class actions

74 *See*, *e.g.*, Burbank, *Hold the Corks*, *supra* note 25, at 1027-28.

75 *See* 28 U.S.C. § 2072(b) (2012) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."). Changes in the REA since 1974 are not material for this purpose.

76 Among those who appear to have been misled was the petitioner in *CalPERS*. *See* Brief of Petitioner at 8, 13-14, 48-51, Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042 (2017) (No. 16-373) (treating *American Pipe* tolling as prescribed by Rule 23 and arguing that, so viewed, it is valid under the REA). In fairness, however, the petitioner was seeking to refute, without questioning the premises of, the Second Circuit's analysis "that even if *American Pipe* tolling is derived from Rule 23, and therefore 'legal' rather than 'equitable,' it cannot be used to toll a statute of repose because the Rules Enabling Act would prohibit that result." *Id.* at 48.

77 *CalPERS*, 137 S. Ct. at 2051-52.

78 *See, e.g.*, Stone Container Corp. v. United States, 229 F.3d 1345, 1354 (Fed. Cir. 2000) ("statutory"); Arivella v. Lucent Techs., Inc., 623 F. Supp. 2d 164, 176 (D. Mass. 2009) ("legal" but with a "statutory source"), *discussed infra* text accompanying notes 151–158. In Joseph v. Wiles, 223 F.3d 1155, 1167 (10th Cir. 2000), the court characterized *American Pipe* tolling as "legal" rather than "equitable," but it also recognized that, rather than being prescribed by Rule 23, the tolling doctrine serves its purposes. *See id.* at 1167.

79 *CalPERS*, 137 S. Ct. at 2052. There is simply nothing in the Court's summary of the reasoning in *American Pipe* that supports its assertion immediately following that summary: "As this discussion indicates, the source of the tolling rule in *American Pipe* is the judicial power to promote equity." *Id.* at 2051.

in the federal courts."[80] The class action may be a child of equity, but "the provisions of [Rule] 23" cannot be taken as synonymous with "traditional equitable powers of the judiciary."

In the limitations context, the "traditional equitable powers of the judiciary" are salient in situations where the facts of a case would render it inequitable to apply the pertinent law. The underlying concerns of equity in that context relate to the effect of limitations law on parties.[81] In *American Pipe*, by contrast, the Court crafted a tolling rule in order to protect Rule 23 policies that serve primarily institutional interests—"the efficiency and economy of litigation which is a principal purpose of the procedure."[82] That the main focus was institutional is also signaled by the Court's conclusion that its tolling rule is available whether or not absent members of a putative class relied on the filing of the action or were even aware of it.[83]

Contrary to the suggestion in *CalPERS*,[84] the *American Pipe* Court's discussion of cases in which equitable considerations had been invoked to justify limitations tolling does not mean that it was relying on such considerations as the basis for its tolling rule. Indeed, in a 1975 decision distinguishing *American Pipe* and the primary precedent on which it had relied in that discussion, *Burnett v. New York Central Railroad Co.*,[85] the Court observed:

> Neither case is helpful. The respective periods of limitation in those cases were derived directly from federal statutes rather than by reference to state law. Moreover, in each case there was a substantial body of relevant federal procedural law to guide the decision to toll the limitation period, and

80 Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 540 (1974); *see also* Albano v. Shea Homes Ltd. P'ship, 227 Ariz. 121, 127 (2011) ("*American Pipe* tolling is a court-created rule based on policy considerations and principles underlying Rule 23.").

81 "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005).

82 414 U.S. at 453.

83 *See supra* text accompanying note 40. Having observed that "[t]olling may be of great value to allow injured persons to recover for injuries" that they did not discover "through no fault of their own," the *CalPERS* Court reasoned that "[i]n a similar way, tolling as allowed in *American Pipe* may protect plaintiffs who anticipated their interests would be protected by a class action but later learned that a class suit could not be maintained for reasons outside their control." 137 S. Ct. at 2055. This may be true, but, not being founded in equity, the rule does not require reliance on, or even awareness, of the putative class action. See State Farm Mut. Auto Ins. Co. v. Boellstroff, 540 F.3d 1223, 1234 (10th Cir. 2008) ("[T]he *American Pipe* and *Crown* decisions highlight the fact that reliance or even awareness of the class action are irrelevant. In this vein, we have concluded that *American Pipe* tolling is 'legal rather than equitable in nature. . . .'").

84 "The Court also relied on cases that are paradigm applications of equitable tolling principles, explaining with approval that tolling in one such case was based on considerations deeply rooted in our jurisprudence." 137 S. Ct. at 2052 (internal quotations omitted).

85 380 U.S. 424 (1965).

> significant underlying federal policy that would have conflicted with a decision not to suspend the running of the statute.[86]

Rather, the cases were cited in support of the conclusion that "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose."[87]

Contrary to the treatment of this question in *CalPERS* and some passages in *Resh*, none of the Court's reasoning in *American Pipe* "reveals a rule based on traditional equitable powers, designed to modify a statutory time bar where its rigid application would create injustice."[88] As we demonstrate in Part II, "traditional equitable powers" do not exhaust judicial power to fashion rules that are required for the protection of existing federal law. The source of *American Pipe* tolling is federal common law. Although "Rule 23 does not and could not validly provide a tolling rule, in devising such a rule 'not inconsistent with the legislative purpose,' the Court was not required to ignore the policies exogenous to limitations that animate Rule 23, including in particular the policy against 'multiplicity of activity.'"[89]

B. Crown, Cork & Seal *(and* Eisen*): Individual Actions and Certified Classes*

The Court's holding in Section II of *American Pipe* was limited to the facts of the case and thus to situations in which, certification having been denied, a putative class member seeks to intervene beyond the limitations period.[90]

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86 Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 466 (1975). In a footnote, the Court briefly described *Burnett* and *American Pipe*, observing with respect to the latter: "In the light of the history of [Rule] 23 and the purposes of litigatory efficiency served by class actions, we concluded that the prior filing had a tolling effect." *Id.* at 467 n.12.

87 *American Pipe*, 414 U.S. at 559.

88 *CalPERS*, 137 S. Ct. at 2052.

89 Burbank, *Hold the Corks*, *supra* note 25, at 1027-28 (footnotes omitted). *See also* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 773-74 (1986) [hereinafter *Interjurisdictional Preclusion*] ("Because Federal Rules cannot validly provide for the creation of federal common law . . . they are sources of power only if, fairly read, they may be said to require it."); Burbank & Wolff, *Redeeming the Missed Opportunities*, *supra* note 32, at 50 ("[T]he application of Rule 23 in those proceedings was the occasion for the Court to implement class action policies in federal common law that it was otherwise authorized to make."). For others who have followed us in reaching this conclusion, if not our conclusions about the reach and limits of the federal common-law rule, see Wendy Gerwick Couture, *Class-Action Tolling, Federal Common Law, and Securities Statutes of Repose: A Recommendation*, 46 LOY. U. CHI. L.J. 525, 540-43 (2015); Lowenthal & Feder, *supra* note 71, at 549, 556; *see also* Rhonda Wasserman, *Tolling, The American Pipe Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 825 (2006).

90 As we have seen, however, the Court evidently deemed necessary to that holding the resolution, in Section I of the opinion, of the status for limitations purposes of the members of a certified class.

The main reasons given for its holding, however, are also applicable where, rather than intervene in the original action, the individual prefers an independent action over a motion to intervene.[91] The Court so held, explicitly, in *Crown, Cork & Seal Co. v. Parker*.[92] In addition, the Court implicitly resolved the question whether *American Pipe* tolling extends to situations in which class certification is denied for reasons other than, or in addition to, lack of numerosity.

The District Court's additional reasons for denying certification in *Crown, Cork & Seal* were that the claims of the named plaintiffs were not typical of the claims of the class and that the named plaintiffs were not adequate representatives, both of which findings might have been thought to affect the applicability of the tolling rule in *American Pipe*.[93] We infer from the Court's inattention to that aspect of the case that the justices had come to understand the incongruity of such an *ex post* inquiry as part of a rule that was designed to prevent the risk aversion of absent members of a putative class from defeating central purposes of Rule 23.

Instead of relying categorically on the reasons why certification was denied, the Court appears to have opted to focus on a comparison of claims actually made in order to determine whether a defendant had fair and timely notice for limitations purposes.[94] Recalling Justice Blackmun's concurring opinion in *American Pipe*, Justice Powell stressed the potential "abuse" that would follow if *American Pipe* tolling were "read . . . as leaving a plaintiff free to raise different or peripheral claims following denial of class status."[95] He also concluded, however, that "it is indisputable that the *Pendleton* class suit notified petitioner of respondent's claims. The statute of limitations therefore was tolled under *American Pipe* as to those claims."[96]

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In its 1983 ruling in *Crown, Cork & Seal*, the Court viewed *American Pipe* tolling as an exercise of judicial power, rather than the result of a rule imposed directly by Rule 23, and there is no hint of "a rule based on traditional

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91 This is not to say that the two situations are identical. As we discuss below, individual actions raise issues of governing law that are not presented by intervention in the original action.

92 462 U.S. 345, 349-51 (1983). Like *American Pipe*, *Crown, Cork & Seal* involved suit under a federal statute (Title VII) that contained its own limitations provision.

93 *See supra* text accompanying note 46 (quoting language potentially confining the Court's holding to situations where certification is denied for lack of numerosity); *see also supra* note 37 (quoting language suggesting importance of findings of typicality and adequate representation).

94 The Court noted that it was "undisputed that respondent was a member of the asserted class." *Crown, Cork & Seal*, 462 U.S. at 347.

95 *Id.* at 354 (Powell, J., concurring).

96 *Id.* at 355.

equitable powers, designed to modify a statutory time bar where its rigid application would create injustice."[97]

> The Court [in *American Pipe*] reasoned that unless the filing of a class action tolled the statute of limitations, potential class members would be induced to file motions to intervene or to join in order to protect themselves against the possibility that certification would be denied. The principal purposes of the class action procedure—promotion of efficiency and economy of litigation—would thereby be frustrated. To protect the policies behind the class action procedure, the Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."[98]

Moreover, *Crown, Cork & Seal* surfaced another powerful argument in favor of *American Pipe* tolling. In a footnote in *Eisen v. Carlisle & Jacquelin*,[99] less than five months after *American Pipe* was decided, the Court explained why, contrary to the petitioner's argument, individual notice to members of a certified class who could be identified with reasonable effort would not be futile after the limitations period had expired. The *Eisen* Court observed that *American Pipe* "established that commencement of a class action tolls the applicable statute of limitations as to all members of the class."[100] Although seemingly dictum, the statement reflected the result logically entailed by Section I of *American Pipe*, which the Court in that case evidently considered essential to its holding in Section II.[101] The Court's reasoning in *Eisen* provided an additional reason for the *Crown, Cork & Seal* Court not to confine tolling to intervenors. In the process, however, it also raised the stakes of determining the source of the rule, its source of authority, and the limits of judicial power:

> If *American Pipe*'s tolling rule applies only to intervenors, this reference to *American Pipe* is misplaced and makes no sense. *Eisen*'s notice requirement was intended to inform the class member that he could "preserve his opportunity to press his claim separately" by opting out of the class. But a class member would be unable to "press his claim separately" if the

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97 Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042, 2052 (2017).

98 *Crown, Cork, & Seal*, 462 U.S. at 349 (citation omitted). *See id.* at 351 ("The result would be a needless multiplicity of actions—precisely the situation that [Rule 23] and the tolling rule of *American Pipe* were designed to avoid.").

99 417 U.S. 156 (1974).

100 *Id.* at 176 n.13.

101 Professor Couture contends that "in *Eisen*, the Court summarily extended the reach of *American Pipe* tolling, without discussing the purposes of Rule 23." Couture, *supra* note 89, at 542. She neglects the structure of the opinion in *American Pipe*, Section I of which concerned the members of certified classes and did discuss Rule 23's purposes and policies. *See supra* text accompanying notes 35–62; *supra* note 90; *infra* text accompanying note 141.

> limitations period had expired while the class action was pending. The *Eisen* Court recognized this difficulty but concluded that the right to opt out and press a separate claim remained meaningful because the filing of the class action tolled the statute of limitations under the rule of *American Pipe*. If *American Pipe* were limited to intervenors, it would not serve the purpose assigned to it by *Eisen*; no class member would opt out simply to intervene. Thus, the *Eisen* Court necessarily read *American Pipe* as we read it today, to apply to class members who choose to file separate suits.[102]

C. Chardon*: Accommodating the Specific Requirements of Section 1988*

In *Chardon v. Fumero Soto*,[103] decided one week after *Crown, Cork & Seal*, the Court for the first time considered the application of *American Pipe* tolling in a case where the federal statute affording the claim did not also prescribe a limitations period. Moreover, because the putative class action was brought under section 1983, it was governed by section 1988,[104] which is "a statute similar to the Rules of Decision Act but more narrowly focused and hence not as easy to ignore or wish away."[105]

At issue in the case was the timeliness of individual actions brought by unnamed members of a putative section 1983 class action after certification was denied. The answer turned on whether the tolling effect was governed by the law of Puerto Rico, in which event they were timely, or a uniform federal rule, in which event they were filed too late. The Court of Appeals had held that class action tolling was available under Puerto Rican law and that the Puerto Rican courts would apply a tolling rule that provided for renewal of the limitations period upon denial of certification rather than, as in *American Pipe*, suspension upon filing of the putative class action.

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102 *Crown, Cork & Seal*, 462 U.S. at 351-52 (citations omitted).

103 462 U.S. 650 (1983).

104 Section 1988 provides in pertinent part:

> The jurisdiction in [designated civil and criminal civil rights cases] shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

42 U.S.C. § 1988(a) (2012).

105 Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 705 (1988) [hereinafter *Of Rules and Discretion*].

The Supreme Court distinguished *American Pipe* on the ground that there "federal law defined the basic limitations period, federal procedural policies supported [tolling] during the pendency of the class action, and a particular federal statute provided the basis for deciding that the tolling had the effect of suspending the limitations period. No question of state law was presented."[106] The Court continued:

> In a § 1983 action, however, Congress has specifically directed the courts, in the absence of controlling federal law, to apply state statutes of limitations and state tolling rules unless they are "inconsistent with the Constitution and laws of the United States." *American Pipe* does not answer the question whether, in a §1983 case in which the filing of a class action has tolled the statute of limitations until class certification is denied, the tolling effect is suspension rather than renewal or extension of the period. *American Pipe simply asserts a federal interest in assuring the efficiency and economy of the class action procedure.* After class certification is denied, that federal interest is vindicated as long as each unnamed plaintiff is given as much time to intervene or file a separate action as he would have under a state savings statute applicable to a party whose action has been dismissed for reasons unrelated to the merits, or, in the absence of a statute, the time provided under the most closely analogous state tolling statute.[107]

Noting agreement among the parties and the Court of Appeals that tolling applied, the Court held that the federal interest asserted in *American Pipe* was vindicated by "the Puerto Rican rule that, after tolling comes to an end, the statute of limitations begins to run anew."[108] Key to its analysis for purposes of section 1988 was the view that, whatever the status of class action tolling under *American Pipe*,[109] the tolling effect prescribed in that case was fashioned by analogy to provisions of the Clayton Act and did not itself constitute "an established federal rule of decision . . . making resort to state law unnecessary."[110] Disagreement on that question prompted a dissenting opinion by Justice Rehnquist (joined by Justices Powell and White).

The dissent argued that "the decision [in *American Pipe*] recognizes a federal rule of tolling applicable to class actions brought under [Rule] 23, and

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106 *Chardon*, 462 U.S. at 660-61.

107 *Id.* at 661 (emphasis added) (footnote omitted) (citation omitted).

108 *Id.* "Since the application of this state-law rule gives unnamed class members the same protection as if they had filed actions in their own names which were subsequently dismissed, the federal interest set forth in *American Pipe* is fully protected." *Id.*

109 "Petitioners, respondents, and the Court of Appeals all agree that the statute of limitations was tolled . . . . We must examine the reasoning of *American Pipe*, however, to determine whether that decision embodies the second requirement that petitioners urge us to recognize [a uniform federal rule of suspension]." *Id.* at 658.

110 *Id.*

that this rule is made applicable by § 1988 to claims brought under § 1983."[111] Reasoning that, because the Clayton Act did not address the question and the Court made no reference to state law, "the source of the tolling rule applied by the Court was *necessarily* Rule 23,"[112] the dissent maintained that, "[i]n interpreting Rule 23 to contain a [tolling rule], the Court also addressed the more general question of [tolling effect],"[113] and that in so doing "it was fashioning a general federal tolling rule grounded on Rule 23."[114] Thus, with reference to section 1988, unlike the situation in *Board of Regents of University of State of New York v. Tomanio*,[115] where there was "a void in federal statutory law,"[116] "[o]wing to *American Pipe* and its interpretation of Rule 23, there is no comparable void in this case."[117] In support of that view, the dissent contended that the Court's failure to hold "that Rule 23 reflects a uniform tolling rule . . . encourages needless litigation regarding what state tolling rule applies,"[118] and that "[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations."[119]

* * *

The Court in *Chardon* did not need to decide whether *American Pipe*'s tolling rule applied, because the parties and the Court of Appeals agreed that there would be class action tolling as a matter of Puerto Rican law. Thus, in the Court's view, the only question was whether, in a case governed by section 1988, the tolling effect prescribed in *American Pipe* (suspension) or the tolling effect prescribed by Puerto Rican law for analogous cases (renewal) was applicable. That said, if state law had called for no tolling at all, it is apparent that the Court would have required that state law be displaced.[120] As put by the dissent, "[i]f the law of a particular State was that the pendency of a class action did not toll the statute of limitations as to unnamed class members,

111 *Id.* at 663-64 (Rehnquist, J., dissenting).

112 *Id.* at 664.

113 *Id.* at 665.

114 *Id.*

115 446 U.S. 478 (1980).

116 *Chardon*, 462 U.S. at 666 n.1 (Rehnquist, J., dissenting) (quoting *Tomanio*, 446 U.S. at 483).

117 *Id.*

118 *Id.* at 667.

119 *Id.*

120 *See id.* at 661 (majority opinion) ("After class certification is denied, that federal interest is vindicated as long as each unnamed plaintiff is given as much time to intervene or file a separate action . . . ."); *id.* at 661 ("[T]he federal interest set forth in *American Pipe* is fully protected"); *id.* at 661 n.15 (discussing, by contrast, hypothetical Puerto Rican rule that would give an unnamed class member "an incentive to protect his interests by creating the very multiplicity and needless duplication against which the Court warned in *American Pipe*").

there seems little question but that the federal rule of *American Pipe* would nonetheless be applicable."[121]

There is language in the Court's opinion in *Chardon* suggesting that *American Pipe*'s tolling rule was an interpretation of Rule 23, but it occurs in the Court's summary of the Court of Appeals' opinion, and, as is often true, the meaning of "interpretation" is ambiguous.[122] Elsewhere, the Court refers to "the common-law rule of suspension."[123] There is no suggestion in the Court's description of *American Pipe* that it viewed that case as imputing the basic tolling rule, let alone the prescribed tolling effect, directly to Rule 23, which may have been the view taken by the dissenting justices. There is also no hint of "equitable tolling" in the Court's discussion of *American Pipe*,[124] which is not surprising given the Court's description of that case as one where "federal procedural policies supported the tolling of the statute during the pendency of the class action"[125] and as "assert[ing] a federal interest in assuring the efficiency and economy of the class-action procedure."[126]

The dissent's basic argument was that *American Pipe* established uniform federal law rendering resort to state law unnecessary under section 1988, and that it did so as an interpretation of Rule 23. The dissenting justices may have viewed Rule 23 as the source of the rule in *American Pipe*.[127] If so, as previously discussed, the *American Pipe* Court's discussion of the history of Rule 23 does not provide the support that the dissenters claimed for this view.[128] Moreover, as we have noted, it is a view that is difficult to reconcile with the limitations in the REA and, if that barrier were surmounted, one that, by reason of the supersession clause, would render the attention paid to statutory limitations policy in *American Pipe* superfluous.[129] Finally, since Rule 23 governs only in federal courts, this view of *American Pipe* would render the federal courts powerless to protect their institutional interests, or the interests of the members of certified classes who opt out, against subversion in subsequent state court proceedings.

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121 *Id.* at 667 (Rehnquist, J., dissenting).

122 *See id.* at 654 (majority opinion) (describing Court of Appeals opinion as noting that "this Court had interpreted the Federal Rules of Civil Procedure to permit" tolling).

123 *Id.* at 655.

124 *But see* Reno v. Catholic Soc. Servs., 509 U.S. 43, 82 (1993) (Stevens, J., dissenting) (including *American Pipe* in a string citation with a parenthetical stating "equitable relief must be 'consonant with the legislative scheme'").

125 *Chardon*, 462 U.S. at 660-61.

126 *Id.* at 661.

127 *See id.* at 664-65 (Rehnquist, J., dissenting) ("[T]he source of the tolling rule applied by the Court was *necessarily* Rule 23. Any doubt as to this fact is removed by the Court's lengthy discussion of the history, purposes, and intent of the Rule."); *id.* at 665 ("In interpreting Rule 23 to contain a *rule* . . . .") (emphasis added).

128 *See supra* text accompanying notes 63–64.

129 *See supra* text accompanying notes 74–75.

Perhaps, however, this account of Justice Rehnquist's dissent is too literal. Perhaps, that is, the dissenting justices did not clearly distinguish between sources of federal rules and sources of authority for those rules, did not clearly distinguish between interpretation and judicial lawmaking, and did not intend to assimilate a judge-made rule directly to a Federal Rule of Civil Procedure whose provisions and policies it was designed to protect. Indeed, this alternative account also finds considerable support in the dissent in *Chardon*. Thus, in the sentence following that in which it described *American Pipe* as "[i]nterpreting Rule 23 to contain a rule,"[130] the dissent described the Court in that case as "fashioning a general federal tolling rule grounded on Rule 23."[131] Moreover, Justice Rehnquist's opinion elsewhere referred to "the federal rule under Rule 23;"[132] it observed that "in areas aside from class actions, the Court has recognized that federal tolling rules apply to state statutes of limitations,"[133] and it asserted a "claim that Rule 23 reflects a uniform tolling rule."[134]

Whatever the position of the dissenting Justices in *Chardon* as to the source of the rule in *American Pipe*, the questions they raised about the costs imposed by the Court's interpretation require attention not just in the context of cases governed by section 1988, but also in other contexts where state law may be pertinent. We address them in Part III.B.4.[135]

D. *Post*-Chardon *Cases: The Hazards of String Citations*

After *Chardon* was decided, and prior to *CalPERS*, the Court was not again called on seriously to engage *American Pipe* in order to determine the source of the tolling rule in that case. Instead, during this period *American Pipe* served mostly as fodder for string citations and brief descriptions.[136] Although hopelessly inconsistent as a group, among them the brief descriptions come closer than the string citations to the true source of *American Pipe* tolling.

In *Young v. United States*,[137] the Court included *American Pipe* in a "see also" string citation for the proposition that "[i]t is hornbook law that limitations periods are 'customarily subject to 'equitable tolling,' . . . unless tolling would

130 *Chardon*, 462 U.S. at 665 (Rehnquist, J., dissenting).

131 *Id.*

132 *Id.* at 666.

133 *Id.* at 666-67. The Court supported this proposition as follows: "See, e.g., Holmberg v. Armbrecht, 327 U.S. 392 . . . (1946) (general federal principles of equity must be applied by federal courts in actions involving federal claims, even where state statutes of limitations are borrowed)."

134 *Id.* at 667.

135 *See infra* text accompanying notes 261–277.

136 We omit from the cases discussed below Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), which is discussed *supra* text accompanying note 86.

137 535 U.S. 43 (2002).

be 'inconsistent with the text of the relevant statute.'"[138] Of course, and again, *American Pipe* itself contains scant evidence that the Court relied on "equitable tolling" and a great deal of evidence that it did not.

In *Irwin v. Department of Veteran Affairs*,[139] the Court included *American Pipe* in a string citation designed to support the proposition that "[w]e have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during a statutory period,"[140] appending the parenthetical "(plaintiff's timely filing of a defective class action tolled the limitations period as to individual claims of purported class members)."[141] Unfortunately, the Court did not seem to recognize either that *American Pipe*'s treatment of the status of members of a certified (i.e., non-defective) class for limitations purposes in Section I of the opinion was integral to its holding in Section II, or that, for this reason, the footnote in *Eisen*, confirming that they are entitled to a toll upon opting out, was a foregone conclusion. In addition, the parenthetical neglects the *American Pipe* Court's conclusion that tolling was available to people who did not rely on, including those who were unaware of, the filing of the putative class action.

In *Devlin v. Scardelletti*,[142] the Court cited *American Pipe* for the proposition that "[n]onnamed class members are . . . parties . . . in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them."[143] Far from attributing the rule to "equitable tolling," however, the Court observed that "[o]therwise, all class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation—to simplify litigation involving a large number of class members with similar claims—would be defeated."[144]

In *Smith v. Bayer Corp.*,[145] the respondent invoked *American Pipe* and another case in support of the argument that an absent member of a putative class should be treated as a party for preclusion purposes. The Court responded that "these cases, which were specifically grounded in policies of judicial administration, demonstrate only that a person who is not a party to a class suit may receive certain benefits (such as the tolling of a limitations period) related to that proceeding."[146] "[P]olicies of judicial administration" is not an obvious synonym for "general federal principles of equity."[147]

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138 *Id.* at 49.
139 498 U.S. 89 (1990).
140 *Id.* at 96.
141 *Id.* at 96 n.3.
142 536 U.S. 1 (2002).
143 *Id.* at 10.
144 *Id.*
145 564 U.S. 299 (2011).
146 *Id.* at 313 n.10.
147 *See supra* note 133 and accompanying text.

In *Credit Suisse Securities (USA) LLC v. Simmonds*,[148] the respondent relied on *American Pipe* in support of the argument that the tolling rule applied in a Ninth Circuit decision "is best understood as applying legal—rather than equitable—tolling."[149] The Court responded:

> We based our conclusion [in *American Pipe*] on "the efficiency and economy of litigation which is a principal purpose of [Fed. Rule Civ. Proc. 23 class actions]." Although we did not employ the term "legal tolling," some federal courts have used that term to describe our holding on the ground that the rule "is derived from a statutory source," whereas equitable tolling is "judicially created." *Arviella v. Lucent Technologies,* Inc., 623 F. Supp. 2d 164, 176 (D. Mass. 2009). The label attached to the [Ninth Circuit] rule does not matter. As we proceed to explain, neither general equitable-tolling principles nor the statutory source of § 16 supports the conclusion that the limitations period is tolled until the filing of a § 16(a) statement.[150]

Indeed, labels should not matter, but the Court's reference to Judge Young's decision in *Arivella* is misleading, deflecting attention from the fact that the "statutory source" to which he was referring was Rule 23, not the substantive statute that grounded the claims in question. In *Arivella*, the court explained that "*American Pipe* tolling 'is a species of legal tolling,' [because] it is derived from a statutory source, in this case Rule 23."[151] The court then went on to explain that "[l]egal tolling is . . . distinct from equitable tolling, which is a judicially created doctrine that stops the running of a statute of limitations in certain situations involving unfairness or excusable mistake."[152]

It is clear that, although describing *American Pipe* as "derived from a statutory source, in this case Rule 23," the *Arivella* court understood that Rule 23 was not the source of the tolling rule in the sense that, for example, it is the source of the rule requiring an opportunity to opt out of 23(b)(3) class actions.[153] Thus, the operative significance of that court's distinction between "legal tolling" and "equitable tolling" is not that only one of them is judicially fashioned. It is rather that one of them is fashioned to serve general, "judicially created" principles of equity jurisprudence,[154] while the other is

148 566 U.S. 221 (2012).

149 *Id.* at 226 n.6.

150 *Id. (citations omitted).*

151 623 F. Supp.2d 164, 176 (D. Mass. 2009) (citation omitted).

152 *Id.* at 176 (citation omitted).

153 *See id.* at 173-78. Apart from quotations from *American Pipe* that demonstrate this understanding, the court referred to *Crown, Cork & Seal* as a decision in which "the Court expanded the *American Pipe* tolling rule." *Id.* at 174.

154 Having stated the proposition of hornbook law about equitable tolling that is quoted above in the text at note 138, the Court in *Young* continued: "Congress must be presumed to draft limitations periods in light of this background principle. That is doubly true when it is enacting limitations periods

fashioned in the service of "federal policies demonstrably rooted in sources of unquestioned validity."[155] The *Arivella* court undoubtedly also understood that "[p]lainly the Rules are not acts of Congress."[156] Perhaps, however, it disagreed that they "can not be treated as such"[157] for all purposes. Perhaps, like the Constitution and federal statutes, Federal Rules can properly be treated as a source of authority for federal common law because they are promulgated under the authority of the REA, which represents "Congress' attempt to exercise" the "Constitution's grant of power over federal procedure."[158] We pursue that question further in Part II.

Finally, in *Menominee Indian Tribe v. United States*,[159] the Court appeared to accept the Tribe's distinction between "class-action tolling," for which it cited *American Pipe*, and "equitable tolling,"[160] but the Court discussed only the latter because the Tribe was not eligible for the former. As a result, the decision deserves no greater weight than occasional references to *American Pipe* as an example of "equitable tolling," such as those discussed above and relied upon by the Court in *CalPERS*.[161] All such references are essentially useless in the search for the source of the rule and its source of authority.

II. *AMERICAN PIPE* TOLLING: SOURCE OF AUTHORITY

Our conclusion that the *American Pipe* rule constitutes an exercise of federal common law requires both specification and explanation. The term "federal common law" encompasses several varieties of federal judicial lawmaking, and the failure of courts and commentators to describe them with precision accounts for some of the lack of clarity that has characterized discussions of *American Pipe*. The Court's references to "the equitable powers of courts" and "equity jurisprudence" in *CalPERS*[162] are particularly inadequate in this regard, leaving not just the content but also the variety of federal judicial authority unspecified.

When federal courts exercise judicial lawmaking authority, they sometimes define and enforce rules that carry into effect independent federal

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to be applied by bankruptcy courts, which are courts of equity and 'apply the principles and rules of equity jurisprudence.'" Young v. United States, 535 U.S. 43, 49-50 (2002) (citations omitted).

155 Burbank & Wolff, *Redeeming the Missed Opportunities*, *supra* note 32, at 52.

156 Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting).

157 *Id.*

158 Hanna v. Plumer, 380 U.S. 460, 474 (1965). *See* Burbank & Wolff, *Redeeming the Missed Opportunities*, *supra* note 32, at 52 (including "the Constitution, federal statutes, and Federal Rules" in "sources of unquestioned validity" as possible sources of authority for federal common law).

159 136 S. Ct. 750 (2016).

160 *Id.* at 754-55.

161 *Cf.* Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1368 (2013) ("Is the Court having once written dicta calling a tomato a vegetable bound to deny that it is a fruit forever after?").

162 Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042, 2050-51 (2017).

policies and supersede contrary state law. In such cases, references to "the traditional power of the courts to apply the principles of equity jurisprudence"[163] neither provide a meaningful account of the source of authority on which the federal courts are relying nor identify the source of the standard the federal court should employ. Both the Rules of Decision Act ("RDA") and the Supreme Court's federal common law jurisprudence require much more, a fact that Justice Frankfurter made clear in *Guaranty Trust Co. of New York v. York* when he bemoaned the fact that "equitable doctrines are so often cast in terms of universal applicability when close analysis of the source of legal enforceability is not demanded."[164]

In this Part, we provide a more fully specified account of our conclusion that *American Pipe* tolling is a federal common-law doctrine crafted by the Supreme Court to carry into effect the provisions of Rule 23 and the policies they embody: to preserve efficiency in aggregate litigation and protect the opt-out right that absentees enjoy in a Rule 23(b)(3) class action. In Part III, we undertake an explanation of the standards that should govern the application of that doctrine in different settings in light of the account of its origins that we provide here.

A. *The Different Varieties of Federal Common Law*

The term "federal common law" embraces a range of doctrines representing different types of federal judicial lawmaking.[165] First, some of those doctrines relate only to the internal administration of federal court adjudication and have no preemptive impact in state court proceedings. *Forum non conveniens* is one example. Federal *forum non conveniens* doctrine makes a series of policy choices concerning the circumstances in which federal courts should decline to entertain lawsuits that have significant non-U.S. elements and might more appropriately be heard in non-U.S. courts.[166] State court systems set their own policies on these questions, and when their standards differ from the federal standard, a dismissal from federal court on *forum non coveniens* grounds does not preclude a state court from entertaining

163 *Id.* at 2050 (internal quotations marks omitted).

164 326 U.S. 99, 103 (1945). The language comes from a passage in which the Court criticized practice under *Swift v. Tyson* that "gave currency" to "sentiments for uniformity of decision . . . particularly in cases where equitable remedies were sought, because equitable doctrines are so often cast in terms of universal applicability when close analysis of the source of legal enforceability is not demanded." *Id.*

165 For an extended treatment of this issue, see Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. PA. L. REV. 1847, 1860-78 (2017).

166 *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

the suit. In such a case, an anti-suit injunction seeking to "protect or effectuate" the federal judgment would be invalid.[167]

Second, other federal common law doctrines speak directly to questions of liability or regulatory policy. These doctrines are often described as substantive (though we eschew such labels here). They set policy on matters of "uniquely federal concern"[168] or establish rules for the resolution of the competing claims of interested states. On the same day that it handed down *Erie Railroad Co. v. Tompkins*,[169] the Court issued *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,[170] a case involving competing claims by Colorado and New Mexico for the use of water from the La Plata River. Explaining that the dispute must be governed by a federal rule of decision, the Court confirmed a line of cases decided when *Swift v. Tyson*[171] held sway and held that "neither the statutes nor the decisions of either State can be conclusive" because such competing claims of regulatory authority must be resolved by "federal common law."[172]

In the years that followed, the Court issued federal common-law rulings involving interstitial questions of federal law—cases where a federal statute left matters "to judicial determination . . . to be derived from [the statute] and the federal policy which it has adopted,"[173] and cases where broadly-worded statutory mandates indicated that "the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law."[174] In a number of these cases, the Court also took the occasion to explain that federal common law can employ standards derived from state law where doing so advances federal policies, interests, and values. In such cases, "the state law has been absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy."[175] Where they apply, these doctrines have preemptive effect: they displace contrary state law, whether in federal or state court.

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167 *See* Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146-50 (1988). The defendants in *Chick Kam Choo* also made a preemption argument that depended on the particular impact of maritime jurisdiction on the federal policies implicated in the case, but the Court did not resolve that question. *Id.* at 149-50.

168 Clearfield Tr. v. United States, 318 U.S. 363 (1943); *see also* Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

169 304 U.S. 64 (1938).

170 304 U.S. 92 (1938).

171 41 U.S. (16 Pet.) 1 (1842).

172 *Hinderlider*, 304 U.S. at 110.

173 Deitrick v. Greaney, 309 U.S. 190, 200-01 (1940).

174 Sola Elec. v. Jefferson Elec., 317 U.S. 173, 176 (1942) (citations omitted).

175 Bd. of Comm'rs of Jackson Cty. v. United States, 308 U.S. 343, 351-52 (1939) (citations omitted).

American Pipe tolling is distinct from each of these categories of federal common law in several important respects. As it was originally formulated, the doctrine carries into effect policies that relate to the administration of the proceedings in the initial federal action. The ruling in *American Pipe* addressed the concern that absentees would risk losing the ability to recover if class certification were denied and the statute of limitations were not tolled, giving them an incentive to file protective motions to intervene in the original action and thereby undermine basic purposes of a representative proceeding.

At the same time, *American Pipe* tolling extends beyond the internal administration of the original action. The doctrine adjusts the rights of claimants in a fashion that touches on liability policy, authorizing plaintiffs to pursue claims that would otherwise be barred by the applicable limitations provision. And when the Court held in *Crown, Cork & Seal* that *American Pipe* tolling is equally available to plaintiffs who file a new lawsuit rather than intervening in the original action, it made clear that the doctrine applies outside the boundaries of the proceeding where suit was originally filed. The application of *American Pipe* tolling to subsequent actions is not simply a matter of comity among federal courts.[176] Moreover, in so doing the Court preserved the value of the right to opt out in 23(b)(3) actions by eliminating the Hobson's choice that claimants would face if opting out would leave them barred by the pertinent statute of limitations in a subsequent individual action. Finally, *American Pipe* tolling also reduces pressure on the district court in the original action to make a speedy and potentially improvident certification decision in the hope of avoiding adverse limitations consequences for absentees. The conclusion that precipitous certification decisions of this type should be discouraged prompted 2003 amendments to Rule 23 to relax the timing of the certification decision.[177]

States are not required to permit tolling in state law class actions in their courts. Indeed, they need not make the class action device available at all. When they do authorize class actions, they are free to pursue policies that prompt absentees to file protective actions, or that present them with difficult choices in deciding whether to opt out, or that delay the certification decision, all

176 *See, e.g.*, Smith v. Bayer Corp., 564 U.S. 299, 317 (2011) ("[O]ur legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs . . . . [W]e would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute.").

177 *See* Tobias Barrington Wolff, *Multiple Attempts at Class Certification*, 99 IOWA L. REV. BULL. 137, 140 (2014) *(*"As the Advisory Committee explained [in its notes accompanying the 2003 amendments to Rule 23], experience had demonstrated that the practice of conditional class actions and the pressure to issue an order quickly had the capacity to impose improper settlement pressure on defendants; thus, the authority to issue conditional orders was eliminated and the requirement for a prompt order [contained in prior language requiring a certification decision "as soon as practicable after the commencement of the action"] was relaxed to 'an early practicable time.'").

subject only to the limitations (if any) imposed by the Constitution. *American Pipe* tolling carries into effect distinctively federal class action policies, and when the doctrine applies in state court it displaces contrary state law.

This hybrid character—a federal common-law doctrine that aims to preserve and promote the provisions of and policies underlying a procedural rule by shaping the behavior and rights of parties in both the same and subsequent proceedings—makes *American Pipe* tolling distinctive, but hardly unique. This is a species of federal judicial lawmaking authority that the federal courts have acknowledged in other settings. In *Semtek International Inc. v. Lockheed Martin Corp.*, the Court held that "federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity."[178] Having concluded that state preclusion law, borrowed as federal law, would usually apply, the Court indicated that a federal preclusion standard might be necessary to enable district courts to enforce procedural policies like those found in the discovery rules in cases where borrowed state preclusion law would not adequately do so.[179] Federal preclusion doctrine is judge-made law that "govern[s] the effect that must be accorded federal judgments by other courts."[180] That being so, preclusion doctrine could not be "ensconced in rules governing the internal procedures of the rendering court itself," which are subject to "the jurisdictional limitation of the Rules Enabling Act."[181] Nonetheless, the Court explained, if "state law did not accord claim-preclusive effect to dismissals for willful violation of discovery orders, federal courts' interest in the integrity of their own processes might justify a contrary federal rule" that would bind subsequent tribunals.[182]

American Pipe tolling operates in a similar fashion. Federal common law plays a necessary role in cases of this description. Procedural rules and policies must sometimes be enforced outside the boundaries of the initial action in order to be fully effective. But as the *Semtek* Court correctly noted, any interpretation of a Federal Rule of Civil Procedure that purported to "govern[] the effect that must be accorded federal judgments by other courts" would "arguably violate the jurisdictional limitation of the Rules Enabling Act."[183] In the absence of a governing statute, these policies would have no effective enforcement mechanism without federal common law to carry them into effect.

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178 531 U.S. 497, 508 (2001).

179 *See id.* at 509; *see also* Burbank, *Interjurisdictional Preclusion*, *supra* note 89, at 783 ("[U]ncertainty as to the binding nature of federal judicial action might lead to disregard of perfectly valid Federal Rules and orders and . . . the costs of such disregard would fall on the federal courts.").

180 *Semtek*, 531 U.S. at 503.

181 *Id.*

182 *Id.* at 509. These passages from *Semtek* speak to the applicable standard as well as the source of authority for the federal rule, a matter we take up in the next section.

183 *Id.* at 503.

The same limitation would prevent any construction of a Federal Rule that mandated the effect that other courts must give to a ruling on class certification, including a tolling rule. The multiple certification issue that the Court addressed in *Smith v. Bayer Corp*.[184] provides a useful illustration. In *Bayer*, the Court held that a federal judgment of dismissal in a proposed class action could not bind the parties in a counterpart state proceeding, both because certification was denied in the federal proceeding (meaning that the proposed absentees were not bound by the judgment) and because of differences in the certification standards under Rule 23 and the counterpart provision that governed in the subsequent state-court proceeding (meaning that issue preclusion was not available). In discussing possible alternatives for addressing the problem of multiple attempts at class certification, the Court indicated that a direct solution would require "legislation [enacted by Congress] to modify established principles of preclusion."[185]

These limitations reinforce the conclusion that we draw from a close reading of *American Pipe* and its progeny. *American Pipe* tolling cannot be a mandate flowing directly from Rule 23. The doctrine is the product of federal common law crafted to carry into effect policies underlying Rule 23 that do no violence to the REA.[186]

B. *Responding to the Bootstrapping Concern—Sources of Authority and Sources of Rules*

This account of *American Pipe* tolling could provoke an objection that we must address: bootstrapping. If the REA prohibits a Federal Rule from prescribing a tolling doctrine directly, the argument would go, then a judge-made tolling doctrine grounded in federal common law cannot rely on a Federal Rule for the policies it carries into effect. On this view, *American Pipe* tolling would have to be prescribed by a statute enacted by Congress, or otherwise rely on policies arising from sources that are not constrained by the REA. Federal common law, the argument would go, cannot do indirectly what a Federal Rule

184 564 U.S. 299 (2011).

185 *Id.* at 318 n.12. In the same footnote, the Court goes on to say: "Nor does this opinion at all address the permissibility of a change in the Federal Rules of Civil Procedure pertaining to this question." *Id.* The Court chose more agnostic language when discussing the potential role of the rulemaking process here, and for good reason. Unlike federal legislation, a Federal Rule that purported to "modify established principles of preclusion" would violate the Enabling Act. As the Court explained in *Semtek*, "it would be peculiar to find a rule governing the effect that must be accorded federal judgments by other courts ensconced in rules governing the internal procedures of the rendering court itself. Indeed, such a rule arguably would violate the jurisdictional limitations of the Rules Enabling Act." *Semtek*, 531 U.S. at 503.

186 For the (misguided) suggestion that "*American Pipe* could be read simply to be specialized federal common law: a judicial gloss effectuating class actions *enforcing the antitrust laws*," see Lowenthal & Feder, *supra* note 71, at 549; *id.* at 570, 580.

is prohibited from doing directly.[187] So framed, this broad bootstrapping argument is incorrect.[188] Explaining why it is incorrect provides a valuable occasion to understand both the sources and the limits of federal common law.

Erie brought about a wholesale reexamination of the doctrine of federal common law. As we have both explored in other work, the Court undertook that reexamination over a period of several decades, and its efforts were often characterized by confusion about the interplay of the Constitution, the Federal Rules, the lawmaking power of federal courts, and the relationship between federal and state authority. One early moment of clarity came in *Guaranty Trust*, when the Court confirmed the power of federal courts to promulgate doctrines for the administration of the actions they adjudicate, even when they sit in diversity and hear cases over which they have no authority to declare controlling liability rules—what might be termed a weak form of inherent judicial power.[189]

Guaranty Trust also held that this variety of federal common law was qualified in diversity cases by "the policy of federal jurisdiction which [*Erie*] embodies"[190] to ensure that a different "form or mode" of enforcement in a

187 *See, e.g.*, Westen & Lehman, *supra* note 66, at 365 ("[T]he statutory prohibition on rules that abridge 'substantive rights' must be deemed to apply to judge-made rules, too; otherwise, judges could do through common law adjudication what they cannot do through the carefully circumscribed and safeguarded mechanism used to create rules of civil procedure."); *see also* Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on* Erie *and* Gasperini, 46 U. KAN. L. REV. 751, 759-61 (1998) (following Westen & Lehman); Lowenthal & Feder, *supra* note 71, at 556-57. Lowenthal and Feder recognize, however, that it is "[p]erhaps . . . too much" to require "that *all* procedural rules . . . be developed and tested as if they were Rules." Lowenthal & Feder, *supra* note 71, at 557.

188 For work that seeks to circumvent the REA's restrictions through federal common law, and therefore *is* fairly charged with bootstrapping, more narrowly framed, see Graham C. Lilly, *The Symmetry of Preclusion*, 54 OHIO ST. L.J. 289, 319-21 (1993). The REA's limitations cannot be evaded through federal common law that purports to implement a Federal Rule by advancing policies not properly the subject of rulemaking. *See* Burbank, *Of Rules and Discretion*, *supra* note 105, at 774; *infra* text accompanying note 196.

189 The Court held that the "forms and modes of enforcing [rights in federal and state courts] may at times, naturally enough, vary because the two judicial systems are not identic," *Guaranty Trust*, 326 U.S. at 108, and it explained that the power of the federal courts to adopt their own forms and modes of enforcement flows from their inherent authority as an independent court system. *See id.* at 104-05 (describing the power that federal courts have to prescribe the "forms and modes of proceeding in suits of . . . equity" by virtue of having "cognizance" of equity suits). Professor Barrett distinguished the power of federal courts to develop procedural common law in the absence of congressional authorization and the inherent authority of each federal court to regulate its own proceedings. *See* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 879, 882 (2008). She also identified two possible sources of "nonexpress *judicial* power . . . inherent and implied incidental authority." *Id.* at 851. For a recent discussion of a district court's (weak) inherent powers, including limits on those powers, see Dietz v. Bouldin, 136 S. Ct. 1885, 1891-93 (2016) (affirming district court's inherent power to rescind a jury discharge order). The articulated limits are that "an inherent power must be a reasonable response to a specific problem and the power cannot contradict any express rule or statute." *Id.* at 1892.

190 *Guaranty Trust*, 326 U.S. at 101.

federal diversity court would not "substantially affect the enforcement of the right as given by the State."[191] This holding in *Guaranty Trust*, inaccurately described in later cases as a test of pure outcome determination, was misapplied in a series of disputes potentially involving the application of Federal Rules of Civil Procedure, with inadequate attention to the federal judicial origin of the doctrine at issue in *Guaranty Trust* or the sub-constitutional nature of the jurisdictional policy that qualified that doctrine.[192]

The Court sought to resolve this confusion in *Hanna v. Plumer*[193] when it provided a restatement of the doctrine that emphasized the distinction between cases in which the form or mode of proceeding in federal court is the product of a Federal Rule and those where federal common law provides the rule. In the process, *Hanna* helped to clarify the role of the RDA in this doctrinal economy. The RDA specifies that the laws of the several states provide rules of decision in courts of the United States "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide."[194] When *Hanna* held that Federal Rules of Civil Procedure, if valid, govern all questions in federal court that fall within their scope without any need to defer to the jurisdictional policies of the diversity statute (the so-called "twin aims of *Erie*"), it confirmed that the Federal Rules have the status of "Acts of Congress" through the grant of delegated lawmaking authority that Congress made to the Supreme Court in the REA.[195] As with any federal statute, the federal courts have the power to carry into effect the policies of Federal Rules of Civil Procedure through judge-made federal common law. In the language of the RDA, the Rules sometimes "require" that their provisions or policies be enforced through a preemptive federal common-law rule.

The *American Pipe* tolling doctrine fits comfortably within this post-*Hanna* taxonomy of federal common law and the Federal Rules. Like a preclusion doctrine of the type noted by the *Semtek* Court that would be

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191 *Id.* at 108-09.

192 *See, e.g.*, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 556-57 (1949) (applying *Guaranty Trust* to a dispute requiring plaintiffs in a shareholders derivative class action to post a security bond and pay costs to prevailing defendants with only perfunctory attention to the role of Rule 23); *id.* at 557 (Douglas, J., dissenting) ("This New Jersey statute, like statutes governing security for costs, regulates only the procedure for instituting a particular cause of action and hence need not be applied in this diversity suit in the federal court. Rule 23 of the Federal Rules of Civil Procedure defines that procedure for the federal courts."); *id.* at 560 (Rutledge, J., dissenting) ("In my view Rule 23 of the Federal Rules of Civil Procedure, derived from the former Equity Rules and now having the sanction of Congress, is valid and governs in the Cohen case.").

193 380 U.S. 460 (1965).

194 28 U.S.C. § 1652 (2012).

195 *Id.* § 2072(a) (2012) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.").

necessary to enforce sanctions for discovery violations, *American Pipe* tolling is a mechanism for carrying into effect provisions contained in, and policies animating, a law (Rule 23) that has been promulgated pursuant to a grant of delegated authority. As previously observed when discussing the preclusion questions that the Court later addressed in *Semtek*:

> In authorizing the Court to promulgate Federal Rules, Congress must have contemplated that the federal courts would interpret them, fill their interstices, and, when necessary, ensure that their provisions were not frustrated by other legal rules. That does not mean that the federal courts are free to create uniform federal decisional law or displace particular state law rules in areas untouched by the Federal Rules. Nor does it mean that the federal courts can create federal common law on the basis of policies not validly the concern of Federal Rules. It does mean, however, that when the Supreme Court has exercised the power delegated by Congress to prescribe uniform Federal Rules, we should regard those rules, if valid, as if they were Acts of Congress. In effect, they are assimilated to the Enabling Act for purposes of the Rules of Decision Act. Because Federal Rules cannot validly provide for the creation of federal common law . . . they are sources of power only if, fairly read, they may be said to require it.[196]

This account of the authority undergirding the *American Pipe* rule does not answer the question of the standard that should govern either the reach or the limits of the doctrine in particular contexts. "Here as elsewhere it is essential to distinguish sources of authority from sources of rules."[197] We take up the complex set of questions surrounding the applicable standard in the next section. But this account does answer a broadly framed bootstrapping argument, which would conflate these issues.[198] This bootstrapping objection argues that when the limitations of the Enabling Act prevent Rule 23 from serving as the direct source of a tolling rule they must also prevent Rule 23 from serving as the source of the policies informing the mandatory tolling rule carried into effect through federal common law. *Hanna*, properly understood, forecloses that argument when it confirms the status of Federal Rules as federal statutory authority for purposes of the RDA. "Judge-made

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196 Burbank, *Interjurisdictional Preclusion*, *supra* note 89, at 773-74; *accord* Stephen B. Burbank, *Where's the Beef? The Interjurisdictional Effects of New Jersey's Entire Controversy Doctrine*, 28 RUTGERS L. REV. 87, 115-16 (1996) [hereinafter "*Where's the Beef?*"] (federal common law implementing policies underlying Rule 19); Perdue, *supra* note 187, at 759 ("The Rules, just like any statute, provide a basis for common law law-making.").

197 Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1947 (2006) [hereinafter *Aggregation*].

198 "The Court was not persuaded by the attempt of the petitioners in *American Pipe* to measure the Court's power to make law 'by judicial decision' according to its power to make law by 'court rule.'" Burbank, *Hold the Corks*, *supra* note 25, at 1028.

federal common law tolling a statute of limitations need not observe the Rules Enabling Act's restrictions simply because the Court fashioned that law, which it was otherwise empowered to do, with reference to (nonlimitations) policies underlying Rule 23."[199]

To hold otherwise would be to yoke the source of authority to the source of the policies sought to be enforced and, in effect, to limit federal courts to the weak and qualified form of federal common law that was the subject of *Guaranty Trust*. Such limitations on federal judicial lawmaking would be unsustainable. As one of us wrote in a related context, "when the Supreme Court makes law through supervisory court rules [under the authority delegated by Congress in the REA], it is engaged in an enterprise that, both practically and normatively, is different in important respects from the enterprise in which the Court, or any federal court, is engaged when it makes federal common law."[200] The Supreme Court, acting as rulemaker, has adopted a set of procedural provisions and policies through the Federal Rules of Civil Procedure that are not dictated by state law. Those procedural provisions and policies apply equally in diversity and federal question cases, and federal courts must have the power to give them effect in either setting. As with the federal common law of preclusion that the Court discussed in *Semtek*, the jurisdictional setting may have some impact on the standard that should govern, but it has no impact on the source of authority for the exercise of federal common law.

III. THE REACH AND LIMITS OF *AMERICAN PIPE*'S FEDERAL COMMON-LAW RULE

As the discussion in Part II makes clear, there are different varieties of federal judge-made law, and each may have a different reach and different limits depending on its source of authority and the context in which the question arises. Thus, what courts and commentators often refer to as inherent judicial power finds its source of authority, and also its reach and limits, in Article III of the Constitution and in statutes conferring subject matter jurisdiction on the federal courts and regulating their proceedings,

199 *Aggregation*, *supra* note 197, at 1947. *Cf.* Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 880 (1984) ("If the Bank's theory [which would have precluded members of unsuccessful pattern and practice Title VII class action from thereafter bringing individual disparate treatment claims] were adopted, it would be tantamount to requiring that every member of the class be permitted to intervene to litigate the merits of his individual claim.").

200 Burbank, *Hold the Corks*, *supra* note 25, at 1021; *see also* Burbank, *Interjurisdictional Preclusion*, *supra* note 89, at 774 ("Even when legal regulation in a certain area is forbidden to the Rules, the policies underlying valid rules may help to shape valid federal common law.").

including statutes that prescribe the law to be applied.[201] Being nothing more than federal common law, it must be consistent with those statutes, unless one of them sought to deprive the federal courts of a power necessary to function as such under Article III.[202] The source of authority for the federal common law tolling rule emerging from *American Pipe* and its progeny is not a statute but a rule of court prescribed under a delegation of legislative authority, Rule 23 of the Federal Rules of Civil Procedure.

In this Part, we explore the reach and limits of *American Pipe*'s federal common-law tolling rule in a number of the contexts in which the question can arise. Before turning to that discussion, however, it is useful to recall that, like the federal common law of preclusion, the common-law tolling rule emerging from *American Pipe* and its progeny was framed in anticipation of, or with reference to, different litigation from the litigation that initially triggered it.[203] Yet, as to both preclusion and tolling, the lawmaking choices underlying the rules in question were designed in part to shape the incentives of litigants in service of the institutional interests of the federal courts, including those of the court presiding in the initial litigation.

A. *Cases Governed by Federal Statutes with Limitations Provisions*

We start with cases that, like *American Pipe* and *Crown, Cork & Seal*, involve claims brought in federal court under federal statutes with their own limitations provisions. In such cases, there can be no doubt about the existence of federal lawmaking power to fashion all of the governing law, and there similarly should be no question about the existence of federal judicial lawmaking power to fashion a tolling rule so long as it is (1) consistent with the statutory limitations provision and (2) implements either general equitable principles, against the background of which Congress is deemed to legislate, or the provisions of, or policies underlying, other federal law, which for that reason can serve as the source of authority.

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201 *See, e.g.*, Link v. Wabash R.R. Co., 370 U.S. 626, 630-33 (1962); *Ex parte* Peterson, 253 U.S. 300, 312 (1920).

202 Responding to careless assertions of federal inherent judicial power, one of us has observed: "[U]nlike the judiciaries of some states, the federal courts have very little inherent judicial power in the strong sense—power that prevails as against a conflicting legislative prescription. In order to qualify as such for a federal court the power must be 'necessary to the exercise of all others.'" Burbank, *Role of Congress*, *supra* note 73, at 1686. The author then observed that "[t]he federal courts do have substantial inherent power in the weak sense—power to make procedural law and 'to provide themselves with appropriate instruments required for the performance of their duties' *in the course of deciding cases*, in the absence of congressional authorization." *Id.* (footnotes omitted).

203 For this purpose, "different litigation" means both cases that are wholly separate and litigation that is different because, although that which triggered and shaped the tolling rule was a putative class action, that in which it is applied is not. The latter description, of course, captures *American Pipe*, while the former captures *Crown, Cork & Seal*.

As we demonstrate in Part I, the *American Pipe* Court did not rely on the tradition of equity in fashioning a tolling rule. Rather, imagining the litigant incentives that failure to toll the governing limitations provision would create when certification was denied, and the effects that the resulting behavior would have on the federal courts in which putative class actions were filed thereafter, the Court concluded that such effects would frustrate central policies underlying Rule 23. In *Crown, Cork & Seal*, similar reasoning led the Court to rely on Rule 23 as the source of authority for extending the common-law tolling rule to those who chose to bring their own lawsuits, rather than intervening, after the denial of class certification. Moreover, in relying on the *Eisen* decision for support of that extension, the Court made clear what a careful reading of *American Pipe* suggests, namely that those who opt out of a certified (b)(3) class must also have the benefit of tolling. In the context of a certified class, tolling is necessary to safeguard—preserve as "meaningful"—the specific provision conferring that right, Rule 23(c)(2), which in turn was written so as to ensure that due process of law is accorded absent members of a certified class.

American Pipe obviously controls as to intervention in the federal court that denied certification, as does *Crown, Cork & Seal* as to individual actions filed in federal court, whether it be the court that denied certification or some other.[204]

> There are many reasons why a class member, after the denial of class certification, might prefer to bring an individual suit rather than intervene. The forum in which the class action is pending might be an inconvenient one, for example, or the class member might not wish to share control over the litigation with other plaintiffs once the economies of a class action were no longer available.[205]

What if, however, the federal claim is within the concurrent jurisdiction of the state courts, and, after certification is denied, a member of the putative class files an individual action raising the same claim in state court? Or, on the same assumption, what if a member of a certified (b)(3) class opts out and files an individual action raising the same claim in state court?

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204 Throughout the discussion in this Part, we assume that the individuals seeking to intervene or bringing their own actions advance claims identical to those made in the putative class action. We thus do not take a position on the question whether *American Pipe* tolling should be available to claims under different laws that arise out of the same nucleus of operative facts as the claims initially brought. *See, e.g.*, Zarecor v. Morgan Keegan & Co., 801 F.3d 882, 888 (8th Cir. 2015) (limiting tolling to claims that were pleaded in putative class action); Drennan v. PNC Bank Nat'l. Assoc., 622 F.3d 275, 300 (3d Cir. 2010) (noting "strong argument" for tolling of claims that "appear to share a common factual and legal nexus"); Tosti v. City of L.A., 754 F.2d 1485, 1489 (9th Cir. 1985) (holding that individual suit need not "be identical in every respect"); Shankles v. Costa Armatori, S.P.A., 722 F.2d 861, 868 (3d Cir. 1983) (finding no toll for different claim arising from same fire that was the basis of class action).

205 Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350 (1983).

None of the three pertinent Supreme Court cases (including *Eisen*) presented these questions, a fact that should prompt caution about the import of unqualified statements in the Court's opinions.[206] Yet, in a state court case governed by federal substantive law and a federal limitations provision, on what basis could the state court refuse to permit *American Pipe* tolling? Although Rule 23's direct application is confined to the federal courts, not so a federal common-law rule deemed necessary to protect its provisions, policies, and ultimately the federal court system. "Under traditional federal common law analysis, preclusion rules are '[l]egal rules which impact significantly upon the effectuation of federal rights.' The existence of that potential for impact in state litigation involving federal substantive rights supports federal lawmaking competence just as it does in federal litigation."[207] The same is true for limitations rules.[208] A convincing case cannot be made for uniform federal judge-made preclusion rules to govern state judicial proceedings on federal claims as F1. The state preclusion law that governs, however, is displaced when hostile to or inconsistent with federal interests.[209] By contrast, it is difficult to imagine an interest that could support refusal to apply *American Pipe* tolling in state judicial proceedings on federal claims as F2, and it is thus difficult to avoid the conclusion that state courts are bound to apply this federal tolling law under the Supremacy Clause of Article VI.

We reached the foregoing conclusion without considering the impact that permitting state courts to refuse to toll in these circumstances could have on the federal interests sought to be protected by *American Pipe* and its progeny.

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206 *See, e.g.*, Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 550 (1974) ("[T]he filing of a timely class action complaint commences the action for all members of the class as subsequently determined."); *id.* at 554 ("[T]he rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.").

207 Burbank, *Interjurisdictional Preclusion*, *supra* note 89, at 810 (citation omitted). Professor Barrett included preclusion rules as one of five categories of "procedural common law" she examined, claiming that "none of these doctrines, as a rule, applies in state courts." Barrett, *supra* note 189, at 823 n.22. Elsewhere, however, she noted that the proposition did not extend to "the context of interjurisdictional preclusion," *id.* at 831, an exception that, when preclusion is involved, swallows the rule. The problem appears to be one of definition, demonstrating once again the hazards of procedure/substance dichotomies.

208 For a case holding that *American Pipe* governs the tolling effect of a putative *state court* class action brought to enforce a federal statute, and subject to a federal limitations period, see Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560, 562 (7th Cir. 2011). This is a different question from that discussed in the text, and the *Sawyer* court's analysis is inadequate to the task. *See id.* ("Federal law determines the tolling effect of a suit governed by a federal statute of limitations. *American Pipe* establishes that federal rule."); *see also* Respondents' Brief, *supra* note 29, at 33 ("As long as *American Pipe* is a product of the equitable powers of federal courts[,] . . . it makes little difference whether the putative class action said to toll an otherwise untimely individual federal court action proceeded in state court or federal court. Either way, it is federal law that is doing the tolling.").

209 *See* Burbank, *Interjurisdictional Preclusion*, *supra* note 89, at 810-17.

It was enough that such refusal could cause the plaintiffs in question to lose their rights under federal substantive law. Thereafter, the incentive structure that would be created by permitting state courts as F2 to refuse tolling to members of a putative class who, either upon denial of certification or after opting out of a certified class, brought individual suits in those courts would be akin to that described in *Crown, Cork & Seal*: "A putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result would be a needless multiplicity of actions . . . ."[210]

There is a difference, however. Those seeking to take advantage of *American Pipe* tolling could avoid the dilemma by bringing their individual actions in federal court.[211] Even assuming that the law of personal jurisdiction and venue would always make such a court available, requiring individuals to surrender the choice of forum conferred by federal jurisdictional statutes is a questionable way to respond to state interests that are hard to discern and may, in fact, reduce to an interest in not incurring some of the costs of the disintegration (or, in the case of opt-outs, diminishment) of a class action in another jurisdiction.[212] Such an interest, if not simply inconsistent with federal statutes granting concurrent subject matter jurisdiction,[213] hardly seems sufficient to displace federal common law that is otherwise pertinent and valid.

In *Dow Chemical v. Blanco*,[214] the Delaware Supreme Court considered the practical reasons to give effect to another state's class action tolling rule. Observing that, although "*American Pipe* and its progeny all involved class actions and subsequent suits brought in the same jurisdiction," the court concluded that "this factual distinction makes no legal difference." It reasoned that the Supreme Court's analysis—balancing the competing interests of class actions (efficiency and economy of litigation) and statutes of limitation (notice to the defendants)—"is equally sound regardless of whether the

210 *Crown, Cork & Seal*, 462 U.S. at 350-51.

211 We assume that defendants sued in state court would not remove to federal court if the state court could validly refuse to apply *American Pipe* tolling.

212 *See, e.g.*, Wade v. Danek Med., Inc., 182 F.3d 281, 287 (4th Cir. 1999) (predicting that Virginia Supreme Court would not apply a cross-jurisdictional tolling rule for three reasons, one of which was that "Virginia would be faced with a flood of subsequent filings once a class action in another forum is dismissed, as forum-shopping plaintiffs from across the country rush into the Virginia courts to take advantage of its cross-jurisdictional tolling rule."). The prediction turned out to be correct. *See* Casey v. Merck & Co. (Casey III), 722 S.E.2d 842 (Va. 2012) (responding to questions certified to it in Casey v. Merck & Co. (Casey II), 653 F.3d 95 (2d Cir. 2011)); *see also* Casey v. Merck & Co. (Casey IV), 678 F.3d 134 (2d Cir. 2012) (ordering dismissal as untimely).

213 *See* Mims v. Arrow Fin. Servs., 565 U.S. 368, 378 (2012) (emphasizing the "deeply rooted presumption in favor of concurrent state court jurisdiction") (citation omitted).

214 67 A.3d 392 (Del. 2013).

original class action is brought in the same or in a different jurisdiction as the later individual action."[215]

The Delaware court had a choice whether to apply class action tolling interjurisdictionally, because there is no federal constitutional or other legal barrier to states applying their own tolling law as F2 to the claims of litigants in their courts who were putative class members in another state's courts as F1. But its reasoning suggests the costs of applying F2's tolling law, costs that are the same when the first action was heard in federal court. The case thus confirms that, at least in this context, the federal common-law rule stated in *American Pipe* and its progeny must apply interjurisdictionally if it is to be effective in protecting federal courts against bearing all of the institutional costs of (1) interventions and protective actions when a class is not certified, and (2) ensuring that the opt-out rights of the members of certified classes remain "meaningful."

B. *Diversity Cases*

The question remains whether the tolling rule emerging from *American Pipe* and its progeny is a pertinent and valid rule of federal common law in other class actions brought in federal court as F1. All of the Court's class action tolling cases have involved federal substantive law claims, and most of them have involved federal limitations provisions. The question is most difficult to answer when the claims arise under state law, the limitations period is provided by state law, and the federal court's subject matter jurisdiction rests on diversity of citizenship. Most lower federal courts have declined to use federal tolling law in that setting, but their decisions have analyzed the question from the perspective of a federal diversity court sitting as F2 and, in a number of the cases, as a problem of "cross-jurisdictional tolling."[216] A similar lack of focus renders less persuasive one of the few decisions viewing "the federal interest here as sufficiently strong to justify tolling in a diversity case when the state law provides no relief."[217] Here, as elsewhere in the landscape we survey, there has been insufficient attention to the sources of authority for federal law.

In Section B.1, we explore the implications of our approach for state law cases in federal court by reason of diversity jurisdiction. We then turn, in

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215 *Id.* at 397.

216 *See, e.g.*, Thomas v. U.S. Bank Nat. Assoc., 789 F.3d 900, 903 (8th Cir. 2015); State Farm Mut. Auto Ins. Co. v. Boellstroff, 540 F.3d 1223, 1228 (10th Cir. 2008); Wade v. Danek Med., Inc., 182 F.3d 281, 289 (4th Cir. 1999); Vaught v. Showa Denka K.K., 107 F.3d 1137, 1146-47 (5th Cir. 1997). The courts in *Wade* and *Vaught* focused on the problem of "cross-jurisdictional tolling."

217 Adams Pub. Sch. Dist. v. Asbestos Corp., 7 F.3d 717, 719 (10th Cir. 1993) (dictum); *see also* Great Plains Tr. Co. v. Union Pac. R.R. Co., 492 F.3d 986, 997 (10th Cir. 2007) (stating that because federal and state tolling law were the same, "it is not necessary for us to balance the interests of federal procedural law and state substantive law").

Section B.2, to consider whether the regime we advocate is consistent with the Court's current approach, and, if not, what changes in that approach are necessary. In Section B.3, we explore the consequences of our approach for the law applied in courts sitting as F2. Finally, in Section B.4, we circle back to consider whether, even though *American Pipe* tolling is federal common law, it need not be uniform and should, rather, distinguish between tolling and tolling effect, borrowing state law as to the latter except where doing so would contravene important federal interests.

1. The Implications of Our Approach

There is federal lawmaking power to fashion limitations law even for state law diversity cases. Because statutes of limitations generally involve a mix of policies, some of which concern the administration of the business of the courts, Congress could constitutionally prescribe such law for federal courts, including tolling rules enforceable in state court, using its power under the Necessary and Proper Clause to carry into effect the work of the lower federal courts it is empowered to create or the judicial power conferred by Article III.[218] The Court held as much in *Jinks v. Richland County* when it affirmed the power of Congress to enact a tolling provision requiring state courts to extend the limitations period on a state-law claim that was previously pending in federal court. Upholding the mandatory tolling provision contained in the supplemental jurisdiction statute, the Court wrote that section 1367(d) is necessary and proper for carrying into execution Congress's power "[t]o constitute Tribunals inferior to the supreme Court," U.S. CONST., Art. I, § 8, cl. 9, and to assure that those tribunals may fairly and efficiently exercise "[t]he judicial Power of the United States," Art. III, § 1."[219] As had long been clear, the result in *Guaranty Trust* was not required by *Erie*'s constitutional holding. Rather, that decision sought to implement the "policy of federal

218 *See* Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.").

219 Jinks v. Richland Cty., 538 U.S. 456, 462 (2003). The Court recently relied on *Jinks* in rejecting the argument that its interpretation of section 1367(d), pursuant to which a state limitations period is suspended during the pendency of the federal action and for thirty days thereafter, "presents a serious constitutional problem." Artis v. District of Columbia, 138 S. Ct. 594, 606 (2018). For another federal statutory provision that provides for the tolling of state (and federal) limitations periods while an action is pending in federal court, see 28 U.S.C. §1332(d)(11)(D) (2012) (Class Action Fairness Act of 2005 provision concerning claims in "mass actions" removed to federal court).

jurisdiction"[220] that animated much of the *Erie* Court's nonconstitutional discussion of the "defects, political and social"[221] of *Swift v. Tyson*.[222]

If Congress provides statutory rules for the conduct of federal litigation, including diversity litigation, it has the power to make them binding on state courts when the failure to do so might frustrate their successful operation in federal court. Thus, concern that the failure of state courts to follow the same rules for waiver of privilege (and work-product protection) for disclosed communications would subvert their operation in the federal settings for which they were proposed—because risk-averse litigants would shape their conduct in accordance with variant state laws—led Congress to make those rules applicable "in a federal or state proceeding."[223] The rules in question were drafted by those responsible for proposing amendments to the Federal Rules of Evidence under the REA. They were enacted by Congress, rather than promulgated by the Supreme Court, because of the decision made in 1975 to require that "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."[224] In our view, if the federal standards could have been prescribed by valid Federal Rules, it would have been proper for federal common law to ensure their efficacy just as statutory Rule 502 does.[225]

Concerns about the potential impact on federal court proceedings of litigant behavior influenced by state law are one reason Congress provided that the period of limitations for a non-federal claim sought to be asserted within the supplemental jurisdiction of the federal courts is tolled "while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period"[226]—the provision upheld in *Jinks*. In the absence of a toll, risk-averse litigants concerned about losing their state law claim if it were dismissed might bring it separately, or even forgo federal

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220 "Our starting point must be the policy of federal jurisdiction which [*Erie*] embodies." Guaranty Tr. Co. v. York, 326 U.S. 99, 101 (1945) (citation omitted).

221 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74 (1938); *see also* Edward A. Purcell, Jr., *The Story of* Erie*: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, *in* CIVIL PROCEDURE STORIES 21, 54-59 (Kevin M. Clermont ed., 2d ed. 2008); *id.* at 59-63.

222 41 U.S. (16 Pet.) 1 (1842).

223 FED. R. EVID. 502(a), (b); *see also id.* 502(f) ("And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision."). Congress also provided (in 502(b)) rules to govern the effect in federal proceedings of disclosures in state proceedings in certain circumstances.

224 28 U.S.C. § 2074(b) (2012).

225 *See* Stephen B. Burbank, *Case One: Choice of Forum Clauses*, 29 NEW ENG. L. REV. 517, 539 (1995) ("Although . . . no existing federal statute or Federal Rule is pertinent on the . . . issue—in the sense that, as interpreted, it provides the legal standards for resolution of the issue—federal law speaks in more than one voice, and sometimes it may simply call for other federal lawmakers to fashion the rules."). For a recent discussion of federal common law displacing state law in diversity cases, see Alexander A. Reinert, Erie *Step Zero*, 85 FORDHAM L. REV. 2341, 2355, 2381-83 (2017).

226 28 U.S.C. § 1367(d) (2012).

court altogether. In the former situation, the federal courts would lose the potential contribution to accuracy from conjoined litigation of related claims, while the legal system as a whole would lose the potential benefits of having one lawsuit instead of two. In the latter situation, litigants would lose a federal forum for the adjudication of claims that are within federal subject matter jurisdiction.[227] Both concerns are within Congress's power to address through the imposition of a mandatory tolling rule enforceable in state court.

Congress did not prescribe the tolling rule in *American Pipe* and its progeny, and Rule 23 makes no policy choices about limitations, including tolling, even if it could validly do so under the REA. On the other hand, Rule 23 does make explicit policy choices concerning notice and the right to opt out of a (b)(3) class action that require tolling for their vindication through federal common law, and the rule as a whole is animated by policies of litigation efficiency and avoidance of duplicative filings that call out for similar vindication in the interest of the federal court system. Those Rule 23 provisions and policies require protection in diversity class action litigation as in other federal class actions.

2. Refining the Court's Approach

The question, of course, is whether it is possible to reach that result under the Court's existing jurisprudence. If not, the inquiry may illuminate deficiencies in that jurisprudence and means to address them.[228] Differences between rules permitting and forbidding class action tolling in federal and state courts in the same state would materially affect the character or result of the litigation, and those differences would predictably lead to forum shopping.[229] This fact suggests an argument that *Erie* and its progeny require

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227 *See* Jinks v. Richland Cty., 538 U.S. 456, 463-64 (2003) (using similar reasoning as one basis for upholding section 1367(d) against constitutional attack). The statute reflects awareness that, upon dismissal of their nonfederal claims, some litigants may wish to bring all of their claims in state court, by extending the toll to "any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a)." 28 U.S.C. § 1367(d); *see also* Artis v. District of Columbia, 138 S. Ct. 594, 607 (2018) ("How it genuinely advances federalism concerns to drive plaintiffs to resort to wasteful, inefficient duplication to preserve their state-law claims is far from apparent.").

228 For an extended discussion that recognizes the source of the *American Pipe* rule as federal common law but advocates a conclusion different from that reached here in diversity cases, see Lowenthal & Feder, *supra* note 71, at 556-68. Systematic refutation of their analysis would unduly lengthen this Article. Suffice it that the authors, laboring under a weak form of the bootstrap fallacy, *see supra* note 188, fail to understand that Rule 23 is the source of authority for the rule, *see supra* note 195, and fail to appreciate the varieties of federal common law. They thus miss the implications of Rule 23's role for analysis under both the RDA (including in particular its "except" clause) and the Supreme Court's federal common law jurisprudence. Perhaps as a result, they tend to treat "tolling rules" as a monolith.

229 *See*, *e.g.*, Walker v. Armco Steel Corp., 446 U.S. 740, 752-53 (1980); Hanna v. Plumer, 380 U.S. 460, 468-69 (1965).

the use of state tolling rules in a federal diversity class action. But if the RDA is thought to govern the issue, the displacement of state law not recognizing class action tolling by federal common law may reasonably be deemed "require[d]" by Rule 23, which for these purposes has the force of a statute.[230] Again, much of the institutional cost of a no-tolling regime, once established, would be borne by the federal courts,[231] while states reap some of the benefits of federal class actions packaging claims that otherwise would have to be pursued individually. More broadly, protecting the efficacy of a right widely regarded as essential to the constitutional validity of (b)(3) actions should qualify as a powerful basis for a transsubstantive (and transjurisdictional) federal common law tolling rule. And *American Pipe* leaves adequate room to accommodate state interests in protecting defendants against unfair surprise. "The key," as we have argued,

> is a nuanced appreciation of Federal Rules—one that, in the absence of express policy choices, resolves questions of scope by paying attention to what federal common law might achieve if the court could consider, in addition to outcome and the twin aims of *Erie*, federal policies demonstrably rooted in sources of unquestionable validity, including the Constitution, federal statutes, and Federal Rules.[232]

Under the Court's approach, whether or not it implements the RDA,[233] the existence of such focused and robust federal interests is a far cry from the "typical, relatively unguided *Erie* choice"[234] to which the *Hanna* Court referred. As the Court has described its decision in *American Pipe*, "there was a substantial body of relevant federal procedural law to guide the decision to

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230 28 U.S.C. §1652 (2012) ("The laws of the several states, *except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide*, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.") (emphasis added).

231 *Cf.* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508-09 (2001) (discussing the type of federal interest that may support uniform judge-made rules of preclusion, as opposed to borrowed state law, in diversity cases); Burbank, *Interjurisdictional Preclusion*, *supra* note 89, at 764-65, 780-83 (same).

232 Burbank & Wolff, *Redeeming the Missed Opportunities*, *supra* note 32, at 52.

233 *See* Burbank, *Interjurisdictional Preclusion*, *supra* note 89, at 788 ("The policy against different outcomes on the basis of citizenship is a 'policy of federal jurisdiction;' it evidently derives from the act of Congress conferring diversity jurisdiction on the federal courts. In considering whether the Constitution or Acts of Congress (including the Rules Enabling Act) require the application of federal law, the federal courts must consider both policies grounded in those sources pointing towards a federal rule and policies pointing to the application of state law.") (footnotes omitted).

234 *Hanna*, 380 U.S. at 471. *But see* Couture, *supra* note 89, at 541; Lowenthal & Feder, *supra* note 71, at 557; Adam N. Steinman, *Our Class Action Federalism*, Erie, *and the Rules Enabling Act after* Shady Grove, 86 NOTRE DAME L. REV. 1131, 1160 (2011) (arguing that, because Rule 23 "does not address the extent to which a class action tolls the limitations period for unnamed class members . . . . a federal court would face a relatively unguided *Erie* choice").

toll the limitation period, and significant underlying federal policy that would have conflicted with a decision not to suspend the running of the statute."[235]

The *Byrd* Court's attempt to clarify *Erie* jurisprudence—and to save the Federal Rules of Civil Procedure from a brooding omnipresence with extraconstitutional force[236]—lacked the central insight of *Hanna* that solutions to problems in the allocation of lawmaking power between the federal government and the states depend on the source of putative federal law. As a result, in a footnote citing *Sibbach*,[237] the Court in *Byrd* seemed to suggest that the Federal Rules of Civil Procedure were merely one of the "affirmative countervailing considerations"[238] that, as against the policy of federal jurisdiction, may tip the scales in favor of the application of federal judge-made law in a diversity case. From this perspective, it is no surprise that, once armed with that central insight and its implications for the validity of Federal Rules, the Court has hardly mentioned *Byrd* since the *Hanna* decision in 1965.[239]

Once one recognizes that Federal Rules, like federal statutes, can be legitimate sources of authority for federal common law, a dilemma that has vexed the Court since *Hanna* becomes more tractable. Under the Court's decisions it has seemed almost impossible for federal judge-made law to survive *Hanna*'s modified outcome-determination test in a diversity case, and equally unlikely for a Federal Rule of Civil Procedure to fail *Hanna*'s tests for validity under the Constitution and the REA. The Court's awareness of this dilemma has led it to lurch from one extreme to the other in the interpretation of the Federal Rules, yielding what we have called an "incoherent jurisprudence of scope."[240] In some of the cases in which the Court gave an unpersuasively broad interpretation to a Federal Rule (or to a federal statute), more satisfactory rationales were at hand: federal common law or preemption, which we regard as a subset of federal common law.

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235 Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 466 (1975). *See supra* text accompanying note 86. *Cf.* O'Melveny & Myers v. FDIC, 512 U.S. 79, 89 (1994) ("[T]his argument demonstrates the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy.").

236 *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 709 (1974).

237 *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 538 n.12 (1958). The footnote occurs after the words "compliance with a state rule" in the following sentence: "The policy of uniform enforcement of state-created rights and obligations, . . . cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury." *Id.* at 537-38 (citations omitted).

238 *Id.* at 537.

239 *See* Burbank, *Aggregation*, *supra* note 197, at 1948-49. "Indeed, in virtually the Court's only subsequent decision that can plausibly be deemed to have applied *Byrd*, it ignored that case in dealing with the problem on which it might have made a difference and invoked it on the problem for which it was redundant." *Id.* at 1949 (describing Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996)).

240 *See* Burbank & Wolff, *Redeeming the Missed Opportunities*, *supra* note 32, at 35-41.

Even if the *Byrd* Court's footnote citing *Sibbach* was misdirected, and even though a Federal Rule does not directly furnish governing law, its provisions and animating policies may furnish "affirmative countervailing considerations" to the application of state law in federal diversity actions. In such a case, although the application of federal judge-made law different from state law might promote forum shopping, the result would not be "inequitable administration of the laws."[241] When federal common law is reasonably deemed necessary to protect the provisions of a Federal Rule or the policies animating that rule, there are good reasons for a federal court sitting in diversity not to apply contrary state law. An explanation of those reasons should persuade a sophisticated client that the difference is not the product of invidious discrimination.[242] *American Pipe* tolling thus presents a situation unlike that in *Walker v. Armco Steel Corp.*[243] where, having held that Rule 3 did not govern according to its plain meaning, the Court evidently found underlying that Rule no federal policies that were pertinent to the administration of state statutes of limitations.[244]

In providing for class actions as a means to facilitate the efficient and expeditious resolution of related money damages actions in Rule 23(b)(3), the rulemakers sought (among other goals) to confer benefits on both the federal and state court systems, as well as litigants. A right to opt out was central to the adoption of (b)(3), and that right and notice which permits its exercise may even be constitutionally required.[245] The application of state law that did

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241 "The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." Hanna v. Plumer, 380 U.S. 560, 468 (1965).

242 *See* Stephen B. Burbank, *The Bitter With the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1320 n.165 (2000) [hereinafter *Bitter with the Sweet*] ("This is one way of giving independent content to the notion of 'inequitable administration of the laws' as used in *Hanna's* dictum."); Richard W. Bourne, *Federal Common Law and the Erie-Byrd Rule*, 12 U. BALT. L. REV. 426, 474-75 (1983) ("If the justification for the burden is great enough, none would call the impact 'unfair.' Moreover, on the face of it, federal procedural policies seem capable, at least in certain circumstances, of providing such justification.").

243 446 U.S. 740 (1980).

244 *See id.* at 753 ("There is simply no reason why, in the absence of a controlling federal rule [an action that would be barred in state court by a state statute of limitations should proceed to judgment in a federal diversity court]."). In West v. Conrail, 481 U.S. 35 (1987), the Court gave Rule 3 a second "plain meaning," holding that it provided the governing rule for stopping a federal limitations period that was borrowed to fill a gap in federal law. The decision is probably best, and most charitably, explained by the Court's long-enduring failure to recognize that the REA's limitations were animated by separation of powers, not federalism, concerns. It may also have reflected the view that there was no harm in imputing to Rule 3 what federal common law could have accomplished. For a discussion of *West*, see Burbank, *Of Rules and Discretion*, *supra* note 105, at 698-710.

245 For discussion of the fallacy that has led the Court to treat a limited holding about the personal jurisdiction of state courts in class action proceedings as a general statement about the due process right of absent class members to an individual opt-out opportunity, see Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2076-79

not recognize class action tolling in a state law diversity case would undermine federal policies that are basic to Rule 23, a right that it affords, and the constitutional interests that are protected by that right. Those federal policies and interests are of sufficient weight to subordinate the federal jurisdictional policy against different outcomes on the basis of citizenship.[246]

The Court appears to have recognized the need for this species of federal authority in *Tullock v. Mulvane*.[247] *Tullock* involved an action brought in state court seeking damages on an injunction bond that had been required in an earlier federal proceeding. At issue was the ability to recover attorney's fees as part of the damages claimed on the bond. Federal law disallowed that type of damages, but the local law of the state court would permit it. Reversing a decision of the Kansas Supreme Court, the Court held that federal law developed under the authority of a federal equity rule must control the measure of damages for such a claim, even when brought in state court:

> To hold the contrary, as we have previously pointed out, would be but to declare that although the power conferred by Congress upon this court to adopt equity rules is controlling, nevertheless the interpretations of the rules and the limitations which arise from a proper construction of them . . . are without avail.[248]

Against this view of *Tullock* is the fact that, at that time, the authority for federal courts sitting in equity to require security when granting an injunction was Equity Rule 90, which provided:

> In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may be reasonably applied consistently with the local circumstances and local

(2008) (describing the "persistent confusion surrounding the meaning of the Court's opinion in" Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)). Whatever its analytical demerits, this position appears to have become a part of the Court's understanding of the constitutional framework surrounding the class action and so must be taken into account when discussing the constellation of policies that *American Pipe* tolling seeks to effectuate. *See, e.g.*, Wal-Mart Stores v. Dukes, 564 U.S. 338, 363 (2010) ("In the context of a class action predominantly for money damages we have held that the absence of notice and opt-out violates due process.") (citing *Shutts*, 472 U.S. at 812).

246 *See* Burbank, *Aggregation*, *supra* note 197, at 1949 ("[T[he balancing process *Byrd* seemed to authorize . . . balanced one federal policy against another, not 'federal and state interests.'"); Bourne, *supra* note 242, at 491-92 ("[F]ederal courts considering the impact of rejected class certifications brought under diversity jurisdiction would have power to disregard state cases declining to toll their statutes of limitations in comparable circumstances."). *But see* Vaught v. Showa Denko K.K., 107 F.3d 1137, 1147 (5th Cir. 1997) ("[T]he federal interest in that practice does not trump the Texas tolling rule."). The *Vaught* court focused on the state in which the F2 diversity court was located, and it misapprehended what is to be balanced under *Byrd*.

247 184 U.S. 497 (1902).

248 *Id.* at 513.

> conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.[249]

Yet, as Professor Collins observes, "[t]he equity principles applied in federal court were not . . . considered supreme federal law that state courts were required to apply, and in that regard they were unlike today's federal common law."[250] They were also unlike the rule announced in *Tullock*.

Today, the Federal Rules specifically require that one moving for a preliminary injunction or temporary restraining order give security "in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."[251] Rather than justifying the displacement of state law that would permit recovery of attorney's fees on the ground that the long-standing federal rule to the contrary is an interpretation of "costs and damages" in Rule 65(c),[252] we prefer—and the REA counsels—an account founded in the need for a uniform judge-made rule, if, indeed, the case for it can be made. Such a rule would be a far cry from viewing Rule 65 "as a broad charter for federal common law," which neither the Rule's language nor its history supports.[253] It would thus be like the rule in *Tullock* viewed in the larger context described by Professor Collins.

3. Consequences for F2

If, as we contend, the federal common law tolling rule of *American Pipe* and its progeny governs in a state law diversity action, displacing a no-tolling rule of the state in which the federal court sits, lack of fair notice to the defendant within the limitations period remains the only basis for refusing to toll a state statute of limitations on behalf of a member of a putative class in a diversity action, because judicial power to accommodate that interest is part of the federal common-law rule that governs in F1. Inconsistency of tolling with a federal statute of limitations or repose remains a threshold barrier to validity in federal question cases, but inconsistency with state limitations law is not a barrier in state law diversity cases. Federal common law overrides contrary state law in this setting.

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249 *Id.* at 510; *accord* Russell v. Farley, 105 U.S. 433, 437 (1882); Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 274 (2010) ("In the absence of an applicable federal equity rule, for example, a federal court sitting in Georgia was to look to English chancery practice to determine what procedures to follow, rather than to the practices of Georgia state courts.").

250 Collins, *supra* note 249, at 290.

251 FED. R. CIV. P. 65(c).

252 *See* Minn. Power & Light Co. v. Hockett, 14 Fed. Appx. 703, 707 (7th Cir. 2001).

253 Burbank, *Bitter with the Sweet*, *supra* note 242 at 1335.

On this view, the analysis in Part III.A applies with equal force to questions that may arise concerning litigation brought in state courts or federal courts in other states.[254] Just as when F1 involves a federal claim and a federal limitations provision, federal common law would be "a craven watchdog"[255] of Rule 23 policies and of the right to opt out if state courts were free to apply a no-tolling (or no cross-jurisdictional tolling) rule in independent suits brought by members of the class in the diversity action.[256] Again, although states remain free to deny "cross-jurisdictional tolling" to litigants who were the members of class actions brought in the courts of other states, they have no such power with respect to a pertinent and valid federal common-law rule emerging from a federal court as F1. In this context as well, more than comity is involved.[257] The Supremacy Clause requires interjurisdictional tolling. As a result, no state need fear an avalanche of individual actions by reason of its choice on the issue (if it were governed by state law), and one of the major policy reasons for denying such tolling disappears (as to federal class actions).[258]

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254 *See supra* text accompanying notes 205–215.

255 *See* Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247, 266 (2010) ("But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.").

256 As always, the F2 court is free to protect against subversion of the governing limitations law's policies by ensuring adequate notice of the claims.

257 Not recognizing this, the Tennessee Supreme Court observed:

> Our adoption of cross-jurisdictional tolling could, in a general sense, benefit the federal court system in its disposition of class actions. Nevertheless, Tennessee simply has no interest, except perhaps out of comity, in furthering the efficiency and economy of the class action procedures of another jurisdiction, whether those of the federal courts or those of another state.

Maestas v. Sofamor Dane Group, Inc., 33 S.W.3d 805, 808 (Tenn. 2000) (internal quotations omitted); *see also* Wade v. Danek Med. Inc., 182 F.3d 281, 287 (4th Cir. 1999).

258 *See, e.g.*, Portwood v. Ford Motor Co., 701 N.E.2d 1102, 1104 (Ill. 1998) (expressing concern that tolling "may actually increase the burden on that state court's system, because plaintiffs from across the country may elect to file a subsequent suit in that state solely to take advantage of the generous tolling rule"); *Wade*, 182 F.3d at 287; *see also* David Bober, Comment, *Cross-Jurisdictional Tolling: When and Whether a State Court Should Toll its Statute of Limitations Based on the Filing of a Class Action in Another Jurisdiction*, 32 SETON HALL L. REV. 617, 652 n.228 (2002) ("Writing on a clean slate, one could strike the balance differently than have the majority of courts. If all (or at least most) states embraced cross-jurisdictional tolling (and class action tolling in fact reduced the number of "protective" suits), then cross-jurisdictional tolling would be cost-beneficial even where the class action was not pending in the state's own courts. But that train seems to have already left the station.") (quoting Mitchell A. Lowenthal, *Tolling the Statute of Limitations on Class Actions*, N.Y. L.J., Dec. 17, 2001, at 1).

B.4. Borrowed State Law?

Finally, the Supreme Court's decision in *Chardon v. Fumero Soto*[259] suggests the possibility that a distinction should be drawn between the existence of a tolling rule and the effect prescribed by any such rule.[260] *Chardon* was governed by section 1988, but the distinction might be equally pertinent in a state-law diversity action.[261] The distinction is also suggested by *Semtek*. The Court recognized there that federal common law is necessary to ensure that the constitutional and statutory grants of subject matter jurisdiction, including diversity jurisdiction, are not set at naught by state courts disregarding federal judgments. At the same time, the Court recognized that the state law of F1 could be borrowed for most questions of preclusion without the sacrifice of that or other federal interests.[262] Thus, we must confront a difficult question: if the state in which a federal diversity court sits recognizes class action tolling but provides for a different tolling effect than that prescribed in *American Pipe* and its progeny (suspension of the limitations period until the class certification decision is made or, in the case of a certified class, until a member opts out), which law supplies the standard?

Chardon is a troublesome decision.[263] Justice Rehnquist makes a forceful argument in his dissent that *American Pipe* announced a uniform suspension rule in this aspect (albeit one of federal common law),[264] and he argues that the Court's opinion to the contrary seems to sow uncertainty and invite wasteful litigation in an area where certainty and predictability are especially

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259 462 U.S. 650 (1983). We discuss *Chardon* in Part I, *supra* text accompanying notes 103–135.

260 A number of lower courts have apparently missed this and other distinctions, leading them into error. *See, e.g.*, Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560, 562-563 (7th Cir. 2011) (describing *Chardon* as "holding that, when the statute of limitations depends on state law, then state rules determine the tolling effect of a class suit, even if all litigation occurs in federal court."). In context, Judge Easterbrook's use of "tolling effect" evidently includes the question whether there is any toll, and the description does not acknowledge the role of Section 1988 in *Chardon* or the Court's insistence that state law respect the federal interest identified in *American Pipe*.

261 *See* Bourne, *supra* note 242, at 492 (*Chardon* suggests "that in certain areas there is only limited need for federal uniformity and that once the need has been satisfied it is perfectly appropriate to consider the content of various rules of law before exercising choice").

262 *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507-08 (2001); Burbank, *Interjurisdictional Preclusion*, supra note 89, at 762-74; *supra* text accompanying notes 178–182.

263 This is perhaps not surprising given the opacity of the Reconstruction-era statute, 42 U.S.C. § 1988 (2012), which the *Chardon* Court was interpreting. For a convincing reinterpretation of that statute, see Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 618-33 (1985). Professor Kreimer, who recognized that the *American Pipe* tolling rule is federal common law, argued that *Chardon* is consistent with his interpretation of the statute. *See id.* at 631 ("As long as federal interests are not adversely affected, even a tentative prediction of the state court's interpretation of domestic statutory rules can function as the basis for statutory determinations.").

264 *See* Chardon v. Fumero Soto, 462 U.S. 650, 665-67 (1983) (Rehnquist, J., dissenting).

important.[265] We share this concern. The Court may not have appreciated the potential difficulty because the work of "echo[ing the] half-heard whispers of the [Puerto Rican] tribunals"[266] had already been done by the lower federal courts in that case.[267] Moreover, in that posture, the case presented a stark choice between the tolling effect prescribed in *American Pipe* (suspension), which would not have saved the plaintiffs' claims, and that imputed to Puerto Rican law (renewal), which would have saved them. In making that choice, the *Chardon* Court appeared to take an *ex post* perspective.

> *American Pipe* simply asserts a federal interest in assuring the efficiency and economy of the class-action procedure. After class certification is denied, that federal interest is vindicated as long as each unnamed plaintiff is given as much time to intervene or file a separate action as he would have under a state savings statute applicable to a party whose action has been dismissed for reasons unrelated to the merits, or, in the absence of a statute, the time provided under the most closely analogous state tolling statute.[268]

In our view, these dicta give insufficient attention to the potential adverse impact of uncertainty about the content of state law on the vindication of the federal interests sought to be protected in *American Pipe* and its progeny, whose tolling rule was designed to respond to and shape the incentives of risk averse putative class members *ex ante*.[269]

Certainly, in a federal diversity case governed by a state limitations provision, the court should apply, and risk averse members of a putative class should easily be able to identify and rely on, an established state class action tolling rule, whatever its source, which is unambiguously more generous than the suspension rule of *American Pipe*.[270] On the other hand, where state law is

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265 *See id.* at 667-68; Burbank, *Of Rules and Discretion*, *supra* note 105, at 695 ("There may be some questions of federal law, uncertainty about which, at least for a time, benefits the federal system, but limitations is not one of them.").

266 Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1212 (1946) (describing the task of a federal court in diversity litigation after *Erie*).

267 *See Chardon*, 462 U.S. at 654-55 (describing reasoning of the Court of Appeals in deciding that the Supreme Court of Puerto Rico would authorize class action tolling and in identifying the rule as to tolling effect).

268 *Id.* at 661.

269 *Cf.* Burbank, *Of Rules and Discretion*, *supra* note 105, at 694-96 (discussing costs that borrowed state limitations law for federal claims imposes on litigants and federal and state courts, and from perspective of the federal policies or interests sought to be advanced in underlying substantive law); Kreimer, *supra* note 263, at 631 ("The court should defer to the most appropriate state statutory analogy, bearing in mind that a state law is not appropriate if it fails to take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Acts.") (citation and internal quotations omitted).

270 *Cf.* 28 U.S.C. § 1367(d) (2012) (prescribing a uniform federal tolling rule "unless State law provides for a longer tolling period"); *In re* Cty. of Orange, 784 F.3d 520, 530-31 (9th Cir. 2015)

silent on class action tolling, neither (putative) class members nor the federal court should be required to try to figure out whether that state's courts would adopt it, which, given our conclusion that tolling is required by federal common law, could only be for the subsidiary purpose of divining the hypothetical tolling effect.[271] The impulse to give effect to state policies cannot justify adopting a rule that would be "inconsistent with federal policy."[272]

In the middle ground between these situations, attention to state interests and to the capacity of federal common law to borrow state law may suggest that a state rule prescribing class action tolling effect should be borrowed as federal law in a diversity action in federal court so long as it is (1) established law for state-court class actions, and (2) would unambiguously afford absentees in the federal class action adequate time (whether more or less than suspension) either to seek to intervene or to bring independent actions if certification is denied or they opt out of a certified class.[273] If this approach generated too many satellite disputes, the case would be stronger for the conservative rule with which we started this discussion. Either way, the burden should rest on the party urging the application of a state-law standard to show that the requirements of federal policy are satisfied.

In order to prevent confusion and possible inadvertent loss of the ability to proceed independently, the federal court should identify the governing rule as to tolling effect, federal or state, in the order denying class certification or in the notice affording the right to opt out of a certified class.[274] The power to do so is akin to the power a court has to specify those elements of the preclusive effect of its orders that lie within its knowledge and control:

(holding that federal common law governs validity of pre-dispute jury-trial waiver in federal diversity litigation but that it borrows more protective state law as the federal rule).

271 *Cf. Chardon*, 462 U.S. at 667-68 (Rehnquist, J., dissenting) (arguing that under the Court's approach "the inquiry would appear to be, if state law *did* have a class-action tolling rule, which it *does not*, what would state law say with respect to one aspect of that rule's effect?"). When the Court has engaged in this kind of hypothetical prognostication in other doctrinal settings, the results have not been satisfying. *See, e.g.*, Marrese v. Am. Academy of Orthopaedic Surgeons, 470 U.S. 373, 374 (1985) (requiring federal courts to determine under state law the claim preclusive effect of a state court judgment in a subsequent proceeding advancing claims within the exclusive subject matter jurisdiction of the federal courts).

272 Bd. of Comm'rs of Jackson Cty. v. United States, 308 U.S. 343, 351-52 (1939).

273 *Cf.* Great Plains Tr. Co. v. Union Pac. R.R. Co., 492 F.3d 986, 998 (8th Cir. 2007) (finding that the "federal procedural interest [was] adequately protected in this case by application of the Kansas savings statute").

274 *See* Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042, 2058 (2017) (Ginsburg, J., dissenting). ("Today's decision impels courts and class counsel to take on a more active role in protecting class members' opt-out rights.") (internal citations omitted); *see also* Brief of Retired Fed. Judges as *Amici Curiae* in Support of Petitioner at 19-20, Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042 (2017) (No. 16-373).

> The preclusive rules of a jurisdiction can best be understood as a source of authorization for a court to attach prescriptive force to its judgment, along with a set of default rules that determine the extent of that prescriptive force in the absence of any express statement by the rendering forum . . . . Within the parameters established by the applicable preclusion doctrine . . . the rendering court has many tools at its disposal through which to shape the course of the proceedings and control the positive effects of its judgment.[275]

American Pipe tolling and the requirement that it bind state courts in subsequent cases, like the preclusive effect of a federal judgment and its mandatory binding effect, are products of federal common law. In both cases, courts can and should specify the effects of their own orders when those effects lie within their knowledge and control and doing so will eliminate uncertainty that could undermine important federal policies. Just as when the question is the interjurisdictional reach of the law governing the preclusive effects of a federal judgment in a diversity case, "[f]rom the perspective of litigants . . . a system of [tolling] rules . . . keyed to the locus of subsequent litigation would be hopeless, either because it would be unpredictable or because it would be, functionally, a sham."[276] In other words, although complete uniformity may not be necessary as a matter of federal common law in the vertical dimension, it is necessary horizontally.[277]

IV. *CALPERS* WITHOUT BLINKERS (LABELS)

A. *The Inadequacy (and Mischief) of Viewing* American Pipe *as Equitable Tolling*

In Part I, we demonstrate that, although the Court in *CalPERS* was correct that *American Pipe* tolling was not "mandated by the text of a statute or federal rule," it was not correct in asserting that the rule is "based on traditional equitable powers, designed to modify a statutory time bar where its rigid application would create injustice."[278] The latter view finds essentially no support in *American Pipe* itself or in other cases in which the Court was actually engaging the foundations of class action tolling, as opposed to constructing a

275 Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 760 (2005).

276 Burbank, *Interjurisdictional Preclusion*, *supra* note 89, at 797; *see also* Burbank, *Where's the Beef?*, *supra* note 196, at 100-101 (1996) (tying the governing rule in F2 to that applicable in F1 as "essential from the point of view of predictability" given matters considered in planning litigation strategy in F1).

277 *Cf.* Lilly, *supra* note 188, at 322-23 ("Of course, the need for certainty does not tell us which solution, state or federal, is preferable. What it does suggest is that an authoritative uniform approach should be forged . . . .").

278 *CalPERS*, 137 S. Ct. at 2051-52.

string citation.[279] Whether or not the product of teleology—with the end being the safe harbor of the Court's statements about the unavailability of "equitable tolling" in cases governed by a "statute of repose"—the reasoning of the Court on this issue is a potentially fertile source of mischief.

Suggesting that, in a case like the one before it, federal judges are limited to enforcing or interpreting statutes or Federal Rules, on the one hand, and implementing general principles of equity, on the other, the Court in *CalPERS* provides an impoverished account of the sources of federal law. As we also demonstrate in Parts I and II, that account is inconsistent with the Court's federal common-law jurisprudence.

The institutional interests that *American Pipe* was designed to serve were not conjured for the occasion in the absence of guidance in positive law.[280] They were immanent in the class action procedures provided by Rule 23 of the Federal Rules of Civil Procedure, which the Supreme Court promulgated under a delegation of legislative power in the REA. In Part II, we explore further the significance of that fact, as also of the fact that *American Pipe* tolling protects more than core policies animating Rule 23 as a whole. As the Court's subsequent decisions in *Eisen* and *Crown, Cork & Seal* make clear, it also protects—preserves as "meaningful"—a specific provision of Rule 23 that was included to ensure that class actions certified under (b)(3) do not deprive absent members of due process of law. In both respects, Rule 23 serves not as the source of *American Pipe* tolling, but as its source of authority. From the perspective of the RDA, as law promulgated under an Act of Congress, Rule 23 may require otherwise than that state tolling law apply.

As we explain in Part III.A, since *CalPERS* was a case arising under a federal statute that contains its own limitations provision, there can be no doubt about federal judicial lawmaking power to fashion a valid tolling rule.[281] Whatever questions there may be about the validity of *American Pipe* tolling when applied in other contexts, this is its wheelhouse. Federal common law of whatever variety, however, must be consistent with federal statutes.[282]

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279 *See* Arivella v. Lucent Techs., Inc., 623 F. Supp. 2d 164, 176 n.7 (D. Mass. 2009) (Young, D.J.) (explaining that, although "many Circuit court decisions have referred to *American Pipe* tolling as equitable tolling," the few courts required to probe the distinction between equitable and legal tolling–in cases involving statutes of repose–"recognize that *American Pipe* tolling is qualitatively different from equitable tolling").

280 *Cf.* Sec'y, U.S. Dep't of Labor v. Preston, 873 F.3d 877, 884 (11th Cir. 2017) ("A statute of repose confers on a defendant a personal privilege of sorts, in the form of an immunity from further liability. While that privilege can't just be snatched out of the defendant's hand—certainly not, as *Waldburger* confirms, by a squishy doctrine like equitable tolling—there is nothing to prevent the defendant from voluntarily giving it away.").

281 *See supra* text accompanying notes 204–215.

282 This statement is subject to the qualification that federal judge-made law that is necessary for the federal courts to function as such under Article III is valid even when contrary to a statute—inherent power of the strong type. *See* Burbank, *Role of Congress*, *supra* note 73, at 1686.

According to the Court, the fact that the applicable limitations provision contains two periods, one of which it labelled a "statute of repose," meant that the *American Pipe* rule, which it labelled "equitable tolling," could not apply. Having dispatched the latter notion, we turn to the question whether the former is similarly vulnerable and, even if not, whether statutes of repose are, or are always, impervious to federal common law that seeks to protect interests arising elsewhere in federal law.

The *CalPERS* Court's first sleight of hand, turning the *American Pipe* rule into "equitable tolling," spared it the embarrassment of making federal limitations provisions that can be subsumed under the label, "statute of repose," impregnable to judicial adjustment, even in the service of core policies underlying Federal Rules and of interests of constitutional magnitude. As to the latter interests, much stressed by Justice Ginsburg in dissent,[283] another sleight of hand—turning the *Wal-Mart* Court's observations about the right to opt out in (b)(3) class actions into an "ability that . . . should not be disregarded," and the right itself into an "ability" or a "privilege"[284]—should cause Justice Scalia, the author of *Wal-Mart*, to spin in his grave.[285] Indeed, one sleight of hand facilitated the other, since it is easier to

283 *See CalPERS*, 137 S. Ct. at 2056 (Ginsburg, J., dissenting) ("Given the due process underpinning of the opt-out right, I resist rendering the right illusory for CalPERS and similarly situated class members.") (citations omitted); *id.* at 2057 ("CalPERS positioned itself to exercise its constitutional right to go it alone, cutting loose from a monetary settlement it deemed insufficient . . . ."); *id.* ("Absent a protective claim filed within that period, those members stand to forfeit their constitutionally shielded right to opt out of the class and thereby control the prosecution of their own claims for damages.") (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 363 (2011)).

284 Here is the pertinent part of the cited discussion in *Wal-Mart*:

> In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.

Wal-Mart, 564 U.S. at 363 (citations omitted). Passing the common error of representing *Shutts*' holding about due process for purposes of state court jurisdiction as a general proposition applicable to federal court proceedings, "an ability that . . . should not be disregarded" hardly seems a fair reading of that which the *Wal-Mart* Court called a "right" protected by the Due Process Clause (*CalPERS* was a (b)(3) class action).

We doubt that Justice Kennedy's subsequent use of "privilege" (i.e., after "ability") was anything other than elegant variation on a rhetorical sleight of hand. Yet, a recent exploration of the "right-privilege distinction" by our colleague, Shyam Balganesh, notes that "[e]ven though rights are usually accompanied by privileges, situations do exist where privileges remain unprotected by rights, and it is here that the distinction begins to assume practical significance." Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 605 (2008) (footnote omitted).

285 Undoubtedly, however, he rests in peace. *See* Burbank & Farhang, *Class Actions and the Counterrevolution*, *supra* note 4, at 1519 tbl.2 (showing that Justice Scalia ranked third lowest in pro-class-action votes (25%), after Justice Thomas (18%), and Justice Kennedy (17%), in cases from 1960 to 2014).

delimit judge-made law implementing general principles of equity for this purpose than it is such law that was designed in part to keep a promise, the integrity of which implicates not just the interests of litigants and the impact of their behavior on the federal courts, but the constitutionality of Rule 23(b)(3).

B. *The Inadequacy (and Mischief) of Viewing Section 13 as a "Statute of Repose"*

How, then, should *CalPERS* have been decided if, rather than hiding behind the "equitable tolling" label, the Court had recognized the rule emerging from *American Pipe* and its progeny as federal common law created to protect provisions of, and core policies animating, Rule 23? Without that cover, the Court could no longer rely on precedent exempting statutes of repose from equitable tolling.[286] Would the general characteristics of statutes of repose identified by the Court in *CalPERS* support the conclusion that applying *American Pipe* tolling was inconsistent with the three-year bar in the Securities Act of 1933?

In seeking to answer that question, one needs to resist the impulse simply to deconstruct "statutes of repose," revealing the Court's use of that concept as another convenient label, like "equitable tolling," that invites manipulation and lacks probative value in resolving a specific question of legislative intent.[287] To be sure, the Court's opinion—including the main source for its disquisition on statutes of repose, Justice Kennedy's opinion for the Court in *CTS Corp. v. Waldburger*[288]—provides ample evidence for skepticism that here at last is refutation of the fallacy of unitary meaning[289]: from Congress's apparent failure ever to use the term "statute of repose,"[290] to a 1979 legal

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286 Justice Ginsburg's dissent implicitly attacked the notion that statutes of repose should be immune to *American Pipe* tolling. *See CalPERS*, 137 S. Ct. at 2056 (Ginsburg, J., dissenting) ("Respondents, in other words, received what § 13's repose period was designed to afford them: notice of their potential liability within a fixed time window."). That opinion did not, however, dispute the majority's characterization of *American Pipe* tolling as "equitable tolling" or deal directly with precedent on which the majority relied for the proposition that statutes of repose are immune to equitable tolling.

287 *See Recent Cases*, 130 HARV. L. REV. 1760, 1761 (2017) (discussing Stein v. Regions Morgan Keegan Select High Income Fund, Inc., 821 F.3d 780 (6th Cir. 2016)); *id.* ("By emphasizing formal, categorical—and ultimately indeterminate—distinctions, *Stein* reached a rule out of step with *American Pipe*, a decision principally concerned with the practical necessity of class action tolling.").

288 134 S. Ct. 2175 (2014).

289 *See* Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.").

290 "Congress has used the term 'statute of limitations' when enacting statutes of repose . . . And petitioner does not point out an example in which Congress has used the term 'statute of repose.'" CTS Corp. v. Waldburger 134 S. Ct. 2175, 2185 (2014).

dictionary definition of statutes of limitations as statutes of repose,[291] to generalizations based on country-wide surveys.[292] This criticism might, however, be thought a small place to stick. As we discuss in Part I, when addressing the question of consistency with congressional intent, the Court in *American Pipe* itself discussed the policies animating statutes of limitations at a high level of abstraction.[293]

Since, however, a judicially-crafted tolling rule, like all federal common law, must be consistent with any federal statute to which it may be applied, the generality of the policy analysis in *American Pipe* does no harm so long as it must yield to persuasive evidence that any particular statute is animated by different policies, with which tolling would be inconsistent. The same must be true when the question is whether *American Pipe* tolling is consistent with section 13 of the 1933 Securities Act. A label, and the generalized policy analysis that it is thought to entrain, cannot properly occlude actual inquiry concerning congressional purpose. That is particularly true of a label—"statute of repose"—that could not conceivably have had any meaning, as such, to the members of Congress in 1933 or 1934.[294]

In searching for evidence concerning the "nature and purpose of the 3-year bar"[295] at issue in *CalPERS*, it is important to keep in mind that the landscape for which Congress was legislating in the mid-1930s was different from today's landscape in a number of potentially salient respects. "Statutes of repose" are not all that members would not have recognized. They would not have recognized, and were not legislating for, the modern damages class action. The lawsuits they had in mind were lawsuits brought by individuals (or entities) on their own behalf. Reconciling the purposes of federal limitations law with representative actions brought under Rule 23(b)(3) was, of course, the problem that confronted the Court in *American Pipe*. It was also the problem that confronted the Court in *CalPERS*, but you would never know it.

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291 *See id.* at 2186 (noting the entry, "[s]tatutes of limitations are statutes of repose," in 1979 edition of Black's Law Dictionary). The Supreme Court said the same thing in the same year. *See* United States v. Kubrick, 444 U.S. 111, 117 (1979) (stating, after generally describing "statutes of limitations," that "[t]hese enactments are statutes of repose").

292 *See Waldburger*, 134 S. Ct. at 2182-83 (repeatedly relying on 54 C.J.S., Limitations of Actions § 7 (2010)). Such reliance may be defensible in *Waldburger*, which concerned the scope of a 1986 amendment to CERCLA that preempts state "statutes of limitations" applicable to tort actions in certain circumstances. *See* 42 U.S.C. § 9658 (2012).

293 See *supra* text accompanying note 50.

294 The *Waldburger* Court concluded "that general usage of the legal terms has not always been precise, but the concept that statutes of repose and statutes of limitations are distinct was well enough established to be reflected in [1982]." 134 S. Ct. at 2186. It was not established at all fifty years earlier. For a thorough discussion of product liability statutes of repose, see McGovern, *supra* note 25. According to the author, "at least five definitions of 'statute of repose' [were] in use" in 1981. *Id.* at 582. He also noted that the "first product liability statute of repose was passed in 1977." *Id.* at 588.

295 Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042, 2048 (2017).

Having outsourced the work of distinguishing statutes of repose from statutes of limitations to *Waldburger*, the *CalPERS* Court asserted that (1) the "3-year time bar in §13 reflects the legislative objective to give a defendant a complete defense to any suit after a certain period,"[296] (2) "[f]rom the structure of §13, and the language of its second sentence, it is evident that the 3-year bar is a statute of repose,"[297] and (3) "[the 'in no event'] instruction admits of no exception and on its face creates a fixed bar against future liability."[298] Moreover, although the Court acknowledged that "the question whether a tolling rule applies to a given statutory time bar is one 'of statutory intent,'"[299] it had already concluded that the "history of the 3-year provision also supports its classification as a statute of repose," and that the "evident design of the shortened statutory period was to protect defendants' financial security in fast-changing markets by reducing the open period for potential liability."[300] Finally, in recapitulating its reasoning before addressing the petitioner's "four counterarguments,"[301] the Court restated its conclusions that "the 3-year limit is a statute of repose . . . [a]nd [that] the object of a statute of repose, to grant complete peace to defendants, supersedes the application of a tolling rule based in equity." In short, "the text, purpose, structure, and history of the statute all disclose the congressional purpose to offer defendants full and final security after three years."[302]

The problems here are not confined to the use of a label or to its anachronistic use.[303] The Court's "structural" analysis fails actually to engage the relationship between the two periods in section 13, and its attribution of congressional purpose equivocates about the nature of the "full and final security" offered by the 3-year bar.

As to the question of structure, recalling that, when Congress enacted section 13 in 1933 and amended it in 1934, the lawsuits in mind were those brought by individuals, the text suggests two purposes: first, to require those who had discovered (or reasonably should have discovered) their injury to sue within one year, and second to set an outer limit for bringing suit, even if no injury had been discovered, at three years.[304] Unburdened by a label, let alone

296 *Id.* at 2049.

297 *Id.*

298 *Id.*

299 *Id.* at 2050 (quoting Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1226 (2014)).

300 *Id.*

301 *Id.* at 2052.

302 *Id.*

303 *See* McGovern, *supra* note 25, at 621 ("The precise meaning attributed to th[e] statute in a particular set of circumstances is far more important than its label . . . . Thus, great care should be exercised in determining the precise meaning and applicability of any given statute of repose.").

304 As to the use of the discovery rule in legislation, Professor Corman concludes that the "legislative purpose in placing an absolute limit on the time for discovery is to assure the potential

subsequent (nationwide) experience that the *Waldburger* Court invoked when reifying "statutes of repose," Congress appears to have been aware that unvarnished limitations periods governing actions for fraud were usually mitigated by a discovery rule, and thus to have spared the judiciary the need to furnish one. In that light, the "in no event" language that introduces the 3-year bar would appear to speak, and to speak only, to the discovery issue. Accordingly, when the focus is on the structure of the particular statutory provision at issue in *CalPERS*, even if *American Pipe* tolling were a variety of "equitable tolling"—which it is not—it should not be foreclosed.[305]

As to congressional purpose, which attention to structure has already illuminated, since a lawsuit brought one day short of three years (and within one year of discovery) would be timely under section 13, and since such a lawsuit might take years to come to judgment or settlement, "full and final security after three years"[306] cannot mean security from potential liability. The Court elsewhere appears to acknowledge as much when it refers to "a fixed bar against future liability"[307] and "the open period for potential liability."[308]

Similarly, "complete defense" and "complete peace" do not necessarily mean the same thing.[309] Only the latter seems to speak to a limitations policy with which those who enacted and amended section 13—written in the 1930s and with individual litigation in mind—would have been familiar: enabling those who are subject to the regulatory commands of the 1933 Securities Act, as amended, to move on, free of fear of undiscovered claims, after three years.

C. *The Limits of Textualism*

Textualism has its limits. The Court made no effort to square its reading of section 13 with the history of that provision, other than to note that the two periods were shortened in 1934 and to speculate about why that was

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defendant of a time for repose, while removing the uncertainty and unpredictable cost of open-ended litigation that is possible under the judicially created discovery rule." 2 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 11.2 (1991); *see also* 1 *id.* § 1.3.2.1 (describing five different definitions of "statutes of repose").

305 In her dissent in *Waldburger*, Justice Ginsburg posed the, apparently rhetorical, question: "What is a repose period, in essence, other than a limitations period unattended by a discovery rule?" CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2190 (2014) (Ginsburg, J., dissenting). That appears to be an accurate statement of the function of the 3-year bar in section 13. The Court's jurisprudence of labels in this domain, however, appears to make a "statute of repose" impregnable to all equitable tolling doctrines, not just the core discovery doctrine. Equitable tolling may be appropriate in other circumstances, including some in which defendants are fully aware of claims against them within the statutory period. *See, e.g.*, Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424 (1965).

306 *CalPERS*, 137 S. Ct. at 2053.

307 *Id.* at 2049.

308 *Id.* at 2050.

309 *See supra* text accompanying notes 296, 302.

done.[310] This is perhaps understandable from those who prefer speculation about what is plausible to evidence,[311] and labels to analysis. Those who "prefer the messiness of lived experience to the tidiness of unrealistically parsimonious models"[312] may wish at least to inquire whether there is pertinent legislative history. Indeed there is.

There is no reference to a "statute of repose," or to "repose" as a term connected with time limitations for bringing suit, in the legislative histories of the 1933 or 1934 Acts. There is evidence, however, that the Congress that considered and adopted amendments to the two-period structure in the 1933 Act intended to implement a general policy of limitations law. This policy sought, at a certain point, to enable potential defendants to go on with their lives free of the fear of lawsuits.

The legislative history of the 1933 Act does not contain useful discussion of Section 13.[313] The original House bill, H.R. 4314, did not have any limitations provision.[314] In hearings held on that bill, there was discussion about an unspecified statute of limitations applying "to a fraud action authorized by this legislation."[315] There was also discussion of the general rule that in fraud actions the statute is not "set in motion until the fraud [i]s discovered"[316] and of the need to put something in the bill to deal with situations where someone, having discovered the fraud, "might sleep on his rights, or bide his time."[317] A successor House bill included the 2-year/10-year

310 *See supra* text accompanying note 300.

311 *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662 (2009).

312 Stephen B. Burbank, *On the Study of Judicial Behaviors,: Of Law, Politics, Science, and Humility*, in WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE 53 (Charles Gardner Geyh ed., 2011).

313 Perhaps that helps to explain why the account in one of the few amicus briefs that discussed the legislative history of the 1933 and 1934 Acts was so tendentious. *See* Brief for the Secs. Indus. and Fin. Mkt. Assoc. and the Clearing House Assoc. L.L.C. as *Amici Curiae* in Support of Respondents at 8-9, Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042 (2017) (No. 16-373) (hereinafter "SIMFA and CHA amicus brief") (repeatedly misattributing concerns about proposed director liability provisions to concerns about limitations).

314 *See* H.R. 4314, 73d Cong. (1933).

315 *Federal Securities Act, Hearing on H.R. 4314 Before the H. Comm. on Int'l and Foreign Commerce*, 73d Cong. 215 (1933) (statement of Rep. Clarence F. Lea).

316 *Id.* (statement of Mr. Samuel Houston Thompson, former Chairman, Federal Trade Commission).

317 *Id.*

provision that was finally enacted,[318] and it was described as "the period of limitations provided by section 13."[319]

The legislative history of the 1934 Act, by contrast, contains a great deal of Senate hearing testimony and floor debate that sheds light on congressional purpose. Because of the overlap between Section 17 of the 1934 Act and the 1933 Act, it was determined to make the limitations periods the same, which required an amendment to Section 13 of the 1933 Act. The earliest discussion occurred at a Senate Hearing on February 28, 1934, during the testimony of Thomas Corcoran. Senator Kean was concerned that Section 17(e) of the bill, which then provided a 2-year period after discovery "means nothing but blackmail."[320] Elaborating, he observed: "They discover it after the market has gone down, and after something has happened, and they are looking for mistakes, and years afterwards there is a liability that carries to your grandchildren and great-grandchildren."[321] After a further exchange, Corcoran observed: "What you mean to say is that there should be a provision, or statute of limitations, in here to the effect that the action may be maintained at any time within 2 years after the discovery of the violation, but in no event more than 6 years after the actual filing of the false report."[322]

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318 *See* H.R. 5480, § 13, 73d Cong. (1933). James Landis's personal account of the legislative history of the 1933 Act makes it clear that the House took the leadership role, "the Senate Committee on Banking and Currency [being] busy with its investigation of securities transactions and securities markets," which undergirded the 1934 Act. James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 41 (1959); *see also id.* at 42, 45, 48.

319 H.R. REP. NO. 73-85, at 12 (1933). The Senate bill, which was the subject of a Senate Report, included a "5-year limitation . . . upon all civil suits, actions, or proceedings brought by purchasers." S. REP. NO. 73-47, at 6 (1933). As is evident from the enacted bill and the Conference Report, the House version prevailed. *See* H. REP. NO.73-152, at 12 (1933) (Conf. Rep.).

320 *Stock Exchange Practices, Hearing on S. Res. 84 (72d Cong.) and S. Res. 56 and S. Res. 97 (73d Cong.) Before the S. Comm. on Banking and Currency*, 73d Cong. 6565 (1934) [hereinafter "*Senate Hearing*"] (statement of Senator Hamilton F. Kean).

321 *Id.*

322 *Id.* (statement of Mr. Thomas Gardiner Corcoran, Counsel, Reconstruction Finance Corporation). Shortly thereafter, he referred to section 13 of the 1933 Act: "There is a provision in the Securities Act which requires you to bring suit within a certain time after the discovery, but there is a cut-off at 10 years. You wish something analogous to that?" *Id; see also id.* at 6718 (Ferdinand Pecora, chief counsel to the Committee who led its investigation observed about section 17(e) that "[t]here might well be added a provision that 'in any event such action will be brought within 6 years of the alleged violation.'"); *id.* at 6993 (in response to concern "that 5 or 6 or 7 years from now you can discover that something has been violated," Pecora stated: "It has already been suggested, and as far as I know it has found favor, that there be a further limitation, that such an action must be brought within 6 years."); *id.* at 7561 (in response to concern expressed by attorney for N.Y. Stock Exchange that, if 2-year period in draft was "after discovery, then we believe there should be some limited period beyond which no action could be brought," and reference to committee discussion "some weeks ago, and general agreement that there should be some maximum limitation, beyond which no action could be brought," Pecora acknowledged the prior discussion and the "suggestion was that action must be brought within 2 years after the discovery of the violation, but in no event could it be brought after 6 years from the commission of the violation."); *id.* at 7743 (witness

By far the most extensive discussion of limitations occurred in the Senate on May 7, 1934, when Senators considered amendments to the existing bill (S. 3240) and a conforming amendment to the 1933 Act. The result of the debate was the adoption of amendments changing the proposed 2-year/6-year structure to 1-year/5-year.[323]

In response to Senator King's assertion that in most States a fraud suit must be brought within 2 years, and "that it seems to me [5 or 6 years] was a rather long time,"[324] Senator Byrnes replied: "Suit must be brought within 1 year after discovery of the statement but the untrue or false statement might not be discovered for 4 years after its utterance. It means only that there is but 1 year after discovery of the statement in which action may be brought. In the states a suit may be brought within 4 years. It simply means that after 5 years or 6 years a suit may not be brought at all."[325]

Much of the debate was occasioned by Senator Norris's objection to having two periods instead of one, such as six years. His main arguments were that the short period keyed to discovery would foment litigation because there would be inadequate time to negotiate a settlement before having to sue, and because defendants would contend that the plaintiff had been on inquiry notice.[326] In pushing back, those who supported a two-period provision made a number of arguments. To Senator Norris's initial question,[327] Senator Fletcher, Chair of the Committee on Banking and Currency, who introduced the bill and was its floor manager,[328] responded:

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concerned that "2 years after the cause of action accrues is unduly restrictive," arguing for discovery rule and approving of Pecora's suggested "statute of limitations of 2 years after discovery, but in no event more than 6 years after the violation.").

323 *See* 78 CONG. REC. 8198-8202 (1934).

324 *Id.* at 8198.

325 *Id.* Senator Byrnes was a member of the Senate Committee on Banking and Currency, where the bill originated, and which held the hearings discussed above. *See Senate Hearing, supra* note 320, at ii.

326 *See* 78 CONG. REC. at 8198-8201.

327 "Why should we have one time fixed for the final limitation and another time fixed as a limitation based on the discovery of the fraud? There will be many cases where the fraud will not be discovered within a year." *Id.* at 8198. Later in the debate, Senator Barkley made it clear that, if the Senate were to follow Senator Norris's approach and adopt one period, "we would make the limitation apply not only to the discovery of the fraud but to the committing of the fraud also, so that a man would be barred at the end of 5 years, or 4 years, or whatever time we fix, from bringing suit for damages upon a false representation on a material commission, *no matter when he might have discovered the fraud*." *Id.* at 8201 (emphasis added). Barkley was also a member of the Senate Committee on Banking and Currency. *See Senate Hearing, supra* note 320, at ii.

328 For reliance on sponsors' statements in interpreting legislation, see, e.g., Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt."), *quoted with approval in, e.g.*, Nat'l Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 640 (1967); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 585 (1988); *see also* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 638 (1990) ("[S]ponsors are the Members of Congress most likely to know what the proposed legislation is all about, and other Members can be expected to pay heed to their

> Mr. President, the thought was that a man ought not to delay suit more than 1 year after he discovers the fraud. If he has been injured and finds that he has been injured, he ought to bring his action within a reasonable time, and we fix that time at 1 year. *If he has not discovered it, the person who made the misrepresentation or false statement ought to feel safe at some reasonable time that he will not be disturbed.*[329]

In response to Senator Norris's argument that the 1-year period would increase litigation because it left too little time for negotiated compromise,[330] Senator Byrnes observed:

> Ordinarily I should be disposed to agree with the Senator that a provision of this kind would require suit to be brought too quickly. There were, however, two questions confronting us. The point has been made that if fraud should be discovered after 2 years, suit could be brought within 10 years. It was argued, and with considerable force, that, inasmuch as the particular suit referred to in this section might be a suit against the directors of a corporation for omission to state a material fact in securing the registration of an issue, it would deter men from serving on boards of directors, because the man might die and his estate would be liable possibly 8 years after his death to a suit brought by an individual.
>
> . . . .
>
> [I]t was agreed that we should modify it to the extent of providing that if a man discovered the falsity of a statement, or the omission to state a material fact, and wished to sue the director of a corporation, he ought to bring suit within 1 year; but, knowing that he might not possibly learn of the falsity or omission for some years, we provided that it must be done within 5 years, and this provision was then changed to accord with the amendment which the Senator from Florida has offered. I think the Senator is familiar with the purpose; but there were two things to be considered. *Looking at the matter from the standpoint of the director of a corporation, one was that we should bring to an end his fear, or the fear of his estate, of a suit. At the same time we desired to preserve the right of a man who might not discover the falsity of a statement for 4 years, because in the very nature of things he might not do so; but upon discovery, he should not be denied the right to bring a suit.*[331]

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characterizations of the legislation."); *id.* at 640 ("[S]tatements by legislators at hearings or on the floor are not as authoritative as those of sponsors and floor managers, unless the speakers can be identified as "players" on that particular bill.").

329 78 CONG. REC. at 8198 (emphasis added). In quoting this sentence, the SIMHA and CHA amicus brief, *supra* note 313, at 10, omitted "[i]f he has not discovered it."

330 *See id.* at 8199.

331 *Id.* at 8199-8200 (emphasis added).

Shortly thereafter the following colloquy occurred:

> Mr. Norris. The Senator now is speaking, however, of a man who might be liable who dies, and whose estate might be liable. That would be true if we made the period 1 year. His estate might be liable at any time within 6 years under the language as it stands now.
>
> Mr. Byrnes. Yes.
>
> Mr. Norris. If the suit were commenced within that statute of limitations, if it were like the suit from Chicago the other day, it might last 11 years longer, and somebody else might die of old age before getting through with it.
>
> Mr. Byrnes. The only difference is that this period is 5 instead of 10 years, as was provided under the Securities Act of 1933. This is just 5 years better; that is all.[332]

The rest of the legislative history is not illuminating. The presentation of the Conference Report in the Senate describes, without explaining, the change from 2/10 to 1/3.[333]

The legislative history of the 1934 Act confirms that "statute of repose" was not a concept known to Congress in the mid-1930s, let alone a concept with invariant characteristics, and that the lawsuits for which they were legislating were lawsuits brought on an individual (nonclass) basis. It also confirms what the structure of Section 13 suggests, namely that, in settling on two periods in conforming amendments for Section 13 of the 1933 Act, those responsible for shaping the legislation sought to implement different purposes of limitations law that they deemed salient for claims based on fraud. They sought to accommodate the problem of undiscovered fraud, while providing an incentive to potential plaintiffs to sue promptly after discovery and setting an outer limit on the period during which potential defendants need to worry about lawsuits. Finally, the legislative history confirms that, as the language and structure of Section 13 suggest, the longer period cuts off undiscovered claims. Nothing in that language or history supports an

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332 *Id.* at 8200.

333 *See* 78 Cong. Rec. 10,111 (1934); *see also* HOUSE REP. NO. 73-1838, at 42 (1934) (Conf. Rep); 78 Cong. Rec. 10,265 (1934). In a statement made after the conference report was adopted, Senator Byrnes observed:

> Whereas the existing law permits a suit to be brought at any time within 10 years after the filing of the registration, the new law will permit such a suit to be brought only within 3 years. It has been argued heretofore that a director would be uncertain as to the settlement of his estate in case of death because of the liability that would exist for a period of 10 years. Under the new law, a suit must be brought within 3 years.

Id. at 10,186.

interpretation that would insulate defendants from claims *sub judice* of which, brought by those of whom, they were already aware.

In sum, Justice Ginsburg and the three other dissenting justices in *CalPERS* were correct. "Respondents, in other words, received what § 13's repose period was designed to afford them: notice of their potential liability within a fixed time window."[334] As a result, applying *American Pipe* tolling, however characterized, is consistent with Section 13. The refusal to do so, on the other hand, portends increased litigation activity, inimical to core Rule 23 policies, of the very sort that prompted the Court to fashion a federal common law tolling rule in the first place. Moreover, that refusal provides an incentive for dilatory behavior by defendants, on the one hand, and for premature certification decisions by the court, on the other hand,[335] neither of which well serves the interests of the federal courts.[336] Finally, the refusal to apply *American Pipe* tolling renders the right to opt out of a certified 23(b)(3) class action worthless in many cases, which, particularly because the judiciary had the power to avoid that result, exacerbates tension with the received account of what preserves the constitutionality of that provision.

CONCLUSION

CalPERS is an analytical house of cards. Indeed, the closing paragraphs of the Court's opinion strongly suggest that the decision is teleological, and they confirm that it is not the product of careful or informed legal reasoning:

> The statute of repose transforms the analysis. In a hypothetical case with a different statutory scheme, consisting of a single limitations period without an additional outer limit, a court's equitable power under *American Pipe* in

334 Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042, 2056 (2017) (Ginsburg, J., dissenting).

335 *See* Professors' Amicus Brief, *supra* note 12, at 14-15.

336 In this connection, we note the *Resh* Court's discussion of the 2003 amendments to Rule 23, which loosened the time frame for making a ruling on class certification from "as soon as practicable" to "an early practicable time." *See* China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 1807 (2018); FED. R. CIV. P. 23(c)(1)(A). The change aimed primarily to curtail the practice adopted by some district courts of issuing early, conditional rulings on certification that permitted suits to proceed as class actions without a thorough and rigorous analysis to determine whether the requirements of Rule 23 were satisfied. The practice gave plaintiffs powerful leverage to demand class settlements that were potentially unwarranted. *See* Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897, 1913-1914 (2014). *Resh* finds in this amendment "a preference for preclusion of untimely successive class actions by instructing that class certification should be resolved early on." *Resh*, 138 S. Ct. at 1807. This is a tendentious account. The primary concern driving the amendment was precipitous grants of class certification, not precipitous denials as *Resh* suggests, and the additional leeway that the change permits to consider competing applications from multiple aspiring class counsel will be pertinent only in those cases where the litigation context facilitates such competition, an issue that *Resh* treats with imprecision. *See infra* text accompanying note 343.

> many cases would authorize the relief petitioner seeks. Here, however, the Court need not consider how equitable considerations should be formulated or balanced, for the mandate of the statute or repose takes the case outside the bounds of the *American Pipe* rule.
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> The final analysis, then, is straightforward. The 3-year time bar in § 13 of the Securities Act is a statute of repose. Its purpose and design are to protect defendants against future liability. The statute displaces the traditional power of courts to modify statutory time limits in the name of equity. Because the *American Pipe* tolling rule is rooted in those equitable powers, it cannot extend the 3-year period. Petitioner's untimely filing of its individual action is ground for dismissal.[337]

As we noted at the beginning of this Article, however, our primary goal is not to demonstrate the error of the decision in *CalPERS*. It is, rather, to minimize the damage that can be caused in other cases by the Court's opinion. To that end, we have sought to demonstrate that (1) the rule emerging from *American Pipe* and its progeny cannot properly be deemed "equitable tolling," (2) federal judicial power is not confined to interpreting or enforcing statutes on the one hand, and implementing equitable principles on the other, and (3) *American Pipe* tolling is the product of federal common law.

The Court spoke again on these issues shortly before publication of this Article, sending mixed signals in an apparent effort to clarify *CalPERS*'s analytical mischief. In *China Agritech, Inc. v. Resh*,[338] the Court held that extending tolling to successive class actions would not serve "[t]he watchwords of *American Pipe*[:] efficiency and economy of litigation, a principal purpose of Rule 23," whereas "allowing no tolling for out-of-time class actions [would] propel putative class representatives to file suit well within the limitation period and seek certification promptly."[339]

In some respects, *Resh* represents an improvement on the missteps the Court made in *CalPERS*. The majority opinion, authored by Justice Ginsburg, frames *American Pipe* tolling as a doctrine that seeks to carry into effect policies of "efficiency and economy of litigation" bound up in Rule 23[340]—a correct statement of the doctrine as far as it goes, although the Court ignores the goal of preserving a meaningful right to opt out in actions certified under Rule 23(b)(3). Unfortunately, the *Resh* opinion also exhibits

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337 *CalPERS*, 137 S. Ct. at 2055; *see also* McGovern, *supra* note 25, at 605-606 ("Terms such as 'statute of limitations' or 'statute of repose' often are used without an explanation of their meaning or rationale. Once affixed, however, these terms may be outcome determinative."); *id.* at 620 (referring to them as "outcome-determinative labels").

338 138 S. Ct. 1800 (2018).

339 *Id.* at 1811.

340 *Id.* at 1806.

serious inconsistencies, incorporating references to "equitable tolling" in key parts of its analysis, albeit in a more subsidiary role.[341] The result is a mish-mash, an attempted course correction that sometimes loses its way. The opinion for the Court had the support of eight Justices (all but Justice Sotomayor, who concurred in the judgment and wrote separately), and it may be that these continued references to equitable tolling concerns were the price of support for a majority ruling that was attempting to shift the primary focus back to the policies of Rule 23.

We express no view here about the correctness of *Resh*'s conclusion that *American Pipe* tolling should not apply in successive class actions, but we do note cause for concern. *Resh* was a securities fraud action governed by the Private Securities Litigation Reform Act (PSLRA) as well as Rule 23. Justice Sotomayor cogently explains in her separate opinion that the majority's argument about the lack of "diligence" shown by class members who did not seek a leadership role in the initial proceeding "makes sense only in the PSLRA context" and "does not follow in the generic Rule 23 context, where absent class members are most likely unaware of the existence of a putative class action."[342] The Court does not clearly tie its analysis on the point to the PSLRA, and it also leaves the impact of the multi-district litigation process almost entirely unaddressed.[343] When combined with the Court's inattention to opt-out rights, this lack of clarity on class action policy leaves considerable room for improvement in future cases, even if *Resh* can be read as shifting the primary focus back to the policies of Rule 23.

As we demonstrate, that focus is essential to proper understanding in this domain, because it signals the distinction between sources of authority and sources of rules: Rule 23 is not the source of the rule in *American Pipe*; it is the source of authority. So understood, we argue, *American Pipe* tolling not only

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341 Perhaps the most egregious reappearance of the "equitable tolling" label comes in the Court's response to an argument concerning *Shady Grove Orthopedic Associates. v. Allstate Insurance Co.*, 559 U.S. 393 (2010). Plaintiffs-respondents in *Resh* claimed that, since *American Pipe* tolling is available to subsequent plaintiffs as individuals, the text of Rule 23 requires that they be allowed to proceed via a putative class action. In rejecting that argument, the Court appears to disavow some poorly chosen language in *Shady Grove* that had suggested a lack of discretion in class certification decisions—a welcome development, if so. *See* Wolff, *Discretion in Class Certification*, *supra* note 33, at 1946-1951 (urging this result). But the Court then invokes "*American Pipe*'s equitable tolling doctrine" when explaining why the text of Rule 23 does not support the respondents' argument. *See Resh*, 138 S. Ct. at 1809. This is at odds with the course correction that the Court appears to implement earlier in the opinion. *See also id.* at 1814 n.2 (Sotomayor, J., concurring in the judgment) (repeating the *CalPERS* mistake and framing *American Pipe* as an equitable tolling doctrine).

342 *Resh*, 138 S. Ct. at 1813 (Sotomayor, J., concurring in the judgment)*; see also id*. at 1814 ("But in suits not covered by the PSLRA, absent class members may not know of the pending class action early enough to 'aid' the court, and will likely have to file a completely separate lawsuit if what they seek is lead-plaintiff status.").

343 *Id*. at 1811.

governs in federal class actions prosecuting federal claims and subject to federal limitations provisions; it also governs in federal diversity class actions prosecuting state claims and subject to state limitations provisions. Federal common law protects and carries into effect the opt-out right granted by Rule 23 and aggregate litigation policies underlying the rule as a whole. These rights and policies represent an exercise of delegated legislative power and require that state law denying tolling to the members of a putative class action yield to the federal common-law rule.[344] And whenever *American Pipe* tolling governs in a federal court as F1, it must also apply in state courts hearing the claims of (putative) class members as F2 in order to be fully effective in the initial proceeding. The Supremacy Clause requires interjurisdictional tolling.[345]

344 *See supra* text accompanying notes 218–227.

345 *See supra* text accompanying notes 205–215, 254–258.