The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations

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Too often, the gravitational pull of the venerable Erie *doctrine draws state courts into filling state law lacuna with doctrines "promulgated" by federal courts. In this Article, Lowenthal and Feder argue that* Erie *does not require state courts to embrace the rulings of their federal counterparts, although state courts may choose to do so. Focusing on the class action tolling doctrine devised by the Supreme Court in* American Pipe *and that doctrine's application to mass tort litigation—which almost always comprises state law claims—the Authors demonstrate that, although commonly assumed otherwise, the federal class action tolling doctrine is not state law simply because of its provenance. If it does anything,* Erie *prohibits federal court meddling in substantive state law and, under either the Rules Enabling Act or the Rules of Decision Act, an automatic extension of* American Pipe *to state law claims constitutes exactly that kind of meddling.*

State courts addressing mass torts should independently examine the worth of class action tolling and, the Authors argue, not admit it to the state canon. In mass torts, it is difficult to square the American Pipe *doctrine with its stated goal of litigative economy; indeed, class action tolling may well generate more litigation than its saves. Moreover, under* American Pipe*'s own requirement that, to trigger tolling, the class action notify defendants of the individual claims and claimants they ultimately may face so that the defendants can gather the evidence they will need to defend themselves in any related individual litigation, class action tolling cannot properly apply to mass tort actions. Thus, not only does class action tolling for mass torts make poor state law, federal courts hearing state law claims must look to state law—not to* American Pipe *and its progeny—to determine the extent of class action tolling, if any.*

Introduction

More than a decade ago, Professors Westen and Lehman warned that "[a]nyone who writes about *Erie Railroad* nowadays should append an explanation, if not an apology."[1] Their article, which provoked an unusually passionate debate,[2] ultimately addressed *Erie*'s role once federal diversity

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1 Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 388 (1980); *see* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

2 *Compare* Martin H. Redish, *Continuing the* Erie *Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959 (1980) *with* Peter Westen, *After "Life for* Erie*"—A Reply*, 78 MICH. L. REV. 971 (1980).

jurisdiction was abolished. The report of diversity jurisdiction's death,[3] however, was premature; diversity still lives.[4] But, Westen and Lehman argued that *Erie* would live even if diversity jurisdiction had died.[5] Mindful of Professors Westen and Lehman's warning, we write about an aspect of *Erie*'s reach that also should be immune from any challenge to diversity jurisdiction's health: *Erie*'s defense of *state* court freedom to develop *state* law unfettered by the emanations of judges on the federal bench "a block away."[6] In short, merely because there exists a seemingly pertinent federal pronouncement—whether a Federal Rule of Civil Procedure ("Federal Rule") or a federal common law rule ("federal rule")[7]—does not mean that, as applied to state law claims, it must be followed by the state courts. Rather, *Erie* helps guide when state courts may—but need not—follow arguably relevant federal judicial statements in the development of state law, much as federal courts may look to state law to fill interstices in federal law.[8]

This Article focuses on one area in which state courts have been wrongly influenced by reading too much into federal pronouncements: the tolling of state statutes of limitations in mass tort[9] class actions. Both class actions and

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3 *See* Westen & Lehman, *supra* note 1, at 311 nn.1-2.

4 *See* 28 U.S.C. § 1332 (1994). Indeed, the jurisdiction of federal courts to hear state law claims has, if anything, expanded. *See* 28 U.S.C. § 1367 (1994), *superseding* Finley v. United States, 490 U.S. 545, 549 (1989); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 320-21 (1994); *see also In re* Abbott Laboratories, 51 F.3d 524, 529 (5th Cir. 1995) (holding that because 28 U.S.C. § 1367 superseded Zahn v. International Paper Co., 414 U.S. 291 (1973), even if only class representatives meet amount-in-controversy requirement, the court can exercise supplemental jurisdiction over all class members).

5 *See* Westen & Lehman, *supra* note 1, at 377-91. Westen and Lehman omit discussion of *Erie*'s role when federal courts exercise supplemental jurisdiction over state law claims. *See* 28 U.S.C. § 1367; United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (noting that federal courts are bound to apply state law to state claims heard under pendent jurisdiction). Presumably, even if diversity jurisdiction were abolished, *Erie* would still have vitality when federal courts exercised supplemental jurisdiction.

6 Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

7 This Article will refer to Federal Rules of Civil Procedure as "Federal Rules"; other procedural rules developed by federal courts will be referred to as "federal rules." *See* John H. Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 697 n.31 (1974). Differentiating between the two is not always so simple. *Compare* Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980) (holding that Federal Rule 3 does not commence an action on a state law claim for statute of limitations purposes) *with* West v. Conrail, 481 U.S. 35, 39 (1987) (holding that an action on a federal law claim is commenced for statute of limitations purposes when, as provided by Federal Rule 3, process is filed with the court). *See* Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 703-09 (1988) (arguing that the holding in *West* should be viewed as a federal rule rather than a Federal Rule).

8 A staggering amount of judicial attention has been devoted to the development of judicial rules to fill gaps in federal legislation. In the area most relevant to this Article— statutes of limitation—the Supreme Court observed this past Term that "[a] look at this Court's docket in recent years will show how often federal statutes fail to provide any limitations period for the causes of action they create, leaving courts to borrow a period, generally from state law, to limit these claims." North Star Steel Co. v. Thomas, 115 S. Ct. 1927, 1930 (1995) (listing cases). There is a wealth of commentary on the subject. For a comprehensive discussion, see Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011 (1980) [hereinafter *Time Bars*].

9 "Mass torts" are "situations in which numerous injuries and, therefore, numerous law-

statutes of limitations were designed, at least in part,[10] to benefit litigants and the judiciary by reducing the volume of litigation.[11] Class actions allow a single court to oversee, in a single proceeding, all litigation involving a common event.[12] Thus, without examining the significant underlying difficulties,[13] mass torts seem likely candidates for class action treatment.[14] Statutes

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suits result from the same event or set of circumstances. Because these claims are usually based on state law, many of them are filed in state court, although those cases involving parties of wholly diverse citizenship may be filed in or removed to federal court." William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1691 (1992).

The mass tort "story usually runs something like this[:] A disaster occurs—a crash, contamination, conflagration, collapse or other calamity—and dozens, hundreds, maybe thousands of victims seek recompense for their injuries from the perceived wrongdoer or wrongdoers." Mitchell A. Lowenthal & Howard M. Erichson, *Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedure*, 63 FORDHAM L. REV. 989, 990 (1995). "Most mass tort litigation can be classified either as mass disaster litigation, which involves injuries suffered by many at one time and place, or mass products liability litigation, which involves wide distribution of a defective product." *Id.* at 994 (footnote omitted). Mass torts may involve claims for personal injuries, property damage, or some combination. In this Article, we are primarily concerned with personal injuries.

10 There are many reasons for the development of these now venerable devices, some "procedural" and some "substantive," as those terms have been employed in the *Erie* lore. *Compare* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281 *with* Stephen B. Burbank, Comment, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012. Class actions, for example, were surely developed in part as a means for enabling litigants lacking a sufficient stake to pursue an individual claim to join with others similarly situated in order to vindicate their rights. This is at least arguably a "substantive" policy. *See* Mary K. Kane, *The Golden Wedding Year: Erie Railroad Company v. Tompkins and The Federal Rules*, 63 NOTRE DAME L. REV. 671, 691 (1988) ("[T]he availability of class actions under Federal Rule 23 has been seen as changing the stakes of litigation to such a degree that its use has been challenged, on the one hand, as altering substantive rights and, on the other, as denying rights because of the broad binding effect of the judgments entered.") (footnotes omitted).

11 *See, e.g.*, *Time Bars*, *supra* note 8, at 1016, 1020-23 (tracing the history of limitations of actions and noting the reduction of "burdensome litigation levels" as one purpose of time bars); Note, *Statutes of Limitations and Opting Out of Class Actions*, 81 MICH. L. REV. 399, 418 (1982) (explaining that "[t]he fundamental objectives of class actions are to promote judicial economy and to prevent inconsistent adjudications") (footnote omitted).

12 *See* FED. R. CIV. P. 23 advisory committee's note (1966 amendments); 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1751 (2d ed. 1986).

13 The propriety of certifying mass tort class actions is well beyond the scope of this Article. Generally, the unique issues presented by each potential plaintiff has made it difficult to certify classes involving mass torts. *See* Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (reversing certification of a tobacco personal injury class action); Georgine v. Amchem Prods., 83 F.3d 610 (3d Cir. 1996) (reversing certification of an asbestos personal injury class action); *In re* American Medical Sys., Inc., 75 F.3d 1069 (6th Cir. 1996) (reversing, through mandamus, certification of a class action against penile implant manufacturers); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.) (reversing certification of a class of hemophiliacs claiming to have contracted the AIDS virus from manufactured drug solids), *cert. denied*, 116 S. Ct. 184 (1995); *see also* FED. R. CIV. P. 23 advisory committee's note; 7B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1783 (2d ed. 1986 & Supp. 1995). As explained below, that same argument militates against applying class action tolling to mass torts. *See infra* part III.B.

14 *See, e.g.*, *In re* Copley Pharmaceutical, Inc., 161 F.R.D. 456, 458 (D. Wyo. 1995) (approving prior certification of a plaintiff class in Albuterol products liability litigation). *But see Rhone-Poulenc*, 51 F.3d at 1297 (decertifying a partial class of hemophiliacs in litigation over an

of limitations also are designed to shield litigants and courts from overwhelming litigation; these time bars abjure adjudication of claims that are commenced only after "evidence has been lost, memories have faded, and witnesses have disappeared."[15] Statutes of limitation play a particularly important role in mass torts, in which the central evidence of an action often consists of facts peculiar to the individual plaintiff: prior medical and employment history, unique product exposure, and individualized health and economic prognosis.[16]

Remarkable for rules of law so similarly dedicated, class actions and statutes of limitation do not interact harmoniously. In an effort to encourage the use of class actions, a trilogy of Supreme Court decisions beginning with *American Pipe & Construction Co. v. Utah*[17]—all involving causes of action created by Congress—form the core of a doctrine that permits the "tolling" of statutes of limitations of absent[18] class members from the moment a class action is filed. This doctrine is designed to encourage the use of class actions by discouraging absent class members from intervening in the class action or filing separate "protective" individual suits.[19] With a class action toll, individual litigants need not race to intervene in the class action, or to file separate suits, as time bars loom.

HIV-contaminated blood supply); Louise Weinberg, *Federal Common Law*, 83 Nw. U. L. REV. 805, 845 n.225 (1989) ("The general understanding is that mass tort cases are unsuitable for class certification."). *See generally infra* text accompanying notes 286-290.

15 Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944); *see also* United States v. Kubrick, 444 U.S. 111, 117 (1979) (explaining that statutes of limitations "afford[ ] plaintiffs what the legislature deems a reasonable time to present their claims, [and] they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise"); *Time Bars*, *supra* note 8, at 1016-20 (setting forth the "institutional," "remedial," and "promotional" justifications for statutes of limitation).

16 *See* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 9-10 (1986) (discussing the problem of indeterminate plaintiffs and "the prospect of ruinous liability for defendants, stupefying organizational complexity for plaintiffs, and unprecedented problems of procedural, evidentiary, and substantive law for the court" in mass toxic tort litigation); *infra* text accompanying notes 286-290.

17 414 U.S. 538 (1974). The two other cases in the trilogy are Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983), and Chardon v. Fumero Soto, 462 U.S. 650 (1983).

18 An "absent" member of the class includes all but those class members who, by name, appear in the class action.

19 *See American Pipe*, 414 U.S. at 553-54 (explaining that the tolling rule promotes "efficiency and economy of litigation" by avoiding "needless duplication of motions"). Nevertheless, class members who opt out of the class still enjoy the benefits of the toll. *See Crown, Cork & Seal*, 462 U.S. at 351; Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 & n.13 (1974); Tosti v. City of Los Angeles, 754 F.2d 1485, 1488-89 (9th Cir. 1985); Doe v. Blake, 809 F. Supp. 1020, 1024 (D. Conn. 1992). This result is, at best, questionable. *See* Warren Consolidated Sch. v. W.R. Grace & Co., 518 N.W.2d 508, 511 (Mich. Ct. App. 1994). One commentator persuasively argues that extending the tolling benefit to opt-outs undermines the very purpose for creating the rule. *See* Note, *supra* note 11. Even if opt-outs should enjoy class action tolling benefits, the question remains whether tolling for state law claims should be governed by state or federal law. *See* Orleans Parish Sch. Bd. v. United States Gypsum Co., 892 F. Supp. 794, 805 (E.D. La. 1995) (noting that it is a "substantial question" whether opt-outs enjoy class action tolling rights, but that for state law claims the answer is supplied by state law).

In adopting this novel[20] tolling doctrine, the Supreme Court tried to protect defendants from having to defend against stale claims; the Court limited the doctrine's application to occasions when the class action pleading gave the defendant adequate notice of the "substantive claims" and the "number and generic identities of the potential plaintiffs" it faced.[21] This notice requirement interjected uncertainty into the application of limitations periods. When the class is certified, a court has found the notice adequate, and there is no need for a toll because all "class members should be deemed to have been 'in court' from the date of the filing of the class action."[22] Almost all mass tort class actions, however, are not certified.[23] There may nevertheless be an *American Pipe* toll if, in a subsequent proceeding brought by an absent member of the non-certified class, another court concludes that the notice to the defendant in the failed class action was adequate. By limiting application of the tolling doctrine to an after-the-fact examination of the defective class action pleading, the Court interjected a sizable element of uncertainty that is anathema (although sometimes unavoidable)[24] to the smooth operation of limitations periods.[25] Because there is an inherent uncertainty regarding whether the second court will find the notice contained in the failed class action to be adequate, in all but the clearest cases savvy plaintiffs' counsel

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20 The *American Pipe* tolling rule runs counter to typical state law tolls, which have the effect of extending a limitations period not to *encourage* a litigant to refrain from filing suit, but as an accommodation to "circumstances beyond a plaintiff's control [that] may *prevent* him from suing within the applicable limitations period." *Time Bars*, *supra* note 8, at 1084 (emphasis added). These circumstances include incompetency, incarceration, and the inability to serve process. *See id.* at 1084 n.342.

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

22 Charles F. Sawyer, Comment, *Class Actions and Statutes of Limitations*, 48 U. CHI. L. REV. 106, 106 (1981) (citing *American Pipe*, 414 U.S. at 545-52).

23 *See In re* American Medical Sys., Inc., 75 F.3d 1069, 1089 (6th Cir. 1996) (finding "a national trend to deny class certification in drug or medical product liability/personal injury cases"); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1304 (7th Cir.) ("Most federal courts, however, refuse to permit the use of the class-action device in mass-tort cases, even asbestos cases."), *cert. denied*, 116 S. Ct. 184 (1995); Lowenthal & Erichson, *supra* note 9, at 1010; *infra* notes 286-290 and accompanying text.

24 *See, e.g.*, Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349-50 (1874); Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961); *Time Bars*, *supra* note 8, at 1019 ("The fraudulent concealment doctrine applies when the defendant has prevented the plaintiff from discovering his injury."). Despite the uncertainty it interjects, the fraudulent concealment doctrine is consonant with the remedial, promotional and (at least some) institutional policies of limitations periods. *See Time Bars*, *supra* note 8, at 1019-20. Yet the Court's recent pronouncements reflect a hostility toward the creation of rules that make limitations periods unpredictable. *See, e.g.*, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991). *Lampf* dealt with the fraud provisions of the Securities Exchange Act of 1934:

> Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period.
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> Litigation instituted pursuant to § 10(b) and Rule 10b-5 [promulgated thereunder] . . . must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation . . . .

Id. at 363-64 (footnote omitted).

25 *See Time Bars*, *supra* note 8, at 1075 ("The purposes of time bars demand that litigants be able to predict with certainty how long a claim remains timely."). Unpredictability undermines the institutional, remedial, and promotional functions of time bars. *See id.* at 1075-76.

should worry whether their clients will benefit from a class action toll. Unless the notice is clearly adequate, they will need to file the protective suits the *American Pipe* class action tolling doctrine was created to avoid.

Whether the class action tolling doctrine serves its intended purpose of litigative economy is therefore subject to serious question. The benefits it confers are, at best, hard to measure, and there are a variety of other mechanisms available to achieve the same ends. Moreover, the costs of class action tolling are exorbitant, at least when applied to modern mass tort litigation. The individual nature of the personal injuries that lie at the core of most mass tort actions prevents the class action defendant from gathering the evidence necessary to test and challenge absent plaintiffs' claims. Indeed, the defendants generally do not even know the identity of the absent class members and, therefore, are unable to discover evidence about that claimant, or marshall appropriate medical, economic, and other witnesses to comment on that claimant's circumstances. Thus, we argue that courts that consider applying class action tolling to mass torts should, as a matter of course, decline to toll limitations periods for absent class members simply because a class action was previously filed.

Analysis of the merits of class action tolling, therefore, should lead to its rejection in mass tort cases. Some courts reach this result by accepting *American Pipe* as state law, but then refusing to apply class action tolling to mass torts because the notice afforded defendants is inadequate. Most courts, however, have skipped right past the stage of questioning whether, for the substantive claims at issue, class action tolling is sensible. Instead, they have assumed that class action tolling as articulated in *American Pipe* and its progeny *is* the rule *because* the Supreme Court seemingly has said so.[26] By doing so, they are erecting an unwarranted and unwise restraint. *American Pipe* does not impose class action tolling on state law claims, which mass torts almost always are,[27] because it cannot. Rather, the decision to adopt class action tolling for state law claims is exclusively for state courts and legislatures to determine: the *Erie* doctrine[28] protects state substantive law from significant interference by both federal rules and Federal Rules, and it is too late in the day to deny that state statutes of limitations—at least for state law claims—are just the sort of rules that cannot be significantly altered or modified by federal procedural lawmaking.[29]

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26 The state courts that have considered class action tolling of mass tort limitations periods have analyzed the issues under the rubric of *American Pipe*, even when they explicitly recognize that they "are not bound" by it. *See, e.g.*, Jolly v. Eli Lilly & Co., 751 P.2d 923, 933-38 (Cal. 1988) (in bank); *see also infra* text accompanying notes 261-263.

27 *See supra* note 9.

28 Here we intentionally employ an encompassing term that embraces not only *Erie* and its progeny, but also the law under the statutes that *Erie* animates: the Rules of Decision Act, 28 U.S.C. § 1652 (1994), and the Rules Enabling Act, 28 U.S.C. § 2072 (1994). Professor Ely illuminated the unique contributions of these statutes, and *Erie*'s influence upon them, to the valid adoption of federal rules and Federal Rules. *See* Ely, *supra* note 7; *see also* Abram Chayes, *The Bead Game*, 87 HARV. L. REV. 741 (1974); John H. Ely, *The Necklace*, 87 HARV. L. REV. 753 (1974); Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682 (1974).

29 *See infra* part II.

Properly liberated from *American Pipe*'s gravitational pull, state courts are free to consider whether class action tolling should be adopted at all, and if so, for what types of claims. Similarly, federal courts hearing state claims must look to state law—not *American Pipe*—for guidance on this question. The states are of course free to embrace class action tolling, but they need not. For mass torts, they should not.

This Article has three Parts. The first describes the *American Pipe* trilogy through which the class action tolling doctrine was announced and shaped by the Supreme Court. Part II explains why, whether analyzed as a Federal Rule of Civil Procedure or a judge-made federal common law rule, the filing of a federal class action cannot toll a state statute of limitations on a state-law claim, as mass torts invariably are. Finally, Part III explains why the filing of a class action should not toll mass tort statutes of limitations.

I. The Class Action Tolling Doctrine

A. American Pipe & Construction Co. v. Utah

On May 13, 1969, only eleven days before the four-year statute of limitations for a federal antitrust action was to expire, the State of Utah commenced a class action in the United States District Court for the District of Utah alleging violations of the Sherman Act[30] against, among others, the American Pipe & Construction Company.[31] Utah purported to represent a class comprised of public agencies in Utah and state agencies in "Western Area" states who were end users of concrete and steel pipe.[32] Nearly seven months later, on December 4, 1969, the district court denied Utah's petition for class certification, for failure to satisfy the requirement of Federal Rule 23(a)(1) that absent class members be numerous enough to render their joinder as individual plaintiffs impractical.[33]

Eight days[34] after the denial of class certification, more than sixty Utah towns, municipalities, and water-and-sewer districts moved to intervene as plaintiffs either as of right, pursuant to Federal Rule 24(a)(2),[35] or permissively, pursuant to Federal Rule 24(b)(2),[36] in Utah's suit.[37] The district court

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30 15 U.S.C. § 1 (1994).

31 *See* Utah v. American Pipe & Constr. Co., 49 F.R.D. 17 (C.D. Cal. 1969).

32 *See id.* at 21.

33 *See id.* This decision, issued on December 17, supported the order of December 4. *See* Utah v. American Pipe & Constr. Co., 473 F.2d 580, 582 & n.4 (9th Cir. 1970), *aff'd*, 414 U.S. 538 (1974).

34 *See* Utah v. American Pipe & Constr. Co., 50 F.R.D. 99, 110 (C.D. Cal. 1970), *aff'd in part, rev'd in part*, 473 F.2d 580 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974). The court denied class certification on December 4, and the Utah towns moved to intervene on December 12.

35 Federal Rule of Civil Procedure 24(a)(2) provides:

> (a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FED. R. CIV. P. 24(a)(2).

36 Federal Rule of Civil Procedure 24(b)(2) provides:

denied the motions to intervene,[38] holding that intervention as of right was inappropriate because the putative intervenors held no interest in the outcome of Utah's suit,[39] that permissive intervention could not be granted because the statute of limitations applicable to the would-be intervenors had expired, and intervention would have prejudiced the defendants.[40] The Ninth Circuit reversed the district court's denial of permissive intervention,[41] holding that the putative class member's action had commenced when Utah filed the class action.[42] The Ninth Circuit reasoned that "[i]f the order [denying class certification], through legal fiction, is to project itself backward in time it must fictionally carry backward with it the class members to whom it was directed . . . ."[43] Because putative members of the class were "safely in court" during the pendency of the class action, the Ninth Circuit explained, they should not be deprived of that security simply because the class action was dismissed for lack of numerosity.[44]

The Supreme Court affirmed the Ninth Circuit's determination,[45] but employed seemingly more sweeping reasoning. The Court held that the motions to intervene by the previously unnamed class members were timely because the limitations statute applicable to their causes of action had been tolled when the class action was filed.[46] According to the Supreme Court, "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,' "[47] the commencement of a class action tolls "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 fashioned this tolling doctrine to encourage putative class members to rely on class actions and to refrain from pursuing individual ini-

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> (b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

FED. R. CIV. P. 24(b)(2).

37 *See American Pipe*, 50 F.R.D. at 100-01.

38 *See id.* at 110.

39 *See id.* at 101-02.

40 *See id.* at 102-08.

41 *See* Utah v. American Pipe & Constr. Co., 473 F.2d 580 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974). The Ninth Circuit affirmed the district court's denial of intervention as of right. *See id.* at 582.

42 *See id.* at 584.

43 *Id.*

44 *Id.*

45 *See* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 561 (1974).

46 *See id.* at 552-53.

47 *Id.* (quoting FED. R. CIV. P. 23(a)(1)).

48 *Id.* at 554.

tiatives.[49] Under *American Pipe*, there is no need for an absent class member to intervene unless and until class certification is denied. If the class is certified, absent class members (who do not opt out)[50] are parties in the action and their claims would be fully asserted by the class representatives. If the class action was timely commenced, there can be no statute of limitations defense as against any class member. If class certification is denied, however, plaintiffs would thereafter be able to file their respective motions to intervene without worry that a time bar expired during the pendency of the certification question.

American Pipe thus invested civil litigants with unusual power. Merely by filing a pleading labeled a "class action," the Court enabled individual litigants to alter the otherwise applicable limitations period affecting asserted claims.[51] This is heady stuff where the limitations period is selected by a court (as is often the case with federal claims),[52] but even more so when the period of limitations is set by Congress—as was the case in *American Pipe*.[53] Nonetheless, by permitting the class representatives to toll a limitations period for all potential class members, the Court removed what might otherwise be a strong impetus for other putative class plaintiffs to bring individual proceedings.

Whether *American Pipe* has reduced litigation by achieving greater reliance on class actions is difficult to measure.[54] The Court thought it would, and therefore had to confront whether this perceived judicial economy would come at an unfair cost to defendants, who would be forced to sacrifice an otherwise available statute of limitations defense. The Justices thought that defendants were not asked to surrender too much:

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49 *See id.* at 550. Although the Court's rationale supports tolling only for claims of putative class members who actually rely on the pendency of a class action, the *American Pipe* tolling doctrine applies to claims of class members who do not rely on, or who were unaware of, a pending class action. *See id.* at 551-52.

50 In class actions certified under Federal Rule of Civil Procedure 23(b)(3), class members may opt to remove themselves from the suit. *See* FED. R. CIV. P. 23(c)(2) (requiring courts to notify each class member that "the court will exclude the member from the class if the member so requests by a specified date"); *see also supra* note 19.

51 Even in the face of frivolous class action pleadings, defendants' only protection against the tolling of the limitations period is the adequate notice requirement set forth in *American Pipe*. *See infra* text accompanying notes 55-62 & 71-73.

52 *See supra* note 8.

53 Because the Sherman Antitrust Act, ch. 647, § 7, 26 Stat. 209 (1890), originally contained no statute of limitations, federal courts borrowed applicable time bars from analogous state statutes. *See* Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 397 (1906). In 1955, Congress made this unnecessary through passage of a uniform statute of limitations for all federal antitrust actions. *See* Act of July 7, 1955, ch. 238, § 4B, 69 Stat. 282 (currently codified at 15 U.S.C. § 15b (1988)). For a discussion of this development, see *Time Bars*, *supra* note 8, at 1037-38 n.114.

54 In this regard *American Pipe*'s own history is, at best, ironic. In *American Pipe*, neither individual nor class suits were filed until less than two weeks before the limitations period was to expire. Had there been no toll, once class certification was denied, American Pipe and the judiciary would have faced but a single lawsuit brought by a single plaintiff. As a result of the Court's *American Pipe* decision, however, the company and the courts were burdened with five dozen interventions. *See infra* part III.A.

> [t]he 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* . . . .[55]

That is, at least because a class action complaint will raise questions of law or fact common to the class,[56] and because the claims of the representative parties will be typical of the class,[57] the filing of a class action will alert defendants to what and against whom they may have to defend. Armed with this knowledge, defendants would know what evidence to gather and preserve.[58] By carefully noting that its decision preserved the fair notice mission of statutes of limitations,[59] the Court intimated that the availability of an *American Pipe* toll hinged on defendants receiving proper notice of the claims and the claimants asserting them.

In a concurring opinion, Justice Blackmun accentuated the central role notice plays in *American Pipe* tolling. After warning that *American Pipe* must not be read as encouragement to file class actions solely to protect sleepy claimants who would not timely file suit, Justice Blackmun wrote that only individuals whose claims "concern the same evidence, memories, and witnesses as the subject matter of the original class suit," should benefit from class action tolling.[60] This way "the defendant will not be prejudiced by later intervention, should class relief be denied."[61] Justice Blackmun went even further to alert courts to potential abuses of the class action tolling doctrine: he encouraged district court judges to use their discretionary powers to prevent class action tolling when there is insufficient identity between an individual's filing and the class action in order to "preserve a defendant whole against prejudice arising from claims for which he has received no prior notice."[62]

B. Crown, Cork & Seal Co. v. Parker

American Pipe applied class action tolling to motions to intervene filed after the statute of limitations would otherwise have expired. In *Crown,*

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55 American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554-55 (1974) (emphasis added) (citation omitted).

56 *See* FED. R. CIV. P. 23(a)(2).

57 *See* FED. R. CIV. P. 23(a)(3).

58 *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353 (1983).

59 *See supra* text accompanying note 55; *see also infra* text accompanying notes 71-73.

60 American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 562 (1974) (Blackmun, J., concurring).

61 *Id.*

62 *Id.*

Cork & Seal Co. v. Parker,[63] the rule was extended to the filing of separate, individual actions. There, Parker, the plaintiff, charged his employer with discrimination in violation of Title VII[64] and obtained a "right to sue" letter from the Equal Employment Opportunity Commission ("EEOC"). Although Title VII requires that suit be brought within ninety days of receipt of the letter,[65] Parker failed to file suit until almost two years later.[66] A class action against the Crown, Cork & Seal Company alleging the same type of discriminatory practices that underlay Parker's complaint, however, was pending while Parker's complaint was before the EEOC, and Parker's suit was filed within ninety days of the denial of certification of that class action.[67] The Supreme Court held that Parker's suit against the Crown, Cork & Seal Company was timely under the reasoning of *American Pipe*.[68]

Crown, Cork & Seal was a logical extension of *American Pipe*. Indeed, it was a necessary extension if *American Pipe* was to have any prospect of minimizing litigation. Few litigants (or, more significantly, their counsel) would knowingly wish to forego their right to pursue individual actions if the only basis for avoiding a time bar was intervening in someone else's lawsuit, in someone else's chosen forum. "There are many reasons," the Court noted, "why a class member, after the denial of class certification, might prefer to bring an individual suit rather than intervene."[69] Forcing absent class members to seek to intervene or forego their claims, concluded the Court, would lead to the very proliferation of litigation *American Pipe* sought to avoid.[70]

Though essentially compelled to take this step to avoid vitiating the goal of *American Pipe*, the Court remained concerned about the cost to defendants that the desired efficiency would exact. The Court worried, rightly in our view, about compromising the important functions served by statutes of limitations. In concluding that the class action tolling doctrine it had created comported with settled limitations policy, the Court reasoned:

> Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims. And a class complaint "notifies the defendants not only of the substantive claims being brought against them, but

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63 462 U.S. 345 (1983).

64 42 U.S.C. § 2000e (1994).

65 *See* 42 U.S.C. § 2000e-5(f)(1).

66 *See Crown, Cork & Seal*, 462 U.S. at 348.

67 *See id.*

68 *See id.* at 353-54.

69 *Id.* at 350.

70 *See id.* at 350-51. The Court said:

> 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—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid.

Id.

> also of the number and generic identities of the potential plaintiffs who may participate in the judgment."[71]

Three Justices issued a concurring opinion that focused exclusively on this troublesome question. While the *Crown, Cork & Seal* majority, and the *American Pipe* majority for that matter, wrote in sweeping terms, the *Crown, Cork & Seal* concurrers recognized that the "tolling rule of *American Pipe* is a generous one, inviting abuse."[72] They noted, just as Justice Blackmun did in his concurring opinion in *American Pipe*, that a class action tolling doctrine could encourage lawyers to file pleadings that invoke the class action mantra solely for the purpose of saving stale claims. Consequently, Justice Powell, joined by Justices Rehnquist and O'Connor, cautioned that:

> when a plaintiff invokes *American Pipe* in support of a separate lawsuit, the district court should take care to ensure that the suit raises claims that "concern the same evidence, memories, and witnesses as the subject matter of the original class suit," so that "the defendant will not be prejudiced." Claims as to which the defendant was not fairly placed on notice by the class suit are not protected under *American Pipe* and are barred by the statute of limitations.[73]

The concurrers thus underscored what was implicit in *American Pipe*: adequate notice to the defendant must be the mainstay of the class action tolling doctrine.

C. Chardon v. Fumero Soto

One week after issuing *Crown, Cork & Seal*, the Court capped its class action tolling trilogy with its decision in *Chardon v. Fumero Soto*.[74] There, the Court addressed not whether or when, but how to toll. Like its predecessors, *Chardon* involved a cause of action created by Congress.[75] Unlike the antitrust claims at issue in *American Pipe* and the Title VII claims at issue in *Crown, Cork & Seal*, however, the civil rights claim in *Chardon* had no limitations period established by Congress.[76]

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71 *Id.* at 352-53 (quoting American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 555 (1974), and citing United Airlines, Inc. v. McDonald, 432 U.S. 385, 395 (1977)).

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

73 *Id.* at 355 (Powell, J., concurring) (quoting Justice Blackmun's concurrence in *American Pipe*, 414 U.S. at 562).

74 462 U.S. 650 (1983).

75 *Chardon* was a civil rights action brought under 42 U.S.C. § 1983 (1994). *See Chardon*, 462 U.S. at 651-52.

76 Section 1983 claims are among those causes of action created by Congress that lack a limitations period. Under the "borrowing" approach used for similar claims, *see supra* note 8, but with an added vigilance directed by 42 U.S.C. § 1988 (1994), courts look to state law to fill this gap in federal civil rights legislation. *See, e.g.*, Wilson v. Garcia, 471 U.S. 261, 266-67 (1985) (applying a New Mexico tort statute of limitations to a § 1983 action); Board of Regents v. Tomanio, 446 U.S. 478, 483-86 (1980) (applying a New York statute of limitations and a New York tolling rule to a § 1983 action); *see also* Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 611-18 (1985). *But cf. Time Bars*, *supra* note 8, at 1041 n.138 (stating that § 1988 "is simply a congressional codification of the presumption to apply state law to fill interstices in federal rights of action").

In *Chardon*, the parties agreed that the applicable limitations period was one year, and that tolling pursuant to *American Pipe* applied because a class action had been filed.[77] The disagreement centered on how the tolling operated.[78] The individual action was filed more than a year after the action accrued—even excluding the period when the class action was pending. It was filed, however, within one year of the denial of class certification, and under Puerto Rico's tolling rules if there is an event that stops the progression of a limitations period, the limitations clock runs anew once the cessation expires.[79] Thus, by fitting Puerto Rico law to *American Pipe*, the Court afforded plaintiffs one year *from the denial of class certification* within which to bring timely section 1983 suits.[80] The indisputably applicable one-year period was itself borrowed from Puerto Rico law.[81] The Court essentially held that the decision to borrow the limitations period necessarily meant that ancillary rules like tolling also had to be borrowed: "'"the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application.'"'"[82] Thus, the Court reasoned that periods of limitations should not be separated from their related tolling provisions.[83] In refusing to bar the *Chardon* action, the Court appeared to fashion a general rule to guide litigants:

> After class certification is denied, [the] federal interest [embodied in *American Pipe*] 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.[84]

In short, when federal courts look to state law to provide the limitations period, they must also do so to determine the effect on that limitations period once class certification has been denied.[85]

Chardon built upon the *Crown, Cork & Seal* notion that absent class members have not slept on their rights until class certification is denied, because their claims are in fact being pursued by class representatives. At the point of certification denial, it is as if an absent class member's claims have

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77 *See Chardon*, 462 U.S. at 652.

78 Tolling can operate in a number of different ways. *See generally Time Bars*, *supra* note 8, at 1084 n.342 (describing different circumstances under which state statutes toll limitations periods); Kathleen L. Cerveny, Note, *Limitation Tolling When Class Status Denied:* Chardon v. Fumero Soto *and Alice in Wonderland*, 60 NOTRE DAME L. REV. 686, 689-90 (1985) (stating that the three permutations of tolling are suspension, extension, and renewal).

79 *See Chardon*, 462 U.S. at 655 (citing Feliciano v. Puerto Rico Aqueduct & Sewer Auth., 93 P.R.R. 638, 644 (1966) and Heirs of Gorbea v. Portilla, 46 P.R.R. 279, 284 (1934)).

80 *See id.* at 661.

81 *See id.*; *see also infra* note 85.

82 *Chardon*, 462 U.S. at 657 n.8 (quoting Board of Regents v. Tomanio, 446 U.S. 478, 485-86 (1980) (quoting Johnson v. Railway Express Agency, 421 U.S. 454, 463-64 (1975))).

83 *See id.* at 657 & n.8.

84 *Id.* at 661.

85 *See generally Time Bars*, *supra* note 8, at 1055-1104 (discussing when federal courts should create uniform rules for subsidiary issues and when they should apply state law).

been dismissed—but not on the merits. Accordingly, the individual plaintiff has whatever time period is still available under the underlying limitations period and any applicable savings statute within which to bring another timely action. In effect, the "unnamed plaintiffs should be treated as though they had been named plaintiffs during the pendency of the class action,"[86] and to have suffered a procedural dismissal of their claims with the denial of class certification.

Chardon produced a dissent. Three Justices argued that *American Pipe* amounted to a "federal rule of law applicable to the tolling of limitations periods during the pendency of a class action brought under Federal Rule of Civil Procedure 23."[87] In the dissenters' view, *American Pipe* established a uniform rule that suspended the running of limitations periods during the pendency of federal class actions. Indeed, the dissent seemed to imply that this uniform rule would apply regardless of the source of the cause of action. Thus, Justice Rehnquist wrote for the dissenters that "[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, there seems little question but that the federal rule of *American Pipe* would nonetheless be applicable."[88] Taken literally, as it has been,[89] Justice Rehnquist's view that *American Pipe* preempted conflicting state law could be read to apply to all cases in which class actions had been filed in federal court—not just to those, as in *American Pipe*, *Crown, Cork & Seal* and *Chardon*, in which federal rights were at issue.

II. Erie*'s Limitations on* American Pipe

The belief that *American Pipe* and its progeny enable federal courts to toll state statutes of limitations on state law claims is widely held.[90] Even some of our ablest jurists seem to accept this expansive view. For example, in his recent opinion decertifying a class action brought by hemophiliacs who claim to have contracted the AIDS virus as a result of using manufactured drug solids,[91] Chief Judge Posner seemed to accept without question that, although all claims asserted arose under state law,[92] the running of applicable state limitations periods was tolled by the filing of a federal class action.[93] The sole support cited for this assumption[94] was *American Pipe*.[95] However

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86 *Chardon*, 462 U.S. at 659.

87 *Id.* at 663 (Rehnquist, J., dissenting).

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

89 *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 210, 213 (2d Cir. 1987) (referring to "Justice Rehnquist's categorical statement in his *Chardon* dissent"), *cert. denied*, 484 U.S. 1004 (1988).

90 When personal injuries are at issue, the courts are divided. *See infra* text accompanying notes 294-307. When the claim is for property damage, however, courts almost reflexively apply class action tolling. *See infra* notes 261-262, 264 & 268.

91 *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

92 *See id.* at 1296 ("Some 300 lawsuits, involving some 400 plaintiffs, have been filed, 60 percent of them in state courts, 40 percent in federal district courts under the diversity jurisdiction.").

93 *See id.* at 1298.

94 In fairness to Chief Judge Posner, his comments appear to have been dictum.

one views the dictates of the *Erie* doctrine, we think the assumption explicitly made by Chief Judge Posner and implicitly suggested by Justice Rehnquist cannot be correct.

Three propositions support this assertion. First, whatever the source of a federal court's jurisdiction, state law supplies the rule of decision on state law claims. Second, state statutes of limitations are rules of decision that federal courts must apply to state law claims. Third, state tolling rules are as much a part of the body of state limitations law as the applicable time periods themselves. The *Erie* literature supports several conflicting models against which to test particular federal/state choice of law decisions.[96] Whatever the model, and whether the *American Pipe* class action tolling rule is considered as a Federal Rule or a federal rule, we think there is a consensus supporting these three propositions.

A. American Pipe *as a "Federal Rule"*

It would be difficult to argue that the plain meaning of Federal Rule 23 compels class action tolling. There is certainly nothing in the Rule's text that causes the tolling of limitations periods during the pendency of the certification question, nor any such suggestion in the relevant Advisory Committee notes.[97] Nevertheless, the argument that class action tolling is compelled by Rule 23, and is therefore essentially a Federal Rule whose validity is to be judged under the Rules Enabling Act, has some friends in high places.

American Pipe itself, for one. Justice Stewart's opinion for the Court began with an extended discussion of Rule 23 and the problems that led to the Rule's amendment in 1966.[98] He placed particular emphasis on the original Rule's failure to provide a mechanism in advance of final judgment for determining whether the class would be certified.[99] As a result, potential class members could await developments in the class action, "even final judgment," and *thereafter* decide whether to join the class.[100] The Court explained that "[t]his situation—the potential for so-called 'one-way intervention'—aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one."[101]

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95 *See Rhone-Poulenc Rorer*, 51 F.3d at 1298; *see also* Adams Pub. Sch. Dist. v. Asbestos Corp., 7 F.3d 717 (8th Cir. 1993) (suggesting in dictum that *Chardon* validly applied *American Pipe* to state law claims).

96 *See, e.g.*, *infra* note 232.

97 *See* Carrington, *supra* note 10, at 317 ("On its face, Rule 23 has no bearing on limitations law. Limitations law in class actions, so far as it appears, was not on the mind of the draftsmen in 1938 or in 1966, when the rule was rewritten.") (footnotes omitted). At least on this point, Professor Burbank agrees with Professor Carrington. *See* Burbank, *supra* note 10, at 1027 ("Rule 23 does not provide a rule for tolling the applicable limitations period, state or federal, in a class action brought in federal court, and *American Pipe & Construction Co. v. Utah* does not suggest otherwise.") (footnotes omitted).

98 *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 545-52 (1974).

99 *See id.* at 545-46.

100 *Id.* at 547.

101 *Id.* (footnote omitted).

Amended Rule 23 requires that the determination of whether to certify a class be made by the trial court "[a]s soon as practicable after the commencement" of the action.[102] This amendment was designed "to mend" the one-way intervention defect by "assur[ing] that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments."[103] The amendment therefore remedied the problem that led some lower courts to require each class member seeking individual joinder or intervention to do so within the limitations period.[104] Thus, Justice Stewart reasoned:

> 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. . . . [T]he claimed members of the class st[an]d as parties to the suit until and unless they receive[ ] notice thereof and cho[o]se not to continue. Thus, the commencement of the action satisfie[s] 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 in those cases where a class action is found "superior to other available methods for the fair and efficient adjudication of the controversy."[105]

In essence, then, from the moment a pleading denominated as a "class action" is filed, *all* members of the class are parties thereto, and can only lose that status if the class is certified and they opt out, or if the class is not certified. In the latter circumstance, it is as if an absent member's "action has been dismissed for reasons unrelated to the merits."[106] Accordingly, the Court was:

> convinced 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

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102 FED. R. CIV. P. 23(c)(1).

103 *American Pipe*, 414 U.S. at 547.

104 *See id.* at 549-50 & n.19. The rule was applied in "spurious" class actions only, and even then it was a minority position. *See id.* "Spurious" class actions generally involved circumstances where "rights to relief were 'several,' and there was a common question of law or fact affecting the several rights and common relief sought . . . ." 7B WRIGHT ET AL., *supra* note 13, § 1752, at 28-29. The 1986 amendments to Rule 23 "repudiated" this label, *see* 7A *id.* at 18, but Rule 23(b)(3)—the Federal Rule under which class certification for mass torts is generally sought, *see* 7B *id.* § 1783—is a direct descendent of the spurious class action.

105 *American Pipe*, 414 U.S. at 550-51 (quoting FED. R. CIV. P. 23(b)(3)).

106 Chardon v. Fumero Soto, 462 U.S. 650, 661 (1983).

> the class who would have been parties had the suit been permitted to continue as a class action.[107]

The reference to the underlying substantive right at issue—the federal antitrust laws—came only *after*[108] the Court announced its conclusion.[109] In five paragraphs, the Court analyzed whether the tolling doctrine it had just established violated the restriction in the Rules Enabling Act against the adoption of Rules that "abridge, enlarge or modify" any substantive right,[110] thereby seemingly underscoring that the doctrine it was announcing was a Rule (and not a rule). The Clayton Act contains not only a statutory limitations period, but also a congressionally enacted tolling provision (operating when government litigation is initiated).[111] American Pipe therefore argued that the congressional limitations and tolling provisions "make[ ] the 'substantive' statute immune from extension by 'procedural' rules."[112]

The Supreme Court held otherwise; it explained 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."[113] The Court recited precedent outside of the class action context that supported judicial power to create a tolling rule.[114] Also, in a footnote, the Court mentioned the Clayton Act's "scant legislative history" that touched on the subject.[115] It therefore concluded 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."[116]

Given *American Pipe*'s extended discussion of Rule 23, and its only cribbed focus on the underlying substantive right, Justice Rehnquist's view that *American Pipe* had announced "a [F]ederal [R]ule of tolling applicable

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107 *American Pipe*, 414 U.S. at 554 (emphasis added) (footnote omitted).

108 *See id.* at 556-59.

109 *See supra* text accompanying note 107.

110 *See American Pipe*, 414 U.S. at 556 n.26; 28 U.S.C. § 2072(b) (1994).

111 *See* 15 U.S.C. §§ 15b, 16(b) (1994).

112 *American Pipe*, 414 U.S. at 556. The district court essentially accepted this view. After discussing the Enabling Act's second sentence, the congressional tolling period, and the *Erie* doctrine, Judge Pence wrote:

> This court can but conclude that within the statutorily created antitrust universe § 5(b) cannot be re-tolled by any Rule to permit relation back of their several causes of action by intervenors attempting to intervene in either class or non-class actions filed for violation of the antitrust laws, after the tolling period of § 5(b) has ended.

Utah v. American Pipe & Constr. Co., 50 F.R.D. 99, 107-08 (C.D. Cal. 1970), *aff'd in part, rev'd in part*, 473 F.2d 580 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974).

113 *American Pipe*, 414 U.S. at 557-58 (footnote omitted).

114 *See id.* at 558-59. The decisions upon which the Court relied all involved causes of action created by Congress. *See* Burnett v. New York Cent. R.R., 380 U.S. 424 (1965) (Federal Employers' Liability Act ("FELA")); Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231 (1959) (FELA); Holmberg v. Armbrecht, 327 U.S. 392 (1946) (Federal Farm Loan Act); Herb v. Pitcairn, 325 U.S. 77 (1945) (FELA).

115 *American Pipe*, 414 U.S. at 558 n.29.

116 *Id.* at 559.

to class actions brought under Federal Rule of Civil Procedure 23"[117] is at least understandable. So, too, Dean Carrington's observation that *American Pipe* used "*Rule 23* to toll the [Clayton Act's limitations period] during the pendency of the class suit"[118] and that *Chardon* "reaffirmed the implication of *American Pipe* that limitations law that is integral to the concept of the class action could be derived *from that source* [i.e. Rule 23]."[119] Dean Carrington concluded that "[b]oth decisions were correct accommodations of federal civil procedure to the vagaries of limitations law, and of controlling limitations law to the needs of a federal procedure that is faithful to the expectations of the reform movement that created it."[120]

But even assuming Rule 23 explicitly embraced the tolling provision announced in *American Pipe*, it would not be valid under the Enabling Act—at least not as applied to state law claims. This caveat, while textually superfluous (on its face the Enabling Act's proscription against abridging, enlarging, or modifying substantive rights applies irrespective of the *source* of those rights),[121] highlights the difference between a Federal Rule and a federal rule.

It cannot be seriously doubted that there is federal judicial power to interpret and enforce *federal* substantive rights like those conferred by the federal antitrust laws. *Erie* may have declared that "[t]here is no federal general common law,"[122] but there is, to use Judge Friendly's apt phrase, "specialized federal common law:"[123] "federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum, and therefore is predictable and useful as its predecessor, more general in subject matter but limited to the federal courts, was not."[124] In short, *American Pipe* could be read simply to be specialized federal common law: a judicial gloss effectuating class actions *enforcing the antitrust laws*. In that sense, the antitrust laws, not Rule 23, gave birth to the doc-

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117 Chardon v. Fumero Soto, 462 U.S. 650, 663-64 (Rehnquist, J., dissenting).

118 Carrington, *supra* note 10, at 318 (emphasis added).

119 *Id.* (emphasis added).

120 *Id.* at 319.

121 Professor Burbank argues that the Enabling Act's prescription against affecting substantive rights *does* "constrain[ ] the Supreme Court when it makes law for federal question cases." Burbank, *supra* note 7, at 704; *see also* Ely, *supra* note 7, at 721 n.153 (stating that "[t]he Enabling Act is applicable even in nondiversity cases") & 737 n.226 (noting same); *cf.* Henderson v. United States, 116 S. Ct. 1638 (1996) (holding that Rule 4 displaces a service rule under the suit in Admiralty Act). Indeed, *American Pipe*'s reference to the Enabling Act is at least tacit recognition that the Act applies to federal claims. *See* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 556-59 (1974).

122 Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

123 Henry J. Friendly, *In Praise of* Erie — *and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964); *see* Milwaukee v. Illinois, 451 U.S. 304, 334 (1981) (Blackmun, J., dissenting); Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1026 (1967); Henry P. Monaghan, *The Supreme Court, 1974 Term - Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3, 10-17 (1975); *Time Bars*, *supra* note 8, at 1011 n.1.

124 Friendly, *supra* note 123, at 405 (referring to the "predecessor" rule to *Erie* of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)); *see* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 6-7 (1985); *see also* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 885-90 (1986) (arguing that federal judicial power to create federal common law is the rule, not the exception).

trine.[125] In contrast, federal judicial freedom to displace state law on state law claims is much more limited after *Erie*.[126] Furthermore, the Rules Enabling Act seems to render invalid any Federal Rule that has the effect of significantly altering state law that is applicable by its own force in federal court.[127]

As an explicit ground for invalidating a Federal Rule, the Rules Enabling Act's "second sentence"[128] has not seen much duty. Although the second sentence prohibits any Rule from abridging, enlarging or modifying "any substantive right,"[129] the Supreme Court has never found a Rule to violate that prohibition.[130] Several cases, however, came close to the line, each involving a Federal Rule that arguably conflicted with state limitations law applicable to a state law claim.[131]

In this regard, Rule 3 has been an active battlefield. It provides that "[a] civil action is commenced by filing a complaint with the court."[132] The question that, until recently, has vexed the courts is whether the commencement of an action under Rule 3 tolled a statute of limitations. In *Bomar v. Keyes*,[133] a federal civil rights action, Learned Hand held that it did,[134] even though New York's rule required personal service of the pleading.[135] Two

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125 To complete the picture, the extension of *American Pipe* to Title VII class actions in *Crown, Cook & Seal* and to § 1983 class actions in *Chardon* would, again, be a function of the underlying federal substantive law. Under this view, class action tolling should not even apply to all class actions based on federal rights, but only those where the adoption of a tolling rule would be "consonant with the legislative scheme." *American Pipe*, 414 U.S. at 557-58. *But see* Pavlak v. Church, 681 F.2d 617, 619 (9th Cir. 1982) ("Although *American Pipe* concerned a cause of action under the federal antitrust laws, this was in our view an accidental feature of the case."), *vacated*, 463 U.S. 1201 (1983).

126 *See infra* part II.B.

127 *See* 28 U.S.C. § 2072(b) (1994) ("Such rules shall not abridge, enlarge or modify any substantive right.").

128 Ely, *supra* note 7, at 718-19. It is now the first sentence of 28 U.S.C. § 2072(b).

129 28 U.S.C. § 2072(b).

130 *See* Carrington, *supra* note 10, at 286 ("[T]he Supreme Court has not applied this second sentence to affect the outcome of a single case in the fifty years of its operative history . . . .") (footnote omitted); *infra* text accompanying notes 172-177. *But cf.* Marshall v. Mulrenin, 508 F.2d 39, 44-45 (1st Cir. 1974) (holding that Rule 15(c) had to give way to state law).

131 *See* Carrington, *supra* note 10, at 288 (arguing that state statutes of limitations have been "the most noisome challenge to a substance-procedure distinction"); Alfred Hill, *The* Erie *Doctrine and the Constitution*, 53 Nw. U. L. REV. 427, 432 (1958) ("The problem of conflict with state statutes of limitations has been particularly productive of confusion."); Kane, *supra* note 10, at 674 (discussing the "particularly difficult area of the applicability of those Federal Rules that interact with state statutes of limitations").

132 FED. R. CIV. P. 3.

133 162 F.2d 136 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947). The *Bomar* panel also included Judge Clark, the first Reporter for the Supreme Court's Civil Rules Advisory Committee. *See* Carrington, *supra* note 10, at 314. Judge Clark intended Rule 3 to "have a tolling effect on limitations." *Id.* (citing Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1087-88, 1159 n.620 (1982)). Judge Clark also was not a fan of *Erie*. *See* Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 270-71 (1946).

134 *See Bomar*, 162 F.2d at 140-41.

135 *See id.* at 140. New York law now permits certain actions to be commenced, for statute of limitation purposes, by filing the summons and complaint with the clerk of the court. *See* N.Y. CIV. PRAC. L. & R. § 203(c) (McKinney 1992).

years later, in *Ragan v. Merchants Transfer & Warehouse Co.*,[136] the Supreme Court took the opposite path, holding that a Kansas rule materially identical to the New York rule displaced by Rule 3 in *Bomar* would have to be followed. Writing for a near unanimous Court,[137] Justice Douglas explained:

> we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. It accrues and comes to an end when local law so declares. Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co. v. Tompkins* is transgressed.[138]

The Court made no effort to analyze the Enabling Act (it was never mentioned); *Bomar* was distinguished as "a suit to enforce rights under a federal statute."[139]

The Court's apparent acceptance of a schizophrenic Rule 3—having one meaning for federal claims and one for state claims—was a sufficient diagnosis for almost three decades. Then, in *Walker v. Armco Steel Corp.*,[140] the Court granted a request for a second opinion. The intervening years had seen considerable judicial development of the *Erie* doctrine[141] (although little attention was paid to the Enabling Act)[142] and a wealth of academic commentary.[143] Despite the Court's uncritical citation to *Ragan* fifteen years ear-

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136 337 U.S. 530 (1949).

137 In a single substantive opinion, Justice Rutledge dissented in *Ragan*, *id.* at 534, Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949), and Cohen v. Beneficial Loan Corp., 337 U.S. 541, 557 (1949), all of which were decided on the same day. *See Ragan*, 337 U.S. at 557-58.

138 *Id.* at 533 (citations omitted).

139 *Id.*

140 446 U.S. 740 (1980).

141 *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404-07 (1967) (holding that the Federal Arbitration Act displaces state rules that allocate functions between courts and arbitrators in diversity cases involving interstate commerce or admiralty); Hanna v. Plumer, 380 U.S. 460 (1965) (holding that Rule 4(d)(1) governs service of process in diversity cases); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958) (displacing a state rule vesting judges with authority to determine an affirmative defense in favor of a federal policy favoring jury determinations of such issues); Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1956) (holding that the Federal Arbitration Act does not displace state arbitration law for a wholly interstate contract).

142 As Professor Ely lamented, although the Enabling Act contains express limitations on judicial rulemaking, "[y]ou would never know it from the case law." Ely, *supra* note 7, at 719. *See* Burbank, *supra* note 7, at 699 ("Since the Supreme Court's 1941 decision in *Sibbach v. Wilson & Co.*, [312 U.S. 1 (1941),] neither courts nor commentators have evinced much interest in reconsidering the restrictions imposed on Federal Rules by the Rules Enabling Act.") (footnote omitted).

143 *See, e.g.*, Chayes, *supra* note 28; Clark, *supra* note 133; Ely, *supra* note 7; Ely, *supra* note 28; Friendly, *supra* note 123; Hill, *supra* note 131; Hill, *supra* note 123; Mishkin, *supra* note 28; Redish, *supra* note 2; Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977); Westen, *supra* note 2; Westen & Lehman, *supra* note 1; *see also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Herbert Wechsler, *The Political Safeguards of Fed-*

lier in *Hanna v. Plumer*,[144] respected commentators[145] and courts[146] assumed that the rejuvenated outcome-determinative test produced by *Hanna*,[147] coupled with Justice Harlan's concurrence stating that *Ragan* "was wrong,"[148] cured Rule 3 of its psychiatric problems. Professor Ely argued otherwise,[149] and in *Walker* the Court explicitly accepted his view.[150]

Writing for a unanimous Court, Justice Marshall observed that *Walker* was "indistinguishable from *Ragan*."[151] Following *Ragan*'s lead, *Walker* held that "in diversity actions Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations."[152] Rule 3 did not (nor did any other Federal Rule) "govern[ ] the manner in which an action was commenced in federal court for purposes of tolling the state statute of limitations."[153] Therefore, the state tolling rule "controlled because it was an integral part of the state statute of limitations, and under *York* that statute of limitations [i]s part of the state-law cause of action."[154] This construction once again avoided any need to test the validity of a Federal Rule.[155] "Instead, the policies behind *Erie* and *Ragan* control[led] the issue,"[156] calling for application of state tolling law:

> There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely be-

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eralism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954). Further, Professors Hart and Wechsler's classic *The Federal Courts and the Federal System* (1st ed. 1953) was issued, as was the second edition two decades later in 1973, a volume so important some believe it has a "romantic" following—surely unique for a casebook. Weinberg, *supra* note 14, at 818. Indeed, the 1988 issuance of a third edition was itself occasion for extended and thoughtful academic analysis. *See* Akhil R. Amar, Book Review, *Law Story*, 102 HARV. L. REV. 688 (1989).

144 380 U.S. 460, 462 n.1, 469 n.10, 470 n.12 (1965).

145 *See* P. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 749 (2d ed. 1973); Chayes, *supra* note 28, at 748-50; Ely, *supra* note 7, at 730 n.198; Hart, *supra* note 143, at 511 n.72; *see also* J. Bruce Boisture, Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the* Erie *Doctrine*, 85 YALE L.J. 678, 698 n.94 (1976).

146 *See, e.g.*, Ingram v. Kumar, 585 F.2d 566, 568 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979); Walko Corp. v. Burger Chef Sys., Inc., 554 F.2d 1165, 1167-70 (D.C. Cir. 1977); Smith v. Peters, 482 F.2d 799, 802 (6th Cir. 1973), *cert. denied*, 415 U.S. 989 (1974); Sylvestri v. Warner & Swasey Co., 398 F.2d 598, 605-06 (2d Cir. 1968); *see also* Mark N. Parry, Recent Development, *Commencement Rules and Tolling Statutes of Limitations in Federal Court:* Walker v. Armco Steel Corp., 66 CORNELL L. REV. 842 (1981).

147 *See* Ely, *supra* note 7, at 717; *see also* Redish & Phillips, *supra* note 143, at 373.

148 *Hanna*, 380 U.S. at 477 (Harlan, J., concurring).

149 *See* Ely, *supra* note 7, at 729-32; Ely, *supra* note 28, at 756-59; *see also* Hill, *supra* note 131, at 455 (describing *Ragan* and Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956), as representing "a generally salutary development").

150 The Court not only adopted Professor Ely's defense of *Ragan*, but also cited his article in both text and footnote. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 751 & n.12 (1980).

151 *Id.* at 748.

152 *Id.* at 751 (footnote omitted).

153 *Id.* at 746.

154 *Id.* (referring to Guaranty Trust Co. v. York, 326 U.S. 99 (1945)).

155 *See id.* at 752 n.14.

156 *Id.* at 752.

> cause of the fortuity that there is diversity of citizenship between the litigants. The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it.[157]

If all *Walker* did was reaffirm *Ragan* by holding that the plain meaning of the dozen words comprising Rule 3 just did not speak to tolling limitations periods, it might not have caused a fuss. But *Walker* once again distinguished *Bomar*, and explicitly warned that it was *not* addressing "the role of Rule 3 as a tolling provision for a statute of limitations, whether set by federal law or borrowed from state law, *if the cause of action is based on federal law*."[158] And seven years later in *West v. Conrail*,[159] the Court held that "when the underlying cause of action is based on federal law and the absence of an express federal statute of limitations makes it necessary to borrow a limitations period from another statute, the action is not barred if it has been 'commenced' in compliance with Rule 3 within the borrowed period."[160]

Commentators rightly assailed the Court's seemingly irreconcilable view that Rule 3 means one thing for state law claims and something else entirely for federal claims.[161] It is almost remarkable in our age for any legal rule to have a plain meaning, but to have *two* dramatically different plain meanings is surely something special.[162] This dichotomy has been explained in somewhat paternalistic terms: in order to avoid interpreting Rule 3 in a manner that would have led to its invalidation under the Enabling Act, the Court effected a compromise—Rule 3 uniformly served that purpose for federal claims, but uniformly did not for state law claims.[163]

The Court's Rule 3 jurisprudence may be Solomonic or may have destroyed the uniformity the Rules were hoped to provide. That is beside the point here. That drawing distinctions between state and federal claims even in this procedural area *was necessary*—and the Court obviously thought it was, twice—is determinative for our purposes. Under *Walker* and *West*, and under *Ragan* and *Bomar*, the Court seems to be saying that a Federal Rule purporting to alter a state statute of limitations applicable to a state law claim

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157 *Id.* at 753.

158 *Id.* at 751 n.11 (emphasis added).

159 481 U.S. 35 (1987).

160 *Id.* at 39.

161 Professor Burbank has been especially vocal. *See* Burbank, *supra* note 10, at 1022-23; Burbank, *supra* note 7, at 698-707.

162 Highly critical of the Court's Rule 3 approach, *see supra* note 161, Professor Burbank argues that, under it, Rule 3 may have "*three* plain meanings." Burbank, *supra* note 7, at 706.

163 *See, e.g.*, Burbank, *supra* note 7; Burbank, *supra* note 133, at 1032 (noting that *Ragan* is one of "a line of cases" in which the "Court interpreted a number of Rules not to cover the matters in question because of its conviction that those matters were required by *Erie* and its progeny to be governed by state law") (footnote omitted); Friendly, *supra* note 123, at 402-03; Hart, *supra* note 143, at 511 n.72 (recognizing the interpretation but arguing that it was unnecessary because *Ragan* would not "survive a full and candid examination"). For its part, the Court insists that it is not narrowly construing the Rules in order to save them. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.9 (1980). Nevertheless, it recently admitted that "courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies." Gasperini v. Center for Humanities, Inc., 64 U.S.L.W. 4607, 4610 n.7 (U.S. June 24, 1996). As the prime example of this "sensitivity," the Court cited *Walker*. *Id.*

in this manner *would* be invalid. As Professor Burbank explains in his comprehensive study of the Enabling Act, one would draw the same conclusion from an examination of the Enabling Act's history:

> [T]he pre-1934 history [of the Enabling Act] suggests, at the least, a prohibition against Federal Rules that have an effect on rights recognized by the substantive law that is predictable and identifiable. No matter what policies animate it, a tolling rule is of that sort, because the choice of the event that will toll the statute necessarily defines or limits the subsistence of a claim under the substantive law.[164]

Whatever the process that led it there, the Court's consistent view, even in *Hanna*, has been that "state statutes of limitations are to be followed."[165] Thus, Professor Ely argues that:

> statutes of limitation are passed not simply for the substantive purpose of relieving people's minds after the passage of the designated period, but also for procedural purposes, to keep down the size of the docket and to ensure that cases will not be tried on evidence so stale as to cast doubt on its trustworthiness. They are therefore procedural, which means, first, that Congress could constitutionally enact a statute prescribing a limitation period for diversity cases, and second, that a Federal Rule prescribing such a limitation would satisfy the Enabling Act's first sentence. *It should not get by the second sentence, however, for the substantive rights established by state statutes of limitations would be abridged by applying such a Federal Rule.*[166]

If a Federal Rule that displaced a state service provision is invalid, a tolling Rule like *American Pipe* surely must be. Tolling the statute upon commencement does not add much to the number of sleepless nights the defendant must endure: under Rule 4(m), the time between commencement and service must not be more than 120 days.[167] By contrast, the pendency of certification often takes longer, sometimes years, Rule 23(e)(1) notwithstanding.[168] Further, beyond the added length of the limitations period is the potential magnitude of the exposure: the filing of an individual action merely

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164 Burbank, *supra* note 133, at 1160 (footnote omitted).

165 Ely, *supra* note 7, at 716 n.126 (citing Hanna v. Plumer, 380 U.S. 460, 469 (1965)). Indeed, in *Gasperini*, the Court explicitly reaffirmed what was at *Ragan*'s core—that "the *Erie* principle precludes a federal court from giving a state-created claim 'longer life . . . than [the claim] would have had in the state court.' " 64 U.S.L.W. at 4611 (quoting Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533-34 (1949)).

166 Ely, *supra* note 7, at 726-27 (emphasis added) (footnotes omitted). Relying on the legislative history of the Enabling Act, Professor Burbank comes to the same conclusion: "If instead the Court [in *West*] had turned to the Enabling Act's legislative history, it is most unlikely that Rule 3 would have been sustained as a supplemental provision for statutes of limitations, federal or state." Burbank, *supra* note 7, at 702 (citing Burbank, *supra* note 133, at 1158-60).

167 *See* FED. R. CIV. P. 4(m) (former Rule 4(j)).

168 *See* Becker v. McMillin Constr. Co., 277 Cal. Rptr. 491, 492-93 (Cal. Ct. App. 1991) (over 29 months); Levi v. University of Hawaii, 679 P.2d 129, 130-31 (Haw. 1984) (over 66 months); Waltrip v. Sidwell Corp., 678 P.2d 128, 130-31 (Kan. 1984) (32 months); Bonhiver v. Graff, 248 N.W.2d 291, 296, 299 (Minn. 1976) (34 months). *See also* Evan A. Davis & Mitchell

deprives the defendant of repose from the named plaintiff's claims, but a Rule creating class action tolling eliminates that repose from *every* potential claimant. To the defendant, the difference is not a detail, but a whammy.

The notion that any Rule that is "arguably procedural"[169] must be valid is therefore not the reality. This should please Justice Harlan and Professor Ely, the former because he feared *Hanna* had unwisely embraced such a test,[170] and the latter because he argued that it had not.[171] In fact, the Court has been careful to limit the reach of Rules where they otherwise might encroach upon state limitations periods.[172] One example is *Schiavone v. Fortune*.[173] Prior to its 1991 amendment, Rule 15(c) permitted amendments to relate back against newly named defendants only when the defendants received notice "within the period provided by law for commencing the action against" them.[174] In *Schiavone*, the Court narrowly read this language to refer only to the applicable limitations period, *not* to "the time period that might be allowed for service of process under Rule 4([m])."[175] As Professor Kane observed, this construction "avoids any suggestion that the Federal Rule impermissibly enlarges the limitations period."[176] Lower courts have engaged in similar construction efforts with other Rules.[177] Thus, although a class action tolling Rule would be "arguably procedural," it still would be invalid because, in the absence of a similar state rule, it would supplant a state provision that "embodies a substantive policy:"[178] "the feeling of release, the assurance that the possibility of ordeal has passed, that a state seeks to create by enacting a statute of limitations."[179]

A. Lowenthal, *Class Actions*, *in* 5 SECURITIES LAW TECHNIQUES § 92.03[1] (Matthew Bender 1995); 7B WRIGHT ET AL., *supra* note 13, § 1785.

169 Hanna v. Plumer, 380 U.S. 460, 476 (1965) (Harlan, J., concurring). *But see* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) (explaining the test for validity of a Federal Rule as whether it "really regulates procedure").

170 *See Hanna*, 380 U.S. at 475-76 (Harlan, J., concurring).

171 *See* Ely, *supra* note 7, at 718-38.

172 The Court did so in *Hanna* by refusing to overrule *Ragan*. *See supra* text accompanying notes 144-150.

173 447 U.S. 21 (1986), *superseded by* FED. R. CIV. P. 15(c)(3).

174 *Id.* at 24 n.5 (setting forth the text of Rule 15(c) in 1986). *Schiavone* was superseded in 1991. *See* FED. R. CIV. P. 15(c) advisory committee's note. Rule 15(c) now requires that newly named defendants receive notice of a timely filed action "within the period provided by rule 4(m) for service of summons and complaint." FED. R. CIV. P. 15(c)(3). Rule 4(m) replaced Rule 4(j). In the light of *Walker* and *Ragan*, Rule 15(c)(3) should not apply to state law claims where state law requires personal service of process to toll the limitations period.

175 Kane, *supra* note 10, at 685.

176 *Id.*

177 *See* Morse v. Elmira Country Club, 752 F.2d 35, 42 (2d Cir. 1984) (limiting Rule 4(m) (then Rule 4(j)) to controlling the method of service, not tolling of limitations periods); Poulos v. Wilson, 116 F.R.D. 326, 330-31 (D. Vt. 1987) (applying a state law requiring service in 30 days rather than Rule 4(j)). *West v. Conrail* "implicitly confirmed the correctness" of *Morse* and *Poulos*, observing that "in diversity suits 'state law not only provides the appropriate period of limitations but also determines whether service must be effected within that period.'" Kane, *supra* note 10, at 684 (quoting West v. Conrail, 481 U.S. 35, 39 n.4 (1987)). *But see* Burbank, *supra* note 7, at 699-700 (arguing that federal courts have not shown much interest in enforcing the restrictions or the rules imposed by the Enabling Act).

178 Ely, *supra* note 7, at 722.

179 *Id.* at 726. To that end, a Federal Rule that only tolled federal claims also might be

B. American Pipe *as a "federal rule"*

Because the text of Rule 23 does not purport to reach, let alone compel, tolling limitation periods, it may have been unfair to consider *American Pipe* as having announced a Federal Rule. Although the doctrine clearly relates to, and is supported by, the Rule 23 class action device, it is perhaps better thought of as a rule of federal common law. By insisting that *American Pipe* had not announced a uniform tolling doctrine in *all* federal court class actions, the *Chardon* majority certainly seemed to embrace this view. Indeed, it pointedly observed that in *American Pipe* "[n]o question of state law was presented."[180]

Although considering *American Pipe* to be a federal rule has more textual charm, it does not do much for its validity—at least not where state law claims are at issue. That there is federal judicial power to announce a toll (however defined) whenever a class action seeking to vindicate *federal* rights has been filed seems clear.[181] Indeed, the Court has created tolling rules for federal claims repeatedly.[182] In *Burnett v. New York Central Railroad Co.*,[183] for example, it announced a rule for FELA cases, holding that the timely filing of an action in state court dismissed for improper venue tolls the limitations period applicable to the same claim later asserted in federal court.[184] The pertinent question, though, is whether there is judicial power to announce such a rule for *all* federal court class actions—even where, as in mass torts, state law claims are at issue.

To the extent the rule we posit purports to apply to state law claims, we leave the Enabling Act and must apply *Erie* and the Rules of Decision Act. Before doing so, consider the Enabling Act once more: if a Rule providing for class action tolling would be invalid, can it possibly be that the same doctrine expressed as a rule—which therefore has not even run the gauntlet sur-

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invalid. *See* Burbank, *supra* note 133, at 1161 ("Reading a tolling function into Rule 3 violates the [Rules Enabling] Act, interpreted in the light of the pre-1934 history, no matter what the basis of federal jurisdiction or what the source of the rule of decision.") (footnote omitted). The test would come if Congress (or, indeed, the Court) were to determine that there should be no such toll due to the nature of the federal substantive right at issue. Assuming that circumstance, a Federal Rule that nonetheless purported to toll the limitations period would appear to be invalid.

180 Chardon v. Fumero Soto, 462 U.S. 650, 661 (1983). There is some reason, though, not to take this statement too far. The *Chardon* majority did appear to think that *American Pipe* had announced a policy applicable to all class actions involving federal claims, but merely rejected the notion that the toll would always be measured by suspending the time bar during the class certification process. *See id.* ("*American Pipe* simply asserts a federal interest in assuring the efficiency and economy of the class-action procedure.").

181 *See infra* text accompanying notes 213-239.

182 *See, e.g.*, Holmberg v. Armbrecht, 327 U.S. 392 (1946) (extending *Bailey* to a federal action lacking a statutory limitations period); Barney v. Oelrichs, 138 U.S. 529, 536 (1891) (applying to a federal claim a state law that tolls the statute while the defendant is absent from the state); Bailey v. Glover, 88 U.S. (21 Wall.) 342, 349-50 (1874) (holding that fraudulent concealment tolls a federal statute of limitations); *supra* note 114; *see also* Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83, 85 (2d Cir.) (applying *Bailey* to antitrust actions), *cert. denied*, 368 U.S. 821 (1961).

183 380 U.S. 424 (1965).

184 *See id.* at 426.

rounding the enactment of Federal Rules[185]—might still be valid? This seems unlikely. *Hanna* made at least "one significant statement about the Enabling Act—that it should be read to protect the prerogatives of state law against incursions by a Federal Rule with somewhat less vigor than that with which the Rules of Decision Act protects them in the absence of such a Rule."[186] Under this view, if a Rule requiring state limitations to be tolled upon the filing of a federal class action is invalid, then a rule having the same effect *a fortiori* must also be invalid. Of course, this reads into the Enabling Act the notion that *all* procedural rules must be developed and tested as if they were Rules. Perhaps that is too much.[187]

In the absence of a Federal Rule, a doctrine announced by the federal judiciary that tolls state limitation periods on state law claims has no ready home. While the competence of federal courts to create federal common law has, of late, been a magnet for academic comment,[188] there seems to be little doubt that, for *state law claims*, the Rules of Decision Act and *Erie* pose limitations.[189] Although there may not be unanimity on what those limits are,[190] the rule we are contemplating—*American Pipe* applied to displace state law on state law claims—would seem to fall distinctly outside of everyone's vision of what federal courts can do.

Certainly the Court seems to think so. It has uniformly construed Federal Rules narrowly in order to avoid the displacement of state limitations law.[191] Both in *Ragan* and then in *Walker* the Court directed that state commencement rules governed whether an action on a state law claim was timely. Although both opinions concluded that Rule 3 did not serve this function—and neither opinion adverted to any other Federal Rule on the subject—both opinions addressed the substantive nature of statutes of limitation, and how integrally related service rules are to limitations policies.[192] In a sense, this is

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185 This involves "being drafted by an Advisory Committee, approved by the Judicial Conference, approved by the Supreme Court, and not vetoed by Congress . . . ." Westen & Lehman, *supra* note 1, at 364.

186 Ely, *supra* note 7, at 720 (referring to Hanna v. Plumer, 380 U.S. 460, 471 (1965)); *see id.* at 716 n.126, 720-22; *see also* Westen & Lehman, *supra* note 1, 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.") (footnote omitted).

187 Indeed, the Rules themselves permit the adoption of "local" procedural rules. *See* FED. R. CIV. P. 83.

188 *See, e.g.*, *infra* note 232.

189 *See infra* text accompanying notes 191-239; *see also* Gasperini v. Center for Humanities, Inc., 64 U.S.L.W. 4607, 4611 (U.S. June 24, 1996) (citing with approval Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949), and Guaranty Trust Co. v. York, 326 U.S. 99 (1945), and holding that "*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court").

190 *See infra* note 232.

191 *See supra* text accompanying notes 128-179.

192 In *Ragan*, Justice Douglas explained that, "[s]ince [the] cause of action is created by local law, the measure of it is to be found *only* in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court." *Ragan*, 337 U.S. at 533 (emphasis added) (citations omitted). Similarly, Justice Marshall explained in *Walker* that a state tolling statute "is a statement of a substantive decision by that state that actual service on,

baffling: if there was no Federal Rule on point, what was left to apply other than state law? If the answer is a federal rule having the same content as what Mr. Ragan and Mr. Walker argued Rule 3 to have, then *Ragan* and *Walker* surely prohibit an *American Pipe* rule from displacing state law.

This certainly is the result when there is no Rule in sight. In *Guaranty Trust Co. v. York*,[193] the Court addressed whether a federal court, exercising its equity powers, was bound to follow state limitations law on a state law claim, or instead could invoke the venerable doctrine of laches. Writing for the Court, Justice Frankfurter thought it plain that "a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally."[194] Under the outcome-determination test announced in *York*,[195] state law prevailed.

The issue seems so well settled that *York* is the only time the Supreme Court has had to determine whether a state or federal limitations period governs a *state* law claim being heard in federal court. The Court has, however, often addressed the same question in the context of *federal* causes of action where Congress has not enacted a limitations period. That jurisprudence, and it is considerable, reinforces *York*'s conclusion.

The Court's first brush with selecting a limitations period for a federal right came in *McCluny v. Silliman*.[196] There, a purchaser sued a federal land office registrar more than six years after the registrar refused to enter a tendered land purchase application[197] in violation of federal law.[198] The circuit court applied the forum's six-year limitations period for actions on the case, and barred the action.[199] Plaintiff appealed, arguing that a state law limitations period could not operate to bar a right created by Congress.[200] Looking for guidance from the Rules of Decision Act, the Court disappointed Mr. McCluny and held that the Act required that "the acts of limitations of the several states, where no special provision has been made by congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the state courts."[201]

The conclusion that the Rules of Decision Act compelled application of state limitation law to a federal cause of action was far from obvious. The Act "was intended to insure that federal courts would administer state law in diversity jurisdiction cases 'to secure to a non-citizen the application of the same law which a State Court would give to its own citizens, and to see that

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and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations." Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980).

193 326 U.S. 99 (1945).

194 *Id.* at 110.

195 *See supra* text accompanying notes 153-154 and *infra* text accompanying note 227.

196 28 U.S. (3 Pet.) 270 (1830).

197 *See id.* at 275-76; *Time Bars*, *supra* note 8, at 1025 n.74.

198 *See Time Bars*, *supra* note 8, at 1025 n.75 (discussing the Act of May 18, 1796, ch. 29, § 58, 1 Stat. 486).

199 *See McCluny*, 28 U.S. (3 Pet.) at 276.

200 McCluny argued that "no statute of limitations of the state . . . is pleadable . . . in the circuit court of the United States . . . where the plaintiff's rights accrued to him under a law of congress." *Id.*

201 *Id.* at 277.

within a State there should be no discrimination against non-citizens in the application of justice.' "[202] Congress's focus, therefore, was to "ensure the equal treatment of *state*-created rights in the federal and state courts."[203] Nevertheless, as the nineteenth century was about to expire, the Court reaffirmed the view of the Rules of Decision Act it announced in *McCluny*.

In *Campbell v. Haverhill*,[204] assignees of a patent brought an infringement action in federal court. The trial court applied a state limitations period, and barred the action.[205] The Supreme Court affirmed, once again holding that the Rules of Decision Act required federal courts to apply state limitations law to a federal right.[206] *Campbell* did acknowledge, albeit "hesitantly," that the congressional directive to apply state limitations law to federal rights would yield if the state limitations period "unduly burdened or discriminated against a federal right."[207] But that dictum did not alter the result—application of state limitations law—even though the federal right at issue was within the exclusive jurisdiction of federal courts.[208]

The twentieth century gave birth to a decidedly different view of the Rules of Decision Act's role in federal questions.[209] But pausing for a moment, how does the view of the Act as expressed in *McCluny* and *Campbell* affect an *American Pipe* rule? It seems obvious that, if the Act compels application of state law to *federal* rights—thereby precluding development of a federal rule[210] even where there is exclusive federal jurisdiction—it *must* mean that state limitations law is the rule of decision in federal court for *state* rights where state law applies of its own force. Under *McCluny* and *Campbell*, Congress's failure to enact a limitations period meant that the "laws of the several states . . . shall be regarded as rules of decision."[211] Congressional "failure" to enact the right of action itself (i.e., when the source of the right is

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202 *Time Bars*, *supra* note 8, at 1026 n.79 (quoting Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 83 (1923)).

203 *Id.* (emphasis added).

204 155 U.S. 610 (1895).

205 *See id.* at 611.

206 *See id.* at 614. *McCluny* and *Campbell* were not alone. Prior to *Erie*, the Court repeatedly held that the Rules of Decision Act required federal courts to apply state time bars to federal rights that lacked statutory time periods. *See* O'Sullivan v. Felix, 233 U.S. 318, 322 (1914) (Civil Rights Act); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 397 (1906) (antitrust); McClaine v. Rankin, 197 U.S. 154, 158 (1905) (National Bank Act); Brady v. Daly, 175 U.S. 148, 158 (1899) (copyright).

207 *Time Bars*, *supra* note 8, at 1032. The *Campbell* court explained:

> In such case it might be plausibly argued that it could never have been intended by Congress that [the Act] should apply to statutes passed in manifest hostility to Federal rights or jurisdiction, but only to such as were uniform in their operation upon state and Federal rights and upon state and Federal courts.

155 U.S. at 615.

208 *See* U.S. CONST. art. I, § 8; Act of Feb. 15, 1819, ch. 19, 3 Stat. 481 (codified as amended at 28 U.S.C. § 1338 (1994)) (actions in equity); Act of Apr. 10, 1790, ch. 7, 1 Stat. 109 (actions at law); *see also Time Bars*, *supra* note 8, at 1031 & n.92.

209 *See infra* text accompanying notes 213-239.

210 At least since 1842, federal courts did not question their competence to develop federal common law rules. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842).

211 28 U.S.C. § 1652 (1994). In this regard, the Rules of Decision Act remains unchanged from its original enactment in 1789. *See* Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 92. In view of

state law) is an even stronger directive to apply state law. As Justice Frankfurter put it in *York*:

> Prior to [*Erie*], it was not necessary, as we have indicated, to make the critical analysis required by the doctrine of that case of the nature of jurisdiction of the federal courts in diversity cases. But even before [*Erie*], federal courts relied on statutes of limitations of the States in which they sat. In suits at law State limitation statutes were held to be "rules of decision" within § 34 of the Judiciary Act of 1789 and as such applied in "trials at common law."[212]

Erie ushered in a new vision of the Rules of Decision Act. It rejected *Swift*'s notion that state decisional law was not a "rule of decision,"[213] but also had a profound effect on the Act's role when federal rights were at issue.[214] *McCluny* and *Campbell* were rejected; rather, where federal claims were at issue, Congress *had* "otherwise require[d] or provide[d]."[215] For these claims, federal courts were free to make (or, perhaps it is better to say, charged with responsibility to develop) specialized federal common law to fill the interstices in congressional legislation.

One year after *Erie*, Justice Frankfurter explained the proper role of the Rules of Decision Act in the development of federal rights. In *Board of County Commissioners v. United States*,[216] the government brought suit against a county for wrongfully collecting taxes from an Indian tribe, in violation of an 1861 treaty. While the county admitted liability, it agreed only to refund the principal, arguing that state law prohibiting the recovery of interest on taxes wrongfully collected applied.[217] Rejecting the *McCluny* and *Campbell* notion that the Rules of Decision Act compelled application of state law, Justice Frankfurter explained that because the "starting point for relief" is a treaty that is silent on the subject at issue, Congress has:

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the enactment of the Federal Rules of Civil Procedure, the Act now applies to "civil actions" as opposed to "trials at common law." *See* 28 U.S.C. § 1652 historical revision notes (1994).

212 Guaranty Trust Co. v. York, 326 U.S. 99, 110-11 (1945). *McCluny* was the first in a series of cases that Justice Frankfurter cited in support of this proposition. *See id.*

213 Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938), *overruling* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). The Court explained:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no general federal common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Id.

214 Otherwise, *Erie*'s holding that state decisional rules were "laws," coupled with the *McCluny* view that the Rules of Decision Act compels application of state law to gaps in federal rights, would significantly denude federal courts of competence to develop even specialized federal common law. *See Time Bars*, *supra* note 8, at 1030 n.91.

215 28 U.S.C. § 1652 (1994).

216 308 U.S. 343 (1939).

217 *See id.* at 349.

> left such remedial details to judicial implications. Since the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of [the state].[218]

Though able to fashion their own rules in such circumstances, the federal courts could discharge that responsibility by selecting sensible state law:

> Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated; but in defining the extent of that right its relation to the operation of state laws is relevant. . . .
>
> . . . .
>
> Having left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature, Congress has left us free to take into account appropriate considerations of "public convenience." Nothing seems to us more appropriate than due regard for local institutions and local interests.[219]

Emphasizing that the decision to select state law "was a judicial choice,"[220] the Court explained:

> 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. In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in their relation with the states or their political subdivisions.[221]

Federal courts were therefore able to fashion remedial details in congressional rights of action unshackled from the notion begun in *McCluny* that they were directed to apply state law. Instead, they were free to look to the general corpus of law, state and federal, existing and contemplated, and fashion a rule that best effectuated congressional intent. Since *Board of County Commissioners*, the Court has accepted this construct of the Rules of Decision Act as its guiding principle whenever the gap in federal law was a limitations period.[222]

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218 *Id.* at 349-50 (citing Erie R.R. v. Tompkins, 304 U.S. 64 (1938)).

219 *Id.* at 350-51 (citations omitted).

220 *Time Bars*, *supra* note 8, at 1039.

221 *Board of County Commissioners*, 308 U.S. at 351-52 (citations omitted).

222 *See infra* text accompanying notes 223-232. Recently, on different occasions, two Justices have questioned this doctrine. In DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983), Justice Stevens argued in dissent that federal courts had borrowed state limitation periods "not because . . . it was a sensible form of 'interstitial law making,' but rather because they were directed to do so by the Congress [in the Rules of Decision Act]." *Id.* at 172-73 (Stevens, J., dissenting). In support, he relied on *Campbell*. *Id.* at 173 n.1. Within three years, however, Justice Stevens seemed to rethink this view, joining with the majority in Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 146-47 (1987) (accepting the test set out in *DelCostello* as correct). *See also* North Star Steel Co. v. Thomas, 115 S. Ct. 1927 (1995) (Stevens,

Holmberg v. Armbrecht,[223] issued one year after *York*[224] and also written by Justice Frankfurter, begins this long line of authority. There the Court had to determine the appropriate time within which to bring a suit in equity under the Federal Farm Loan Act.[225] The Circuit Court, applying *York*, held the action barred by a state statute of limitations.[226] Using language directly applicable to our question—the validity of an *American Pipe* rule for state law claims—Justice Frankfurter characterized *York* as holding that state limitations periods are, for state law claims, "a significant part of the legal rules which determine the outcome of a litigation."[227] "But in the *York* case," Justice Frankfurter emphasized, "we pointed out with almost wearisome reiteration, in reaching this result, that we were there concerned solely with State-created rights."[228] In *Holmberg*, however, the Court was confronted with an equitable right created "by Congress."[229] There, courts may, but need not, apply state law to fill federal interstices.[230] And in *Holmberg*, the Court

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J., joining majority). *But see* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 367 n.2 (1991) (Stevens, J., dissenting).

With the decision in *Agency Holding*, Justice Scalia took up the cudgels of this position. There, in his dissent, Justice Scalia argued that *McCluny* and *Campbell* had correctly interpreted the Rules of Decision Act and that the Act compelled federal courts to apply state limitations law to federal claims lacking statutory periods except where "rebutted by affirmative congressional action" or where state statutes "discriminate against federal claims or provide too short a limitations period to permit vindication of the federal right." *Agency Holding*, 483 U.S. at 163 (Scalia, J., dissenting); *see also id.* at 161-63.

Other than *McCluny* and *Campbell* themselves, Justice Scalia found support for his position in Justice Stevens's dissent in *DelCostello* and in articles by Professor Hill and Judge Friendly. *See id.* at 164 n.2. He did not mention *Board of County Commissioners*, and neither Professor Hill nor Judge Friendly should have been happy with Justice Scalia's use of their articles. Justice Scalia suggested that both authors thought that application of the Rules of Decision Act is *not* limited to "diversity cases," and that the Act has operational effect where federal rights are at issue. *See id.* But a review of the articles demonstrates they embrace the former; not the latter. Both acknowledge that the Rules of Decision Act applies outside of diversity jurisdiction because federal courts, exercising federal question and supplemental jurisdiction, *have competence to determine state law claims*. The "correct view," Judge Friendly explains, is "that '[t]he *Erie* doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law.' " Friendly, *supra* note 123, at 408 n.122 (quoting Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 541 n.1 (2d Cir. 1956)); *see* Alfred Hill, *The* Erie *Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1033 (1953) ("The fact that a suit arises under a law of the United States does not mean that all the issues for decision are federal issues.") (footnote omitted).

Indeed, if Justice Scalia were right, his decision for the Court in *Boyle v. United Technologies Corp.* would have been quite a bit more complicated. *See* 487 U.S. 500, 504 (1988) (stating that state law is displaced in areas of federal control, "where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law' "); *see also supra* note 214. In any event, it may be that the continuum linking Justice Scalia's and Justice Frankfurter's interpretations of the Rules of Decision Act may be shorter than it seems. *See* Note, *Rules of Decision in Nondiversity Suits*, 69 YALE L.J. 1428, 1449 (1960).

223 327 U.S. 392 (1946).

224 Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

225 *See Holmberg*, 327 U.S. at 393.

226 *See* Holmberg v. Armbrecht, 150 F.2d 829 (2d Cir. 1945), *rev'd*, 327 U.S. 392 (1946).

227 *Holmberg*, 327 U.S. at 394.

228 *Id.*

229 *Id.*

230 The court explained:

ruled that the equitable doctrines of laches and fraudulent concealment, as opposed to a state statute of limitations, were the appropriate rules of decision.[231]

Thus, unlike for state-law claims, federal courts are free to select, or displace, state law limitation periods when filling gaps in federal law.[232] Significantly, though, with rare (and only very recent) exceptions,[233] the unwavering

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> If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive. The rub comes when Congress is silent. Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation.

Id. at 395 (citations omitted).

231 *See id.* at 396-98.

232 Certainly that is what the opinions in the limitations area teach. *See supra* text accompanying notes 222-230. Commentators who write on the entire plane of federal common law have found different answers. Professor Redish argues that the Rules of Decision Act compels application of state law to fill federal gaps. Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 803 (1989) (stating that an Act is an "unbending prohibition of direct substitutive lawmaking by the federal judiciary"). A second view permits judicial lawmaking where Congress has specifically authorized it. *See* Field, *supra* note 124, at 928 ("[T]he primary limit on power to make federal common law is that there must be a source of authority for any given federal common law rule."); Friendly, *supra* note 123, at 405-22. Professor Merrill argues that federal common law can be made whenever Congress so directs, and whenever the court "finds that the adoption of state law as the rule of decision would unduly frustrate or undermine a federal policy as to which there *is* a specific intention on the part of the enacting body." Merrill, *supra* note 124, at 36.

Professor Weinberg sees an even greater role for federal common law. Rejecting the view "that there is a need for some sort of authorization before federal common law can be fashioned," she argues that, "given the fundamentals of empowerment, what justifies an exercise of federal lawmaking power is the existence of a legitimate national governmental interest." Weinberg, *supra* note 14, at 813 (footnotes omitted).

This certainly simplifies *greatly* the views of these scholars. For our purposes, though, it is enough to demonstrate that none—not even Professor Weinberg, whose view of the proper rule of federal common law is most expansive—would sanction *American Pipe*'s displacement of state limitation periods on state law claims being heard in federal court. *See* Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860, 864-65 (1989) (embracing Professor Ely's view of the "*Erie* doctrine" as a "conflict between federal procedure and state substance likely to arise in a typical diversity case, a case otherwise obviously governed by state law. Professor Ely's subject was *Hanna*, *Ragan*, and *York*. It was not *Clearfield Trust*, *Sabbatino*, or *Borak*") (footnotes omitted); *see also* Westen & Lehman, *supra* note 1, at 373-74 (stating that federal courts may not adopt federal common law of procedure if the "character or result" of the litigation would "materially . . . differ because the suit ha[d] been brought in federal court").

233 The Court has applied analogous federal, rather than state, limitation periods four times. *See* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 355 (1991) (holding that a uniform federal period for a cause of action is implied under § 10(b) of the Securities Exchange Act of 1934); Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 149 (1987) (same for RICO); DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 155 (1983) (same for federal claims of an employer's breach of a collective bargaining agreement and a union's breach of duty of fair representation); McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) (same for a federal unseaworthiness action); *see also* Occidental Life

policy has been to choose *state* law.[234] In doing so, the Court has invariably applied state tolling rules along with the borrowed limitations periods themselves. As one commentator recently put it, "when borrowing a state's statute of limitations, federal courts should also borrow the state's law regarding the 'overtones and details' of the limitation period."[235] *Johnson v. Railway Express Agency, Inc.*[236] exemplifies this rule which is, at most, only one degree of separation removed from *Ragan* and *Walker*:

> In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.[237]

Certain principles, like tolling, are "inseparable from the limitation period."[238] Therefore, when courts borrow state limitations periods to apply to

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Ins. Co. v. EEOC, 432 U.S. 355, 367-71 (1977) (refusing to impose upon the EEOC an analogous state time period for Title VII action).

234 Just this past term, the Court observed:

> Since 1830, "state statutes have repeatedly supplied the periods of limitations for federal causes of action" when the federal legislation made no provision, and in seeking the right state rule to apply, courts look to the state statute " 'most closely analogous' " to the federal act in need. Because this penchant to borrow from analogous state law is not only "long standing," but "settled," "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [our] precedents . . . and that it expect[s] its enactment[s] to be interpreted in conformity with them."
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> There is, of course, a secondary lender, for we have recognized "a closely circumscribed . . . [and] narrow exception to the general rule," based on the common sense that Congress would not wish courts to apply a limitations period that would only stymie the policies underlying the federal cause of action.

North Star Steel Co. v. Thomas, 115 S. Ct. 1927, 1930-31 (1995) (citations omitted); *see also* Reed v. United Transp. Union, 488 U.S. 319, 323-25 (1989) (applying a state limitation period to a claim under § 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959); Wilson v. Garcia, 471 U.S. 261, 266-68 (1985) (applying a state limitation period to a federal § 1983 action); Burnett v. Grattan, 468 U.S. 42, 47-48 (1984) (applying a state limitation law to a federal civil rights action); Runyon v. McCrary, 427 U.S. 160, 180-82 (1976) (same); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 704 (1966) (applying a state limitation period to a claim under § 301 of the Labor Management Relations Act of 1947).

For a general discussion on how federal courts select state limitation periods for federal claims, see Donna A. Boswell, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action*, 136 U. PA. L. REV. 1447 (1988); Ellen E. Kaulbach, *A Functional Approach to Borrowing Limitations Periods for Federal Statutes*, 77 CAL. L. REV. 133 (1989); *Time Bars*, *supra* note 8; Note, *Federal Statutes Without Limitations Provisions*, 53 COLUM. L. REV. 68 (1953) [hereinafter Columbia Note]; Note, *Limitation Borrowing in Federal Courts*, 77 MICH. L. REV. 1127 (1979) [hereinafter Michigan Note].

235 Jim Greiner, Note, *Federal Common Law and Gaps in Federal Statutes: The Case of ERISA Plan Limitation Periods for Section 502(a)(1)(B) Actions*, 93 MICH. L. REV. 382, 387 (1994) (quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 464 (1975)).

236 421 U.S. 454 (1975).

237 *Id.* at 464.

238 Greiner, *supra* note 235, at 392. The author argues:

> Tolling, application, and revival, like the limitation period itself, all depend on a state's balancing of the social values of repose and accuracy inherent in speedy

federal causes of action, they must also borrow these related principles.[239]

This excursion into the role of the Rules of Decision Act has taken us away from whether a federal court can create a federal tolling rule affecting state law claims. But it is quite instructive on the answer to that question. If, even in areas of *choice*, federal courts unwaveringly apply state tolling rules to borrowed limitations periods, the existence of an *obligation* to do so when the state periods apply of their own force is compelling. Otherwise, the fortuity of diversity of citizenship would enable parties to alter, radically,[240] the limitations periods applicable to state law claims. When a plaintiff of citizenship diverse to the defendant cannot be found, the otherwise applicable state limitations period would govern. Nonetheless, if one can be found (and since mass torts often affect many people across state lines, a search for a suitable plaintiff is often not fruitless), the state's law will be displaced by a federal tolling rule. This divergent outcome, turning solely on the availability of federal diversity jurisdiction, is intolerable under our federalism: "The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it."[241] As

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> trials against preservation of the plaintiff's right to recover. *A state legislature considering how long to allow a plaintiff to sue in a certain cause of action might change the length of the contemplated period in response to the applicable principles of tolling, application, and revival.*

Id. (emphasis added). Indeed, in choosing to apply state tolling law, *Johnson* characterized *American Pipe* as unhelpful because the limitation period in *American Pipe* was "derived directly from [a] federal statute[ ] rather than by reference to state law." *Johnson*, 421 U.S. at 466.

239 *See* Board of Regents v. Tomanio, 446 U.S. 478, 483-86 (1980); Retail Clerks Union Local 648 v. Hub Pharmacy, Inc., 707 F.2d 1030, 1033 (9th Cir. 1983) ("When federal courts borrow a state statute of limitations, they also apply the state's tolling law if it is not inconsistent with federal law."); Columbia Note, *supra* note 234, at 72 ("[T]olling provisions . . . have been uniformly derived from state law."); Greiner, Note, *supra* note 235, at 392; *see also* Chardon v. Fumero Soto, 462 U.S. 650, 656-57 (1983).

240 *See supra* note 168.

241 Walker v. Armco Steel Corp., 446 U.S. 740, 753 (1980); *see* Sun Oil Co. v. Wortman, 486 U.S. 717, 726-28 (1988) (holding that state statutes of limitation are substantive for *Erie* purposes but not for Full Faith and Credit purposes); *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 210, 213 (2d Cir. 1987) ("The limitation periods of *American Pipe* and *Crown, Cork & Seal* were derived from federal statutes. Here, we are dealing with Hawaii's limitation statutes. Because none of them provides for tolling in a situation such as exists here, it is doubtful that either *American Pipe* or *Crown, Cork & Seal* can be treated as applicable precedent."), *cert. denied*, 484 U.S. 1004 (1988); Columbia Note, *supra* note 234, at 74 ("Where the basis of a federal court's jurisdiction is diversity of citizenship, it has long been held that the Rules of Decision Act requires that the period of limitation *and other problems arising under a state limitations statute* be resolved in accordance with state law.") (emphasis added) (footnotes omitted).

A contrary result was reached in Atkins v. Schmutz Mfg. Co., 435 F.2d 527 (4th Cir. 1970), *cert. denied*, 402 U.S. 932 (1971), where the Fourth Circuit created a federal tolling rule that operated to extend the limitations period on a state law claim. There were compelling reasons for doing so. Mr. Atkins was injured in Virginia by a machine manufactured by a Kentucky company. Virginia afforded two years within which to bring suits on such claims, but Schmutz Manufacturing was not amenable to process there. Atkins brought suit in Kentucky and assumed that Kentucky would borrow Virginia's two-year period. He did not file his action until after Kentucky's own one-year period had expired, and just two days prior to the expiration of Virginia's two-year period. After he did so, Kentucky changed its borrowing rule, precluding application of the Virginia two-year period, and resulting in the dismissal of Atkins's claims as untimely. In the meantime, Virginia enacted a long-arm statute, enabling Atkins to sue Schmutz

the Court recently put it, "the *Erie* principle precludes a federal court from giving a state-created claim 'longer life . . . than [the claim] would have had in the state court.' "[242]

Indeed, extending *American Pipe* to state law claims must be invalid, for doing so would wreak havoc on state law and state courts. Federal common law is binding upon the states by the force of the Supremacy Clause:[243] "state

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Manufacturing in Virginia. Atkins did so, but by then even the Virginia two-year statute had expired. The Fourth Circuit saved Atkins by holding that the Virginia statute had been tolled during the pendency of Atkins's Kentucky proceeding. *See Atkins*, 435 F.2d at 528-29, 538.

The majority relied upon a federal tolling doctrine—of their own creation—to achieve this result. *See id.* at 533-38. In their concurrence, two judges thought that Virginia law "provide[d] the result," and therefore thought it "unwise to impugn the vitality and scope" of *York*, as they believed the majority had done. *Id.* at 539 (Winter, J., concurring). One commentator extolled *Atkins* as liberating the federal courts from *Erie*'s limitations by permitting them "to emphasize the federal interest in having federal courts administer the greatest possible justice." Note, *The Tolling of State Statutes of Limitations in Federal Courts*, 71 COLUM. L. REV. 865, 881 (1971). "Consequently," this commentator argues, "it seems appropriate for a federal court to determine, in those diversity cases in which a choice-of-law issue arises, whether the state in which it sits is interested and, if the state is not, to choose what the court's independent consideration indicates to be the 'best' rule." *Id.* There was no reference to *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), but there might as well have been.

Another commentator has exposed *Atkins*'s error. *See* Note, *State Statutes of Limitations in Federal Courts: By Whom is the Statute Tolled?*, 1971 DUKE L.J. 785. First, creating a federal rule was unnecessary in light of Virginia law, as the concurring judges argued. *See id.* at 795. Second, the creation of a federal rule to overlay state law on a state claim violated *Erie*, as developed in *York* and *Hanna*. *See id.* at 790-92. Third, it undermined the integrity of the federal transfer provisions by opening an avenue of abuse. *See id.* at 797-98. Fourth, it created disunity among the circuits, unless each circuit (or the Supreme Court) adopted the *Atkins* rule. *See id.* at 802-03. Finally, it encouraged the vice *Erie* sought to stamp out: forum shopping. *See id.* at 798. *Atkins* grounded its new rule, based upon a desire to create unity in the federal system, on the transfer of venue provisions in the Judicial Code. *See Atkins*, 435 F.2d at 533-34. It was able to do so only because Atkins had first filed suit in a Kentucky *federal* district court. *Id.* at 528. What if he had instead begun the journey in a Kentucky state court? Indeed, what if he began his Virginia litigation in *state* court? With everything else being the same, either of these choices (arguably the first, and, at least in the view of the *Atkins* majority, certainly the second) would have required a wholly different result. Under *Erie*, and certainly under *Walker*, that is impermissible:

> There is simply no reason why, in the absence of a controlling [F]ederal [R]ule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants.

Walker, 446 U.S. at 753; *see also* Ely, *supra* note 7, at 717 n.130; Redish & Phillips, *supra* note 143, at 378-80. In any event, if citations are any measure of an opinion's vitality, *Atkins* was stillborn: for more than two and a half decades, no federal court has relied upon it to displace state tolling law on a state law claim.

242 Gasperini v. Center for Humanities, Inc., 64 U.S.L.W. 4607, 4611 (U.S. June 24, 1996) (alteration in original) (quoting Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533-34 (1949)).

243 *See* U.S. CONST. art. VI, cl. 2.; Field, *supra* note 124, at 890 n.30 (stating that "federal common law applies in state as well as federal court"); *id.* at 897 ("Although at one point there was some doubt, it is now established that a federal common law rule, once made, has precisely the same force and effect as any other federal rule. It is binding on state court judges through the supremacy clause.") (footnote omitted); Friendly, *supra* note 123, at 405 (stating that federal common law "is truly uniform because, under the supremacy clause, it is binding in every fo-

law is pre-empted and replaced."[244] Thus, the filing of a class action in federal court means that all absent class members "should be treated [in state court] as though they had been named plaintiffs during the pendency of the class action."[245] Consider the consequences of this *American Pipe* effect. Assume a widely-used drug is recalled because of an association with illness. A class action is promptly filed (along with thousands of individual suits). The class is not certified. Two years and a day later, plaintiff realizes that—prior to the recall—he had been taking the drug and that health problems from which he had been suffering were caused by it. Plaintiff files suit and argues that the applicable two-year limitations period has not run because, under the state "discovery rule," his claim did not accrue until he discovered the injury and its cause.[246]

One might think that the timeliness question will turn on why plaintiff did not discover his claim sooner. How is it that he did not realize he was taking the drug until years later? Was he aware of the recall? When did he first experience the illness he now attributes to the drug? Did he go to doctors? If so, what did they say was the cause of his problem?

But *American Pipe* makes these questions, and their answers, irrelevant. Assuming that, despite reasonable efforts, plaintiff was *in fact* unable to discover his claim earlier, he is still too late. Because a class action had been filed years earlier (even though plaintiff had no knowledge of it)[247], *in law* plaintiff not only *had* discovered his claim, but had actually brought suit (along with all other class members) when the class action was filed. Under *American Pipe*, the timeliness question thus turns on the time between the denial of certification and the initiation of suit: once class certification was denied, plaintiff had to file suit within the period provided by the "state savings statute applicable to a party whose action has been dismissed for reasons unrelated to the merits."[248]

Given the publicity that usually surrounds the product recalls that lead to mass tort litigations, the result may not be too unexpected—how could

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rum"); Merrill, *supra* note 124, at 6; Monaghan, *supra* note 123, at 10-11; Weinberg, *supra* note 14, at 816; Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1512 (1969).

244 Boyle v. United Technologies Corp., 487 U.S. 500, 504 (1988); *see* Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 67 (1966).

245 Chardon v. Fumero Soto, 462 U.S. 650, 659 (1983).

246 Under the typical discovery rule, a cause of action accrues, thus starting the limitations clock to run, "when the litigant first knows or with due diligence should know facts that will form the basis for an action." 2 C.W. CORMAN, LIMITATION OF ACTIONS § 11.1.1, at 134 (1991) (footnote omitted). It applies, in varying forms, to a variety of causes of action where there is some latency between the injury and the event giving rise to the breach of duty. These include malpractice litigation, progressive latent occupational diseases, and products liability litigation. 2 *id.* §§ 11.1.2.1-.1.2.3. The Supreme Court adopted a discovery rule for suits under the Federal Tort Claims Act in *United States v. Kubrick*, 444 U.S. 111 (1979). Although the discovery rule has largely been of judicial creation—anchored in defining when a cause of action "accrues"—it has also been enacted by state legislatures. *See* 2 CORMAN, *supra*, § 11.1. Congress has also enacted a discovery rule for actions to quiet title. *See* 28 U.S.C. § 2409a(g) (1994).

247 *American Pipe* applies to all members of the class, even those "who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed)." American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 551 (1974); *see supra* note 49.

248 *Chardon*, 462 U.S. at 661.

one really be unaware of the underlying facts long enough for *American Pipe* to alter the outcome that would obtain without class action tolling? But even if the result is not dramatically different, should *American Pipe*, or state law limitation policies, be the governing standard? Can it really be consistent with our federalism—and *Erie* "implicates, indeed perhaps it is, the very essence of our federalism"[249]—that state rules providing that personal injury claims accrue when the plaintiff "discovers" them can all be rendered close to functionally irrelevant the moment someone, somewhere files a federal class action? The answer must be no.[250]

Properly understood, when applied to state law claims *American Pipe* is neither a valid Federal Rule nor a valid federal rule. Federal courts should not rely upon it to toll state statutes of limitations applicable to state law claims. More importantly, state courts should recognize that whether the filing of a class action, in a state or federal court, should toll a state limitations period is exclusively a matter of state law. As one Texas court recently put it:

> We do not agree that *American Pipe* operates to toll our state statute of limitations. That case involved an interpretation of Rule 23 of the Federal Rules of Civil Procedure and concerned the question of whether a federal statute of limitations was tolled for the purpose of filing a federal claim. Under the doctrine of the hoary case of *Erie Railroad Co. v. Tompkins* and its progeny, where a claim is derived from state law, as is appellant's suit, state law governs the tolling of the statute of limitations.[251]

Freed of *American Pipe*'s pull, state courts should apply whatever rule best serves state policies. So understood, there is no place for tolling limitations periods in mass tort class actions.

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249 Ely, *supra* note 7, at 695 (footnote omitted).

250 One countervailing argument might be that there is a federal interest in promoting the use of federal class actions, and that obtaining the full benefit of that policy necessitates its application where federal and state law claims are at issue. But to be a sufficient basis for displacing state law, local tolling rules most pose a "significant threat" to that federal priority, Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966), and not result in the " 'inequitable administration' of the law" in violation of the "twin aims" of *Erie*. Walker v. Armco Steel Corp., 446 U.S. 740, 753 (1980) (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965)); *see also* Stewart Organization Inc. v. Ricoh Corp., 487 U.S. 22, 27 n.6 (1988); *cf.* Burlington N. R.R. v. Woods, 480 U.S. 1, 5 (1987) ("Rules which incidentally affect litigants' substantive rights do not violate [the Enabling Act] if reasonably necessary to maintain the integrity of [the Federal Rules]."); Ely, *supra* note 7, at 714. After nearly two centuries of applying state limitations laws, including their "overtones and details," Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 464 (1975), it is exceedingly hard even to contemplate state tolling law as a threat to any federal interest. Moreover, as recently as *Walker*, 446 U.S. at 750-51, the Court held that displacing state tolling law *would* violate the policies inspired by *Erie*. *See also* Hill, *supra* note 131, at 428-29 (describing "categories of . . . outcome-determinative law" as including "[s]tate law which, though usually classified as 'procedural' in the conflict of laws, operates as a bar to a claimed right, such as a statute of limitations or a statute of frauds") (footnotes omitted).

251 Bell v. Showa Denko K.K., 899 S.W.2d 749, 757 (Tex. Ct. App. 1995) (citations omitted). *Compare* Kennedy v. Showa Denko K.K., No. CV 94-312M, slip op. at 12-13 (D.N.M. July 26, 1995) (rejecting the *Bell* court's rationale) *with* Barela v. Showa Denko, K.K., No. CV 93-1469, 1995 WL 316544, at *2 n.4, *4 (D.N.M. Feb. 28, 1996) (rejecting *Kennedy* and embracing the *Bell* court's rationale).

III. The Folly of Class Action Tolling for Mass Torts

Whether a statutorily fixed time period should be subject to adjustment by the occurrence of an event is, typically, a legislative judgment, as is fixing the time period itself.[252] To be sure, courts have developed tolling doctrines like fraudulent concealment[253] and fraudulent inducement to forbear from suit.[254] These are the exceptions.[255] In the absence of a statutory basis for adjusting the time bar, courts generally apply the unvarnished limitations period. It is perhaps telling that no legislature has chosen to enact a statute tolling limitations periods during the pendency of class actions.[256]

There is a serious question whether state courts should even consider announcing a common law rule tolling limitation periods during the pendency of class actions. Apart from the federalism concerns that are threatened when federal courts purport to alter state substantive law,[257] a potentially greater separation of powers concern is threatened when courts arrogate legislative powers to themselves.[258] But, quite clearly, this concern

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252 As Judge Friendly has written, the "selection of a period of years [is] not . . . the kind of thing judges do." Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961); *see* Field, *supra* note 124, at 960-61; Columbia Note, *supra* note 234, at 75 ("A limitation period is an arbitrary measure traditionally and justifiably left to legislative determination . . . ."); Michigan Note, *supra* note 234, at 1131 ("The creation of a fixed-period limitation on actions, necessarily an arbitrary task, is properly characterized as legislative action.").

253 *See supra* note 24.

254 *See* 2 CORMAN, *supra* note 246, § 9.13.

255 2 *id.* § 8.1 ("Certain requirements must be established to persuade a court to apply its equitable powers to preclude the opposing party from effectively using the statute of limitations defense.").

256 *But see* PA. R. CIV. P. 1701 explanatory note; Miller v. Federal Kemper Ins. Co., 508 A.2d 1222, 1227 (Pa. Super. Ct. 1986).

257 While commentators argue that *Erie* was also about separation of powers, *see* Redish, *supra* note 232, at 803; *cf.* Burbank, *supra* note 133 (focusing more specifically on the Enabling Act), it surely has a great deal to do with federalism. *See* Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) (*Erie* is "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems.").

258 Because the fixing of a time period is quite arbitrary, *see supra* note 252, it is more dependent on the fact-finding machinery available to legislators. Moreover, policy decisions of this sort seem best made when an entire array of problems can be considered (e.g., what is the appropriate time bar for contract actions) rather than when focusing on the exigencies of a single dispute before a court. *See, e.g.*, Field, *supra* note 124, at 931-34; Martha A. Field, *The Legitimacy of Federal Common Law*, 12 PACE L. REV. 303, 321 (1992) ("Courts are less suited than Congress to find facts, to deal with certain areas in a systematic fashion, and to decide questions of policy."). Compare this with the criticism of Professor Monaghan's "constitutional common law," Monaghan, *supra* note 123, at 3, by Professors Thomas S. Schrock and Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1149-53 (1978) (discussing the "Court-Congress conflict" precipitated by judicial subconstitutional activity).

Also, legislators are more directly accountable to the electorate than judges. This remains the case even when, as in some states, judges are elected: judicial terms are generally longer than legislators, and, where lower court judges are elected, those judges often answer to judges sitting on higher courts who are not elected. *See, e.g.*, CALIF. CONST. art. 5, § 3 (Supreme Court members elected to twelve-year terms); *id.* art. 4, § 2(a) (state assemblymen elected to two-year terms; state senators elected to four-year terms); ILL. CONST. art. 6, §§ 10, 12(a) (judges elected to terms between four and ten years); *id.* art. 4, §§ 2(b), 4 (General Assembly members elected to two-year terms); MASS. CONST. pt. 2, ch. 2, § 1, art. IX (governor, with advice and consent of

did not stop the Supreme Court from doing so (even understanding *American Pipe* as a rule that only applies to federal claims),[259] nor the many state courts which have adopted *American Pipe* as state law.[260]

The state courts that have adopted class action tolling have done so largely because of *American Pipe*. Whether because of the aura of a U.S. Supreme Court opinion apparently on point,[261] or because the state class action rule is identical to the Federal Rule,[262] state courts have appeared to believe that they *should* adopt class action tolling, even though they are not obliged to do so.[263] The former is a sensible way to corroborate an independently made decision, upon an examination of the appropriateness of adopting such a rule under state law;[264] it should not, however, be the *sole basis* for adopting class action tolling. Moreover, the decision to create a class action tolling rule for antitrust claims may not justify doing so for other federal claims—let alone state claims that do not concern the sort of commercial

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council, appoints all judicial officers); *id.* pt. 2, ch. 3, art. I (judicial officers "hold their offices during good behavior"); N.Y. CONST. art. 6, § 2(a), (e) (governor, with advice and consent of state senate, appoints members of the Court of Appeals to fourteen-year terms); *id.* § 4(c) (governor appoints members of Appellate Division of Supreme Court to five-year terms); *id.* § 6(c) (members of Supreme Court chosen by electors for fourteen-year terms); *id.* art. 3, § 2 (state assemblymen and senators elected to two-year terms).

259 In *Agency Holding*, Justice Scalia's concurrence embraced the *McCluny/Campbell* view of the Rules of Decision Act because it was more "legitimate" than the approach begun in *Board of County Commissioners* and *Holmberg*. He based his dissent from the majority on this issue on the notion that, through the Act, Congress had directed application of state law rather than leaving the matter open for freeform judicial lawmaking. *See* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 157-65 (1987) (Scalia, J., concurring in judgment); *cf.* City of Milwaukee v. Illinois, 451 U.S. 304, 312-17 (1981) (holding that a federal common law claim for nuisance was not available under the comprehensive regulatory program established by the Water Pollution Control Act Amendments of 1972); Carlson v. Green, 446 U.S. 14, 34 (1980) (Rehnquist, J., dissenting) (arguing against the creation of a remedy for Eighth Amendment violations without congressional authority); Cannon v. University of Chicago, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting) (arguing against the implication of a private cause of action under Title IX of the Education Amendments of 1972).

260 *See infra* notes 261-262.

261 *See, e.g.*, First Baptist Church v. Citronelle-Mobile Gathering, Inc., 409 So. 2d 727, 729 (Ala. 1981) (fraud and breach of contract); Rosenthal v. Dean Witter Reynolds, Inc., 883 P.2d 522, 531-32 (Colo. Ct. App. 1994) (violation of Colorado securities laws), *aff'd in part, rev'd in part on other grounds*, 908 P.2d 1095 (1995); Campbell v. New Milford Bd. of Educ., 423 A.2d 900, 905 n.6 (Conn. Super. Ct. 1980) (school attendance policy); Pope v. Intermountain Gas Co., 646 P.2d 988, 1010 n.28 (Idaho 1982) (state antitrust laws); Steinberg v. Chicago Medical Sch., 371 N.E.2d 634, 645 (Ill. 1977) (admission standards to medical school); Lucas v. Pioneer, Inc., 256 N.W.2d 167, 180 (Iowa 1977) (tort action for defective seed corn); Warren Consol. Sch. v. W.R. Grace & Co., 518 N.W.2d 508, 511 (Mich. 1994) (property damage for removal of asbestos); Blakeney v. Kassel, 1991 Tenn. App. LEXIS 394, at *6 (Tenn. Ct. App. May 30, 1991) (fraudulent inducement to purchase coal contracts); American Tierra Corp. v. City of West Jordan, 840 P.2d 757, 762 (Utah 1992) (refund of municipal fee).

262 *See, e.g.*, *First Baptist Church*, 409 So. 2d at 729; Levi v. University of Hawaii, 679 P.2d 129, 132 (Haw. 1984) (retirement policy); Munsterman v. Illinois Agricultural Auditing Assoc., 435 N.E.2d 923, 925-26 (Ill. 1982) (auditor malpractice); *Lucas*, 256 N.W.2d at 172; Grant v. Austin Bridge Constr. Co., 725 S.W.2d 366, 370 (Tex. Ct. App. 1987) (property damage).

263 *See supra* part II.

264 *See, e.g.*, White v. Sims, 470 So. 2d 1191, 1192-93 (Ala. 1985) (valuation of land for ad valorem tax purposes); *First Baptist Church*, 409 So. 2d at 729; *American Tierra Corp.*, 840 P.2d at 761-62.

activity involved in *American Pipe*. Indeed, part of the genius of our federalism is the opportunity it presents for local experimentation.[265] Further, as explained below, the manner in which mass torts are litigated is so different from commercial cases that a different result is warranted. For mass torts, class action tolling produces few if any benefits, and those benefits come at great cost.

Nor is the similarity between state and federal class action rules justification for blindly adopting *American Pipe* as state law. Many states have adopted civil procedural rules identical to the Federal Rules[266] and, understandably, will look to federal experience when interpreting those rules.[267] But state class action rules are triggered only if the class action was filed *in state court*. Often, the class action was filed elsewhere, usually in a federal district court.[268] In that case, whether or not state law embraces a class action device like Rule 23 is irrelevant. Even if the *American Pipe* rationale is

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265 *See* Burnett v. Grattan, 468 U.S. 42, 53 (1984) ("[T]he length of a limitations period will be influenced by the legislature's determination of the importance of the underlying state claims, the need for repose for potential defendants, considerations of judicial or administrative economy, and the relationship to other state policy goals."); Hart, *supra* note 143, at 491-95 (discussing the structure of state government); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 266-67 (1992) (discussing the benefits of local common lawmaking); Note, *supra* note 243, at 1517-18.

If state courts simply adopt rules because their federal counterparts do, the development of the law would be impeded. *See* Chapman v. California, 386 U.S. 18, 48 (1967) (Harlan, J., dissenting) ("To impose uniform national requirements when alternatives are constitutionally permissible would destroy that opportunity for broad experimentation which is the genius of our federal system."); *cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . . ."). We also will have come half circle from the days of the much criticized Conformity Act of June 1, 1872, ch. 255, §§ 5, 6, 17 Stat. 196, 197 (replaced by the Federal Rules of Civil Procedure), by which federal courts were required to conform to the "practice, pleadings, and forms and modes of proceeding" of the states in actions at law. *Id.* § 5. *See* Burbank, *supra* note 133, at 1040-42.

266 To date, every state but Mississippi and Virginia has some procedural rule relating to class actions, *see* THOMAS A. DICKERSON, CLASS ACTIONS: THE LAW OF 50 STATES § 1.04[3] (1995), and most have enacted the equivalent of Federal Rule 23 "with some modification." *See id.* § 1.04[2][b].

267 *See* Ritchie v. Grand Canyon Scenic Rides, 799 P.2d 801, 803 (Ariz. 1990) (en banc) ("Insofar as it is relevant to this case, Rule 15(c) is identical to the federal rule. Whenever feasible our courts have looked to the origin and interpretation of federal counterparts for guidance in construing the Arizona rules."); Jolly v. Eli Lilly & Co., 751 P.2d 923, 933 (Cal. 1988); Grant v. Austin Bridge Constr. Co., 725 S.W.2d 366, 370 (Tex. Ct. App. 1987). *See generally* DICKERSON, *supra* note 266, § 1.04[3] ("Although federal interpretations of Federal Rule 23 have been the basic support for state court interpretations of each state's own class action rule, occasionally interpretations of Rule 23 are rejected.").

268 For example, several cases involve school districts that sought damages for the removal of asbestos from their facilities. In each, the plaintiffs argued that the pendency of a federal class action in Philadelphia operated to toll relevant state limitation periods. *See* May v. AC & S, Inc., 812 F. Supp. 934, 938-39 (E.D. Mo. 1993); Independent Sch. Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286, 289 (D. Minn. 1990); West Haven Sch. Dist. v. Owens-Corning Fiberglass Corp., 721 F. Supp. 1547, 1554-55 (D. Conn. 1988); Warren Consol. Sch. v. W.R. Grace & Co., 518 N.W.2d 508, 511 (Mich. Ct. App. 1994), *appeal denied*, 530 N.W.2d 750 (Mich. 1995); Beavercreek Local Sch. v. Basic, Inc., 595 N.E.2d 360, 373 (Ohio Ct. App. 1991); *see also* Kennedy v. Showa Denko K.K., No. CV 94-312M, slip op. at 8 (D.N.M. July 26, 1995) (relying on Maryland federal class action to toll New Mexico personal injury claim). *But see* Barela v.

found to be persuasive, its justification—that encouraging use of the state class action device improves judicial efficiency—works only when invoked to further a class action *filed within the same court system under the state procedural rule allowing use of the class action device.* In short, whether a federal class action filed in Maryland tolled the statute of limitations on a New Mexico claim now being pursued in a New Mexico state (or federal) court does not depend on whether or not New Mexico's class action rule is identical to Federal Rule 23. Rather, the issue is whether there is a gap in the limitations law applicable to the substantive right at issue and, if so, whether the policies *underlying that substantive right* would be furthered by creating such a toll. The policies animating the state class action rule would come into play only if there had been a prior New Mexico class action. Only then would the goal of litigative efficiency expressed in *American Pipe* (which, of course, involved a prior *federal* class action) have real relevance.[269]

As one court recently explained:

> The issue here is whether the New Mexico Supreme Court would toll the New Mexico statutory period during the pendency of a class action brought outside its judicial system—in another state or in the federal courts. In this instance, any interest by the New Mexico courts in furthering the economy and efficiency afforded by the New Mexico class action procedure is absent. This Court has been presented no reason to believe that New Mexico would or should toll the statutory period under these circumstances.[270]

Nevertheless, courts are often confronted with tolling questions. In considering whether adoption of a class action tolling rule furthers appropriate state interests, they should consider what the rule will achieve, and at what cost. For mass torts, the costs are far too high.

A. The Limited Benefits of Class Action Tolling

The principal benefit class action tolling is thought to afford is an institutional[271] one: reducing the need for individuals to file separate actions (or to intervene in the class action) caused by a fear that, otherwise, their claims will be time barred.[272] Whether the rule actually achieves this effect is hard to measure; the answer requires analysis of the number of protective filings that were *not* made. As the facts underlying *American Pipe* itself demonstrate, however, there is reason to question whether class action tolling actu-

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Showa Denko K.K., No. CV 93-1469, 1996 WL 316544, at *2 (D.N.M. Feb. 26, 1996) (rejecting *Kennedy*).

269 *See* Hosogai v. Kadota, 700 P.2d 1327, 1333 (Ariz. 1985) (describing *American Pipe* as applying "equitable tolling to successive identical actions arising within the same court system").

270 *Barela*, 1996 WL 316544, at *4 (citing Bell v. Showa Denko K.K., 899 S.W.2d 743, 757-58 (Tex. Ct. App. 1995)).

271 *See* First Baptist Church v. Citronelle-Mobile Gathering, Inc., 409 So. 2d 727, 729 (Ala. 1981); *Time Bars*, *supra* note 8, at 1016-17.

272 *See, e.g.*, American Tierra Corp. v. City of W. Jordan, 840 P.2d 757, 762 (Utah 1992) (adopting class action tolling "to avoid duplication of litigation, promote justice, do equity, and generally further the judicial efficiency and economy that class actions are designed to promote"); *First Baptist Church*, 409 So. 2d at 729-30.

ally burdens rather than benefits the judicial system because it enables otherwise time-barred suits to be filed.[273] And there is cause to believe that the "abuse" Justice Blackmun feared[274] is taking place. Indeed, a leading products liability treatise trumpets, as a major benefit from the filing of a class action, the tolling of limitations periods:

> In class action cases, the statute of limitations tolls upon the filing of the class complaint for the benefit of the class, even in cases in which class certification is ultimately denied. This factor provides a crucial advantage to plaintiffs, as it helps to preserve the rights of class members which would expire from lack of enforcement if not for the initiation of the class action.[275]

The message, at least to cynics, is that by filing a class action on behalf of the client you found today you may be able to represent the client you only find tomorrow.

Even if there were an empirically sound basis for concluding that class action tolling reduced the number of protective filings, how beneficial is that? If a litigant or her counsel sees an advantage to filing an individual suit (such as selecting the forum), one will be filed; class action tolling only *encourages* forbearance from "protective" litigation, it does not compel it. Further, mass tort personal injury plaintiffs frequently choose to press their causes of action individually, despite the filing of related class actions.[276] At that point, the plaintiff will either pursue the individual action vigorously or will not (and instead rely on the class action to develop the common issues). In the former, the defendant can either attempt a consolidation or coordination. If those options are not advantageous, it can actively litigate in the individual

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273 *See supra* note 54.

274 *See* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 561-62 (Blackmun, J., concurring).

275 2A LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 19.02[2][a][i] (1995) (footnotes omitted); *see also* 1 HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 5-02 (2d ed. 1985).

276 For example, in *In re* Northern Dist. of Calif. Dalkon Shield IUD Prods. Liab. Litig., which incorporated 3,258 individual actions, all but one plaintiffs' counsel opposed class certification. 693 F.2d 847, 849 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *see also In re* School Asbestos Litig., 789 F.2d 996, 1009 (3d Cir.) (stating that because of plaintiffs "strong emotional ties" to personal injury litigation, class actions may be inappropriate), *cert. denied*, 479 U.S. 852 (1986) *and cert. denied*, 479 U.S. 915 (1986); Yandle v. P.P.G. Indus., Inc., 65 F.R.D. 566, 569 (E.D. Tex. 1974) (discussing policy reasons for rejecting class actions in mass tort cases).

In fact, in the L-tryptophan litigation that eventually was consolidated for pretrial purposes by the Judicial Panel on Multidistrict Litigation in the United States District Court for the District of South Carolina, a consortium of counsel representing hundreds of plaintiffs nationwide opposed class certification, arguing that it was "unnecessary and unwanted." *See* Aff. of Paul D. Rheingold, Rapoport v. Showa Denko America, Inc., No. JH-90-518, slip op. at 2 (D. Md. Aug. 28, 1990) ("The associated group of plaintiffs' counsel representing tryptophan victims have voted, without dissent, to favor voluntary organization of these suits and to eschew a class action as adding an unnecessary layer of organization."). Plaintiffs' counsel confidently informed the Court that it was "virtually a blackletter law in this country . . . that for routine mass tort actions, class actions should not be used," *id.*, and that, given the opportunity, most plaintiffs would opt out of a certified class action. *Id.* slip op. at 9 ("If any opt-out type of class sought here is created, it is apparent that most of the cases will opt-out."). *See* Lowenthal & Erichson, *supra* note 9, at 1010 n.110.

action. Where the plaintiff wishes to litigate separately, therefore, class action tolling serves little purpose. Similarly, where the plaintiff is content just to file an action and await developments in the class action, the "cost" of that individual filing is minimal at best.

In our experience, the latter scenario is, in fact, the most common. Particularly in modern mass tort litigation, the advantages to class actions are muted because plaintiffs' lawyers are generally highly organized and, essentially, act as a nationwide law firm.[277] "[T]hey coordinate their efforts, establish[ ] a networked team of lawyers on the plaintiffs' side, with a committee or other vehicle to coordinate strategy and the exchange of information."[278] Thus, plaintiffs generally have no need, and therefore no interest, to pursue issues in individual litigations that are already being pursued in the class, or more likely, consolidated mass tort proceeding.[279]

Rather, the cost comes when the plaintiff does not wish to file an individual proceeding but fears a time bar will run if she does not. Even then she can always seek an agreement from the defendant to toll the limitations period pending the class certification decision. If the defendant will not agree, she can simply file suit and await developments in the class action. If, lacking good cause, the defendant insists upon the separate prosecution of the individual action, plaintiff can seek appropriate judicial relief.[280] Only in this latter scenario—when the defendant refuses to agree to toll and further insists upon active prosecution of the individual action—would class action tolling achieve any benefit. Whether that benefit is at all meaningful, however, depends upon whether that fact pattern recurs with frequency. Again, there is no empirical data; nonetheless, it would seem to take a particularly irrational defendant to insist upon the active prosecution of multiple proceedings against it without good cause for doing so.

Of course, the calculus is difficult when the class action is one that bars opt-outs, but the result is substantially the same. For "mandatory classes,"[281] individual proceedings can be stayed pending the class certification decision.[282] Accordingly, class action tolling serves an even smaller institutional

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277 *See* Lowenthal & Erichson, *supra* note 9, at 994-1008 (describing litigation control structures in modern mass tort litigation).

278 *Id.* at 991.

279 "Although a few mass tort litigations have been allowed to proceed as class actions, and the trend appears to favor increasing use of the device, courts overwhelmingly have rejected class certification of mass tort claims." *Id.* at 1010 (footnotes omitted). "The device most often and most successfully used to achieve formal aggregation of mass tort claims is multidistrict litigation . . . ." *Id.* at 1011 & n.114.

280 For a thorough discussion of cooperation and coordination among state and federal courts, *see* Schwarzer et al., *supra* note 9; *see also* AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994).

281 Rules 23(b)(1) and (2) permit the certification of classes when the rights at issue can be heard only in a single proceeding. Accordingly, there can be no opt-outs from a class certified under either of these Rules. *See* FED. R. CIV. P. 23(c)(3); 7B WRIGHT ET AL., *supra* note 13, § 1789, at 244-45, § 1775, at 491-92.

282 Because the premise of class suits under Rules 23(b)(1) or (2) is that the rights at issue can only be appropriately heard in a single proceeding, *see supra* note 281, the rules would be undermined if, despite certification of class actions under them, separate individual actions were allowed to proceed. *See In re* Joint E. & S. Dist. Asbestos Litig., 134 F.R.D. 32, 36 (E. &

purpose here, because even an irrational plaintiff, one who insists upon unnecessarily pursuing a separate proceeding, can be corralled.

Thus, although they are hard to measure, the benefits from class action tolling seem modest at best. Other existing mechanisms—private and public—can achieve virtually the same benefits, and in each the defendant receives actual notice of who the plaintiff is and the nature of his claim. These devices, accordingly, do not exact the sizeable cost to the judicial system and to defendants of opening the courthouse door to otherwise stale claims. Recall that, at least as defined by *American Pipe*, class action tolling benefits even those litigants who are entirely ignorant of the class action, and therefore have in no way refrained from bringing separate proceedings in reliance thereon.[283] But the costs of class action tolling go beyond simply conferring a windfall upon plaintiffs "who have slept on their rights."[284]

B. The Substantial Costs of Class Action Tolling

As the Supreme Court recognized in *American Pipe*, class action tolling counteracts the operation of statutes of limitations. In order to justify eroding the limitations defense, *American Pipe* embraced the idea that, in order for class action tolling to apply, the class action pleading must give the defendant notice sufficient to identify the evidence necessary to mount a defense.[285]

For mass tort personal injury cases, that notice must be sufficient to identify who the absent class members are. In such cases, each plaintiff's experience with the tort-causing agent, medical history, condition and prospects, and economic and personal profile are unique.[286] Although some issues—like whether the product causes injury—may be common to all members of the putative class, the crux of each plaintiff's claim is the individ-

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S.D.N.Y. 1990) (citations omitted) ("Conditional certification of a national mandatory class action pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure will supersede all litigation against [the defendant] pending in federal and state forums.").

283 *See supra* note 49.

284 American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 561 (1974) (Blackmun, J., concurring).

285 *See supra* text accompanying notes 55-62 & 71-73.

286 The Second Circuit explained:

> The relevant question, therefore, is not whether Agent Orange has the capacity to cause harm, the generic causation issue, but whether it *did* cause harm and to whom. That determination is highly individualistic, and depends upon the characteristics of individual plaintiffs (*e.g.* state of health, lifestyle) and the nature of their exposure to Agent Orange.

In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 165 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). Earlier, the Ninth Circuit echoed a similar message:

> In products liability actions . . . individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case.

In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 853 (9th Cir. 1982) (citations omitted), *cert. denied*, 459 U.S. 1171 (1983); *see also* cases cited *supra* note 13.

ualized experience with and reaction to the tort-causing agent.[287] As the Supreme Court of California explained:

> The major elements in tort actions for personal injury—liability, causation, and damages—may vary widely from claim to claim, creating a wide disparity in claimants' damages and issues of defendant liability, proximate cause, liability of skilled intermediaries, comparative fault, informed consent, assumption of the risk and periods of limitation.[288]

The inherent uniqueness of each mass tort plaintiff, and accordingly the varied evidence and legal issues presented by each litigant, have almost invariably doomed requests for certification of such claims.[289] The "individual issues of proximate cause and unliquidated damages render the claims of potential class representatives atypical of the claims of class members," generally precluding certification.[290]

The inadequacy of notice for tolling purposes is highlighted by examining how such classes are typically described in pleadings. Although each pleading is unique, personal injury mass tort classes are typically described as "all persons injured by their use of drug x," or "all persons injured by their exposure to y."[291] Such descriptions provide defendants with no basis for

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287 *See* Mertens v. Abbott Lab., 99 F.R.D. 38, 41 (D.N.H. 1983) ("The importance of the 'details' in each individual claim would clearly outweigh the single determination that DES causes injury."); Jolly v. Eli Lilly & Co., 751 P.2d 923, 934-38 (Cal. 1988) (in bank); 7B WRIGHT ET. AL., *supra* note 13, § 1783; *see also* cases cited *supra* note 13.

288 *Jolly*, 751 P.2d at 936 (citations omitted); *see also* Ganousis v. E.I. du Pont de Nemours & Co., 803 F. Supp. 149, 155 (N.D. Ill. 1992) (noting that the argument that *American Pipe* does not apply in mass tort personal injury action because defendant does not have the "requisite information about the prospective claims . . . appear(s) to have some force and [is] buttressed by some respectable authority"); 7B WRIGHT ET. AL., *supra* note 13, § 1783, at 76 ("[A]llowing a class action to be brought in a mass tort situation is clearly contrary to the intent of the draftsmen of the rule.").

289 Recently, courts confronted with staggering dockets have tried to coordinate and consolidate proceedings, including certifying class actions. *See* Lowenthal & Erichson, *supra* note 9, at 1010 & nn.108-09. In the overwhelming number of cases, however, class certification has been denied. *See id.* at 1010 & n.110; *see also supra* note 23.

290 2A FRUMER & FRIEDMAN, *supra* note 275, § 19.02[3], at 19-26 to 19-27; *see* 2A *id.* at 36; *cf.* 3 NEWBERG, *supra* note 275, § 17.10 (discussing limited instances of common questions in mass tort cases). Even in the tobacco products liability litigation, where the district court granted certification for certain issues, it denied certification for "the issues of injury-in-fact, proximate cause, reliance and affirmative defenses" because "all of these issues are so individually based that class certification is improper." Castano v. American Tobacco Co., 160 F.R.D. 544, 556 (E.D. La. 1995) (footnote omitted), *rev'd on other grounds*, 84 F.3d 734 (5th Cir. 1996) (reversing a grant of class certification).

291 For example, in the L-tryptophan litigations, the proposed class was described as: "All natural persons in the United States who sustained personal injuries as a result of ingesting the nutritional supplement L-Tryptophan together with their spouses, guardians and other such persons having a right to be compensated in damages as a result of personal injuries sustained by such persons." Rapoport v. Showa Denko America, Inc., No. JH-90-518, Complaint at 3 ¶ 7 (D. Md. Feb. 13, 1990); *see also* Paulson v. Showa Denko K.K., No. 90-0166SC, Complaint at 2 ¶ 4 (D.N.M. Feb. 14, 1990) ("The class is composed of all persons who suffered harm as a direct and proximate consequence of ingesting L-Tryptophan."). The currently pending tobacco products liability litigation paints a similar picture. There, the class is defined as:

> (a) All nicotine dependent persons in the United States, its territories and posses-

gathering evidence about any particular plaintiff—other than those specifically named. Indeed, the only "notice" the defendant receives is that something it did (e.g., the design or manufacture of its product) is alleged to have caused harm. That notice is sufficient to alert the defendant to preserve and gather evidence relating to its own conduct. The filing of an individual action, however, provides that notice, too. Yet, no one suggests that an individual filing should toll the limitations period for all possible plaintiffs. Rather, the notice provided in the class action—if it is to be sufficient to toll the limitations period—must do more: it must enable the defendant to gather evidence necessary to defend itself on the unique issues presented by the class of mass tort plaintiffs.

Consider this notice from the absent plaintiff's perspective. If the class is certified, Rule 23(c)(2) requires that absent class members be so notified by "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[292] When the class is identified as nothing more than all persons injured by a particular widely used product, notice by publication is the only—and therefore "the best"—practicable solution: from the class description, there is no way to identify and locate class members in order to give them individual notice.[293] But under a class action tolling doctrine, the defendant—armed with nothing more than this same class description—is supposed to be not only aware of the identity of each absent class member, but also able to gather the evidence necessary to defend against each individual claim before that evidence becomes stale.

Thus, unless the notice specifically identifies who the absent class members are, it will never be sufficient to justify class action tolling. Otherwise, the subsequent individual action will not "involve the same evidence, memories, and witnesses as were involved in the initial putative class action."[294]

> sions and the Commonwealth of Puerto Rico who have purchased and smoked cigarettes manufactured by the Tobacco Companies; (b) the estates, representatives, and administrators of those nicotine dependent cigarette smokers; and, [sic] (c) the spouses, children, relatives and "significant others" of these nicotine dependent cigarette smokers as their heirs or survivors . . . .

In re Tobacco Prods. Liab. Litig., Civ. No. 94-1044, First Amended Class Action Complaint at 7-8 ¶ 19 (E.D. La. May 9, 1994).

292 FED. R. CIV. P. 23(c)(2).

293 In *Silicone Gel Breast Implant Litigation*, for example, the class was certified pursuant to an agreement, and notice was effected through a comprehensive scheme that included individual notice (for those whose names and addresses were known), publication, in print and broadcast media, a "media outreach effort," "direct marketing" through communications with the medical establishment and support groups and others, on-line computer networking, and foreign communications. *See In re* Silicone Gel Breast Implant Litig., No. CV 92-8-10000-S, slip op. at Exhibit C (N.D. Ala. Apr. 1, 1994).

In some mass torts, however, it may be possible to determine the identity of all potential plaintiffs due to the unique circumstances of the underlying events. For example, if the litigation concerns a bus, plane, or train disaster, the passengers can usually be determined fairly readily.

294 Cullen v. Margiotta, 811 F.2d 698, 720 (2d Cir.) (citations omitted), *cert. denied*, 483 U.S. 1021, *overruled on other grounds sub nom.*, Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 156 (1987); *see* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 355 (1983) (Powell, J., concurring); American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 562 (1974) (Blackmun, J., concurring); *see also* Benfield v. Mocatta Metals Corp., 26 F.3d 19, 23 (2d Cir. 1994)

Further, if the evidence, memories, and witnesses are different—as they will be unless the identity of the individual plaintiff is set forth in the class action pleading—class action tolling will subvert the institutional and remedial purposes of statutes of limitations.[295] As one court explained:

> [B]ecause personal-injury mass-tort class-action claims can rarely meet the community of interest requirement in that each member's right to recover depends on facts peculiar to each particular case, such claims may be presumptively incapable of apprising defendants of "the substantive claims being brought against them," a prerequisite, in our view, to the application of *American Pipe*. This being so, putative class members would be ill advised to rely on the mere filing of a class action complaint to toll their individual statute of limitations. The presumption, rather, should be to the contrary . . . .[296]

Despite the centrality of adequate notice to the defendant, most courts have offered a hodgepodge of reasons for rejecting class action tolling for mass torts.[297] Some courts have assumed that state law recognized class action tolling but did not apply it because the plaintiff was not a member of the purported class.[298] In others, defendants appear to have stipulated to the tolling.[299] In some cases, though, courts have applied class action tolling to

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(holding that a fraud class action tolled limitations for RICO claims because it involved essentially the same evidence).

295 These include the defendant's right to repose and the judicial interest in informed decisionmaking produced by unhampered evidence-gathering by the parties. *See Time Bars*, *supra* note 8, at 1016-18.

296 Jolly v. Eli Lilly & Co., 751 P.2d 923, 937-38 (Cal. 1988) (in bank) (citations omitted). As one Texas court recently explained:

> For us to hold that the filing of a mass personal injury suit, in a federal court, in another state, with the variety of claims necessarily involved in such a case, entitled plaintiff to a tolling of the limitations period such as in *American Pipe*, would be . . . [un]warranted . . . and we refuse to do so.

Bell v. Showa Denko K.K., 899 S.W.2d 749, 758 (Tex. Ct. App. 1995); *cf.* Georgine v. Amchem Prods., 83 F.3d 610, 627 (3d Cir. 1996) (distinguishing property damages classes, like school asbestos cases, from personal injury torts); *In re* School Asbestos Litig., 789 F.2d 996, 1009 (3d Cir.) (certifying a class seeking property damage), *cert. denied*, 479 U.S. 852 *and cert. denied*, 479 U.S. 915 (1986); *In re* Three Mile Island Litig., 87 F.R.D. 433, 439-42 (M.D. Pa. 1980) (certifying a property damage class but refusing to certify personal injury class because such injuries were too "diverse and personal"); *Bell*, 899 S.W.2d at 758 (noting that the distinction between property damage and personal injury "is important in determining whether the defendants have received fair notice of the existence of a claim by the filing of a class suit").

297 *See, e.g.*, *Jolly*, 751 P.2d at 934-38; Whall v. Showa Denko K.K., No. 635307 (Cal. App. Dep't Super. Ct. Oct. 20, 1993); *Bell*, 899 S.W.2d at 757-58; *see also* Becker v. McMillin Constr. Co., 277 Cal. Rptr. 491, 496 (Cal. Ct. App. 1991); Singer v. Eli Lilly & Co., 549 N.Y.S.2d 654, 657-61 (N.Y. App. Div. 1990).

298 *See, e.g.*, Sawtell v. E.I. du Pont de Nemours & Co., 22 F.3d 248, 252-54 (10th Cir.), *cert. denied*, 115 S. Ct. 295 (1994); Bonhiver v. Graff, 248 N.W.2d 291, 300 (Minn. 1976); *Singer*, 549 N.Y.S.2d at 658-59; Lego v. McNeiLab, Inc., No. 85-1318, 1986 U.S. Dist. LEXIS, at *4 (E.D. Pa. Apr. 11, 1986).

299 *See* Doe v. American Nat'l Red Cross, No. 92-645 (CRR), 1993 WL 25523, at *1 n.1 (D.D.C. Jan. 29, 1993); *see also* Hyatt Corp. v. Occidental Fire & Casualty Co., 801 S.W.2d 382, 389 (Mo. Ct. App. 1990) (assuming that *American Pipe* would apply in response to an insurance company challenge that an insured waived a limitations defense in a skywalk collapse action).

state law personal injury claims without any analysis of the adequacy of notice.[300]

Those courts that do focus on the notice touchstone of class action tolling invoke the doctrine only hesitantly. In a recent California opinion, for example, the court applied class action tolling to property owners who charged a developer with having negligently constructed the homes in a housing development.[301] A class action had previously been brought, but was denied certification.[302] Absent a toll, the individual suit was barred.[303] After carefully analyzing the adequacy of notice, the court found the action timely because of the nature of the notice:

> As to personal injury claim[s] . . . the same causation and damages variables as to various plaintiffs' medical histories and injuries make a finding of "common questions of law and fact" impossible, and the giving of any meaningful notice of the substantive claims to defendants doubtful . . . . Thus, any application of the tolling doctrine would be inequitable.
>
> As to property damage claims[, however], there is a distinction as to the existence of notice: the affected property and property owners are more readily identifiable as to number and generic identity, making it more reasonable to expect a defendant to be put on some degree of notice of the extent of the claim by the pending class action.[304]

Accordingly, class action tolling was applied to a claim for construction damage in a single housing development because "[v]ariations in proof of causation and damage are not as extreme for this type of property damage as for personal injury mass tort cases, where the injured plaintiffs' personal backgrounds and medical histories are unique."[305] Even so, the court still worried that it had gone too far,[306] and warned that any application of class action tolling "can only be determined by individualized attention to the identity of the claimants and the nature of the claims involved, and by a careful weighing of the important policy considerations in this area."[307]

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300 In *Hyatt*, 801 S.W.2d at 389, defendants did not appear to contest class action tolling where the action involved a discrete, localized event. *See also* Kennedy v. Showa Denko K.K., No. CV 94-312M (D.N.M. July 26, 1995) (applying class action tolling to personal injury mass tort).

Limitation periods were also tolled in *Silicone Gel Breast Implant Products Liability Litigation*, but that was because, pursuant to a settlement, the class was certified and the parties agreed to toll applicable limitations periods for any case (other than a certain two) "brought in federal court." *See In re* Silicone Gel Breast Implant Prods. Liab. Litig., No. CV 92-P-10000-S, 1994 WL 114580, at *4 (N.D. Ala. Apr. 1, 1994).

301 *See* Becker v. McMillin Constr. Co., 277 Cal. Rptr. 491 (Cal. Ct. App. 1991).

302 *See id.* at 492-93.

303 *See id.* at 493-94.

304 *Id.* at 496 (citations omitted).

305 *Id.* at 497.

306 Thus, the court closed its opinion with these words: "Finally, we add our voice to those of other courts which have warned against a too-liberal interpretation of the rule set out in *American Pipe* . . . . [O]ur decision should not be broadly construed to apply to any and all construction defect cases." *Id.*

307 *Id.*

Because notice in class actions will rarely be adequate to apprise mass tort personal injury defendants of the evidence they need to gather, class action tolling should not be permitted. Moreover, the rule must be absolute—whatever the notice, class action tolling should be inapplicable in mass tort personal injury litigation. Otherwise, the possibility that there will be a toll will lead to the filing of otherwise stale claims, while the concern that there will be no toll will lead thoughtful counsel to file protective litigation. At that point, rather than conferring any benefit, class action tolling will cost the judicial system more than it will save, in addition to the price defendants will have to pay.

C. Rejecting Class Action Tolling for Mass Torts

Because any benefit from the adoption of a class action tolling doctrine for mass torts will be modest, and the costs will be high, state courts (and legislatures) should reject class action tolling for this species of litigation. If the doctrine is at all effective (it may be, but that is not obvious and the issue deserves study), it seems best suited where the subject matter at issue is one that generally will support class action treatment. In this regard, the antitrust claim at issue in *American Pipe* is a quintessential example of the sort of dispute in which proceeding by way of a class action is superior. Securities fraud claims are another. In these cases, where—absent a unique problem of the particular named representative—the class generally will be certified, a tolling doctrine probably has the greatest positive impact at the least cost.

While it may be that some mass tort claims will be certified as class actions, they are, at least for now, few and far between. Mass tort litigants continue to pursue claims individually; plaintiffs' counsel themselves are almost monolithic in their opposition to class certification. As a result, the principal effects of applying class action tolling to mass torts will be to encourage stale claims and to burden the judiciary by making it hear motions to dismiss, or if those motions are denied, to permit stale actions to proceed to judgment on the merits. A clear, blanket rule precluding class action tolling for mass torts should prevent such litigation.

There are surely other types of litigation for which class action tolling is inappropriate. Thus, when considering whether to extend class action tolling to areas outside those commercial disputes in which class actions are routinely certified, courts should consider the sorts of questions that make mass torts poor candidates for class action tolling. These include plaintiffs' desire to proceed separately, the availability of other mechanisms to achieve efficiencies, the nature of the notice provided to the defendant, and the policies underlying the substantive rights at issue. The issues are complex and require individualized attention. Even where class action tolling has been adopted as a state rule, its application to different substantive claims should not proceed until these issues are considered. Indeed, we believe this same analysis should be performed by federal courts when considering federal causes of action beyond those like the substantive claims at issue in *American Pipe*, *Crown, Cork & Seal* and *Chardon*.

Application of class action tolling should also not be static. Over time, cases may get litigated in different ways. Changes in substantive law may

make the preference for class actions stronger or weaker. New devices may be created to gain judicial efficiencies. Technologies may be developed to ease the identification of potential class members and to aid the gathering of needed evidence. Some or all of these events may require altering where and how class action tolling will operate. For the time being, however, class action tolling has no place in mass tort litigation.