

Seattle University School of Law Digital Commons

Faculty Articles

Faculty Scholarship

2015

Civil-izing Federalism

Brooke Coleman

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/faculty>



Part of the [Civil Procedure Commons](#), and the [Courts Commons](#)

Recommended Citation

Brooke Coleman, Civil-izing Federalism, 89 *TUL. L. REV.* 307 (2015).
<https://digitalcommons.law.seattleu.edu/faculty/655>

This Article is brought to you for free and open access by the Faculty Scholarship at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Seattle University School of Law Digital Commons.

TULANE LAW REVIEW

VOL. 89

DECEMBER 2014

NO. 2

Civil-izing Federalism

Brooke D. Coleman*

When Chief Justice Roberts and Justice Alito joined the United States Supreme Court, most commentators predicted it would become more conservative. Indeed, many believed that the reinvigorated federalism revolution under Chief Justice Rehnquist would, if anything, become more robust under the new chief. To a large degree, those commentators were right; the Court has decided numerous hotly contested federalism cases along predictable ideological lines. But there are some important counterexamples in the Court's federalism jurisprudence. In a list of cases about access to plaintiff-friendly state courts, the Justices seem to abandon their federalism principles. Instead, the liberal wing of the Court generally votes in favor of robust states' rights, while the conservative wing votes to impose defendant-friendly federal rules in civil litigation or to require plaintiffs to proceed in relatively hostile federal courts.

This Article is the first to focus on the Roberts Court's treatment of federalism in civil procedure cases and the consequences for private civil litigation. It argues that the apparent disconnect between individual Justices' stances in procedural cases and their federalism commitments is due, at least in part, to the Justices' understandings of the purposes for, and effectiveness of, the federal civil litigation system. By examining the Justices' narratives about civil litigation, the Article demonstrates that even as they invoke the language of federalism, the Justices' positions in procedural cases correlate with the civil litigation interests they seek to protect: business interests for the conservative Justices and access to justice for the liberal Justices. This Article concludes that these interests, and not federalism commitments, are far better predictors of how the Justices will decide procedural cases. Yet, the Article argues, the Court should more closely adhere to traditional conservative federalism principles in this context. Procedural jurisprudence that is deferential to states in private civil litigation is likely to create greater access to the courts and thus a more just civil litigation system.

* © 2014 Brooke D. Coleman. Associate Professor of Law, Seattle University School of Law. Many thanks to Steven Baicker-McKee, Robert Chang, Diane Dick, Scott Dodson, Charlotte Garden, David Gartner, Lily Kahng, Michael Kaufman, Sara Rankin, Briana Rosenbaum, Norman Spaulding, Jeff Stempel, Suja Thomas, and Mark Tushnet who commented on early drafts. Thanks also to the Seventh Annual Federal Courts Junior Faculty Forum and the Rocky Mountain Junior Faculty Forum for the insightful comments received there. Brett Carnahan and Constance Lockleav provided able research assistance.

I.	INTRODUCTION.....	308
II.	FEDERALISM DEFINED	312
	<i>A. Substantive Federalism.....</i>	313
	<i>B. Federalism in Procedural Cases.....</i>	316
	<i>C. Methodology.....</i>	318
III.	STATE COURTS, STATE LAW, AND CIVIL JURIES	320
	<i>A. Keeping Cases out of State Courts.....</i>	320
	1. The Federalism Procedural Cases	320
	2. Federalism Falls to State Court Distrust	324
	<i>B. State Courts as Regulators.....</i>	329
	1. The Federalism Procedural Cases	329
	2. Federalism Used To Bolster State Court Access	331
IV.	SUBSTANTIVE LAW CLAIMS.....	334
	<i>A. Skepticism of Particular Substantive Law Claims.....</i>	334
	1. The Federalism Procedural Cases	334
	2. Federalism Yields to Substantive Claim Skepticism.....	336
	<i>B. Greater Concern for Particular Substantive Law Claims.....</i>	340
	1. The Federalism Procedural Cases	340
	2. Federalism Used To Further the Viability of Substantive Claims	341
V.	CIVIL LITIGATION.....	342
	<i>A. Cost and Inefficiency.....</i>	343
	1. The Federalism Procedural Cases	343
	2. Efficiency Concerns Elevated over Federalism.....	345
	<i>B. Access to Justice.....</i>	351
	1. The Federalism Procedural Case.....	351
	2. Federalism as a Means to Access.....	352
VI.	FEDERALISM'S PLACE IN PROCEDURAL CASES.....	355
	<i>A. A Federalism-Procedural Law Prescription.....</i>	355
	<i>B. Optimal Federalism-Procedural Law Balance in Action.....</i>	360
VII.	CONCLUSION.....	366
	APPENDIX	367

I. INTRODUCTION

When Chief Justice John Roberts and Justice Samuel Alito joined the United States Supreme Court, most commentators predicted that

the Court would become more conservative.¹ Indeed, many believed that the reinvigorated federalism revolution under Chief Justice William Rehnquist would, if anything, become more robust under the new chief.² To a large degree, those commentators were right. In a number of contested substantive cases, the conservative wing of the Court has favored states' rights, while the liberal wing has taken the opposite position.³ The standard story is that conservatives believe that limitations on federal power should be substantial and deference to state sovereignty the norm, while liberals believe that the federal government should have meaningful power and that state sovereignty should yield to that power where appropriate.⁴ In the context of substantive legal developments, conservative and liberal Justices tend to, but do not always, divide this way.⁵

1. See, e.g., Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1536 (2007) ("[W]hile both new Justices [Roberts and Alito], not unexpectedly, have emerged as conservatives . . . , our results here suggest that ideological drift is not only possible but likely."); Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 878 (2008) ("Commentators generally agree that on the nine-Justice Supreme Court, the two appointments [of Justices Roberts and Alito] have produced a single-increment move, ideologically, to the right."); Dave Gilson, *Charts: The Supreme Court's Rightward Shift*, MOTHER JONES (June 26, 2012, 5:00 AM), <http://www.motherjones.com/politics/2012/06/supreme-court-roberts-obamacare-charts> ("By several measures, the court headed by Chief Justice John Roberts is the most conservative since the early 1970s . . .").

2. See, e.g., Jeff Bleich, Michelle Friedland & Daniel Powell, *The New Chief*, OR. ST. B. BULL., Nov. 2005, at 18, 23 (noting that Justice Roberts' previous jurisprudence "suggests a willingness to closely scrutinize acts of Congress to ensure they are a proper exercise of the Commerce power, an inquiry that many of the more liberal justices feel is usually unnecessary").

3. See discussion *infra* Part II.A. It is true that the labels "conservative" and "liberal" oversimplify the Justices' ideological positions. Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1433 (2013) ("[T]here is no uniform conservative or uniform liberal ideology. Instead there are multiple imperfectly overlapping ideologies. . . . Such differences can make it difficult or even impossible to distinguish between 'liberal' and 'conservative' Justices."). As this Article notes, decisions do not always split on an even "conservative" and "liberal" plane. For ease of discussion, however, this Article will refer to the Court's popularly perceived factions in this way.

4. This is an oversimplification of federalism as an ideology, but as this Article will discuss, the purpose is not to critique or expound on federalism, but to observe and explain inconsistencies in the Justices' federalism decisions. See discussion *infra* Parts III-V.

5. Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 3 (2004) ("There is, of course, the obvious pattern: Five Justices are generally for imposing constitutional limits on federal authority in a number of different contexts, while four have consistently opposed such limits."). There are exceptions in the substantive context, which will be discussed in Part II.A. See also Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 468-69 (2002) (arguing that the Rehnquist Court's federalism decisions reflect a "mixed picture" of the Justices' ideologies and motivations).

However, this Article reveals that in the procedural law context, the Justices regularly abandon their espoused federalism principles.⁶ This is particularly so in hotly contested cases.⁷ They desert these principles, in part, because they want to protect the parties they believe are most at risk in private civil litigation—businesses or plaintiffs.⁸ Thus, this Article shows that in procedural cases, conservative Justices tend to protect corporate defendants at the expense of their federalism principles;⁹ liberal Justices tend to do the opposite.¹⁰ The Justices' respective opinions in these cases reveal why this is. Conservative Justices are skeptical of the civil justice system, and they are especially concerned that state law and state courts can imperil business interests through, for example, coerced settlements and protracted and costly discovery.¹¹ Conversely, liberal Justices manifest concern for individual or small-business plaintiffs and their access to the civil litigation system.¹² Accordingly, they seek to increase access to relatively plaintiff-friendly state courts. What all this means is that

6. See discussion *infra* Parts III-V.

7. See Lee Epstein, William M. Landes & Richard A. Posner, *Are Even Unanimous Decisions in the United States Supreme Court Ideological?*, 106 NW. U. L. REV. 699, 702 (2012) (“[W]hen the ideological stakes are small, a combination of dissent aversion with legalistic commitments is likely to override the ideological preferences of the Justices.”); Epstein, Landes & Posner, *supra* note 3, at 1445 (“We do not expect a Justice’s ideological preferences to influence his vote in cases in which there are no ideological stakes.”). There are exceptions, of course. See *Bowman v. Monsanto Co.*, 133 S. Ct. 1761, 1764 (2013) (unanimously holding that Monsanto can patent its genetically modified soybean); Adam Liptak, *Justices Agree To Agree, at Least for the Moment*, N.Y. TIMES (May 27, 2013), http://www.nytimes.com/2013/05/28/us/supreme-court-issuing-more-unanimous-rulings.html?_r=0.

8. See Epstein, Landes & Posner, *supra* note 3, at 1473 (“We find that after the appointment of Roberts and Alito, the other three conservative Justices on the Court became more favorable to business”); Jeffrey Rosen, Keynote Address, *Big Business and the Roberts Court*, 49 SANTA CLARA L. REV. 929, 929 (2009) (“[T]he Roberts Court, broadly speaking, does have a generally pro-business orientation”); Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), <http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?pagewanted=all> (discussing Epstein, Landes, and Posner, *supra* note 7); Tony Mauro, *Just How Business-Friendly Is the Supreme Court, Anyhow?*, NAT’L L.J. (ONLINE) (July 24, 2013), Lexis.com (select the “Find A Source” tab; type “The National Law Journal” into the search bar, select “Find” to run the search, and then select that journal from the list; type “Just How Business-Friendly Is the Supreme Court, Anyhow?” into the Natural Language search box and select “Search”) (discussing the debate over whether the Court is pro-business); see also discussion *infra* Parts III-V. But see Richard A. Epstein, *The Myth of a Pro-Business SCOTUS*, HOOVER INSTITUTION (July 9, 2013), <http://www.hoover.org/research/myth-pro-business-scotus> (challenging the allegation that the Court is pro-business).

9. See sources cited *supra* note 8.

10. See discussion *infra* Parts III-V.

11. See discussion *infra* Parts IV.A, V.A.

12. See discussion *infra* Parts III.B, IV.B, V.B.

when a procedural case includes a federalism issue, the Justices are much less likely to take their traditional federalism positions and are much more likely to make decisions protective of these interests.

This Article is the first to focus on the Roberts Court's treatment of federalism in procedural law and what it means in the context of private civil litigation.¹³ It argues that the Justices consistently abandon their traditional federalism principles in procedural cases. Yet, the Article argues, the Court's guiding federalism values in this context should be more traditionally conservative. States have a critical interest in protecting their citizenry. Thus, states' laws and courts are owed some amount of deference when their citizens engage in private disputes.

Part II of this Article briefly discusses federalism in the substantive context, how federalism issues arise in procedural cases, and the methodology this Article used to determine which procedural cases to review. Parts III, IV, and V discuss procedural cases where federalism is at play, demonstrating that in almost every one of these decisions, most of the conservative Justices take a position that favors the federal government, while most of the liberal Justices take a position favoring the states.

Parts III through V also contextualize the Justices' federalist diversions by discussing them alongside contentious narratives about the private civil litigation system. Part III examines the Justices'

13. See generally A. Benjamin Spencer, *Anti-Federalist Procedure*, 64 WASH. & LEE L. REV. 233 (2007) (reviewing "anti-federalist" conduct by both Congress and the Rehnquist Court and suggesting reforms that would better honor constitutional federalism principles). Spencer's work reveals some procedural areas where the Court has not adhered to substantive federalism principles. *Id.* at 238-40, 247-64. However, his article centers on a discussion and critique of how those decisions are not consistent with broader constitutional principles. *Id.* at 264-81. It does not examine how the pro-federalism and anti-federalism wings of the Court take different ideological stances in private civil litigation cases. In addition, one other scholar has addressed this issue with respect to the *Erie* Doctrine under the Rehnquist Court, see Adam N. Steinman, *What Is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 330 (2008) (arguing that the *Erie* doctrine might require "federal courts . . . to abandon their typically pro-defendant approaches to several key procedural issues in favor of state law standards"), one has addressed the issue of what he calls "judicial-federalism" positions in the Rehnquist Court, see Lonny S. Hoffman, *Intersections of State and Federal Power: State Judges, Federal Law, and the "Reliance Principle,"* 81 TUL. L. REV. 283, 287 (2006) (arguing that the Rehnquist Court was rather consistent in its "arising under" jurisprudence in "expressing faith in the ability of state courts to decide correctly and apply federal law"), and one has addressed this issue with respect to Congress, see Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1608-10 (2000) (arguing that congressional legislation like the Class Action Fairness Act of 2005 (CAFA) violated the new federalism pronounced by the Court in substantive federalism cases).

narratives about state courts, state law, and civil juries, arguing that conservative Justices tend to operate from a place of distrust of state systems, while liberal Justices tend to be more deferential. Part IV explains the Justices' dueling narratives about the value of particular substantive law claims. In Part V, the Article explores the Justices' narratives about the private civil litigation system, in which the conservative Justices voice concern about innate inefficiencies and the liberal Justices tout the system's access-creating potential. Together, Parts II through V demonstrate that the Justices' abandonment of their traditional federalism positions is due, at least in part, to the Justices' appetite for taking pro-business or pro-plaintiff positions. These Parts also establish how the Justices' narratives about the civil justice system's functionality are reflected in their overall procedural jurisprudence, whether the specific cases involve federalism issues or not.

Finally, Part VI argues that in private civil litigation cases, the Court should be guided by more traditional conservative federalism principles. The states' interests in protecting their citizens, the deference owed to state laws and systems, and the role that states play in the overall regulatory regime argue in favor of subordinating federal power in these cases. The Article closes by showing how the Court has generally followed these conservative federalism principles in private civil litigation cases where subject matter jurisdiction is at issue. The Court's approach in subject matter jurisdiction cases, the Article argues, might be a model for how the Court should weigh federalism when deciding procedural issues in the private civil litigation context.

II. FEDERALISM DEFINED

For the purpose of this Article, federalism refers to the broad debate over the balance of power between the states and the federal government.¹⁴ At its most basic level, Chief Justice Roberts, and Justices Alito, Anthony Kennedy,¹⁵ Antonin Scalia, and Clarence

14. This Article approaches these issues from a procedural perspective, not a constitutional law one. Thus, the Article does not discuss the Court's constitutional federalism in great detail. In other words, while the Tenth Amendment, Eleventh Amendment, anti-commandeering principles, Supremacy Clause, and Section 5 of the Fourteenth Amendment guide the Court's treatment of constitutional federalism, those issues are not the focus of this Article. While those doctrines play a role, for example, in the Court's preemption cases, this Article is concerned with the concept of federalism more generally, not the detailed doctrinal analysis of how federalism is utilized in the Court's jurisprudence.

15. Justice Kennedy is thought of as the "swing vote" as he is often the deciding vote in five-to-four cases. See Richard G. Wilkins, Scott Worthington, Elisabeth Liljenquist,

Thomas tend to defer to state power on decisions involving substantive law. In contrast, Justices Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor generally defer to national power. To put it differently, when it comes to many substantive legal issues that pit federal power against that of the states—what this Article calls substantive federalism¹⁶—the Court’s conservative wing is expected to side with the states, while the Court’s liberal wing is expected to side with the federal government.¹⁷

A. *Substantive Federalism*

While the debate over the boundaries of substantive federalism decreased in the mid-twentieth century, it gained new steam around 1995 with cases like *United States v. Lopez*¹⁸ and *City of Boerne v. Flores*.¹⁹ Many commentators argued that the Court had embarked on a federalism revolution.²⁰ Cases since then have led to similar ideological divides, fueling the debate over the bounds of federalism.²¹

Adam Pomeroy & Amy Pomeroy, *Supreme Court Voting Behavior: 2007 Term*, 37 HASTINGS CONST. L.Q. 287, 299 (2010) (“For yet another Term, Justice Kennedy’s influence over the direction of the Court is nowhere more evident than [in swing-vote cases].”). When it comes to federalism issues, he tends to split evenly between the liberals and the conservatives, with a slight tendency to break conservative more often. See *Analysis Overview*, SUP. CT. DATABASE, <http://scdb.wustl.edu/analysisOverview.php?sid=1301-TWOFOLD-2469> (last visited Nov. 16, 2014). As will be discussed in Parts III through V, however, when it comes to procedural cases that implicate federalism, with the exception of one case, he sides with the conservatives.

16. Scholars will also refer to this as “constitutional federalism.” Fallon, *supra* note 5, at 439. This Article chooses the term “substantive federalism” in order to delineate the distinction between cases addressing substantive law and cases addressing procedural law.

17. There are exceptions to this observation, as this Article further discusses in this Part.

18. 514 U.S. 549, 561 (1995) (striking down a national law that prohibited guns within 1,000 feet of a school).

19. 521 U.S. 507, 511 (1997) (finding the Religious Freedom Restoration Act of 1993 was unconstitutional as applied to the states), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 25 (2001) (“Perhaps the most striking feature of the Rehnquist Court’s jurisprudence has been the revival over the last 5-10 years of doctrines of constitutional federalism.”).

20. Calabresi, *supra* note 19.

21. See, e.g., *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612, 2631 (2013) (finding the Voting Rights Act’s preclearance formula unconstitutional); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) (holding that provisions of the Patient Protection and Affordable Care Act exceeded Congress’s power under the Commerce Clause); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (holding that Title I of the Americans with Disabilities Act could not be used to recover money damages against the states); *Bush v. Gore*, 531 U.S. 98, 110 (2000) (halting Florida’s state court-

This debate is well documented by scholars, who have done exhaustive work in this area.²² Among other things, scholars have argued that the Rehnquist federalism revolution began to dissipate before Chief Justice Roberts took his position.²³ Cases like *Gonzales v. Raich*²⁴ and *Gonzales v. Oregon*²⁵ indicated that the Court might have slowed its federalism movement.²⁶ In *Raich*, for example, Justice Scalia concurred in a judgment that held that federal criminal drug possession laws could trump California's medical marijuana law.²⁷ This position seemed antithetical to his federalism principles, leading scholars to question the strength of the federalism movement overall.²⁸ Debate has been similarly strong over where the Roberts Court will take federalism in the substantive context.²⁹ Key to this debate is an

ordered recount in the 2000 presidential election); *United States v. Morrison*, 529 U.S. 598, 602 (2000) (invalidating the Violence Against Women Act); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (finding that actions against the states for violation of overtime provisions under the Fair Labor Standards Act violated the Eleventh Amendment); *Printz v. United States*, 521 U.S. 898, 933 (1997) (invalidating the section of the Brady Handgun Violence Prevention Act that imposed a duty on state law officials to conduct background checks); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (finding that the Eleventh Amendment prohibited Congress from allowing Indian tribes to pursue an argument that there was a duty to negotiate under the Indian Gaming Regulatory Act).

22. See, e.g., Calabresi, *supra* note 19; Scott Dodson, *Vectorial Federalism*, 20 GA. ST. U. L. REV. 393 (2003); Michael C. Dorf, *Instrumental and Non-Instrumental Federalism*, 28 RUTGERS L.J. 825 (1997); Fallon, *supra* note 5; Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213 (1998); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); James E. Pfander, Introduction, *Once More unto the Breach: Eleventh Amendment Scholarship and the Court*, 75 NOTRE DAME L. REV. 817 (2000); Steven D. Schwinn, *The Framers' Federalism and the Affordable Care Act*, 44 CONN. L. REV. 1071 (2012); Kathleen M. Sullivan, Comment, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 80 (1995).

23. Denise C. Morgan, *Introduction: A Tale of (at Least) Two Federalisms*, 50 N.Y.L. SCH. L. REV. 615, 617 (2005-2006) ("In more recent years, however, the strong rhetoric that the Court used in those cases has faded away and has been replaced by much more cautious, perhaps even counter-Revolutionary, language.").

24. 545 U.S. 1, 33 (2005) (holding that federal law criminalizing the manufacture, distribution, or possession of marijuana was constitutional). Notably, Justice Scalia concurred in this judgment, taking a position that favored federal authority over state law.

25. 546 U.S. 243, 275 (2006) (enjoining enforcement of a rule that would have criminalized physician-assisted suicide allowed under state law). In this case, Chief Justice Roberts and Justices Scalia and Thomas dissented, taking a position that favored federal authority over state law. *Id.*

26. Morgan, *supra* note 23.

27. 545 U.S. at 33 (Scalia, J., concurring).

28. A. Christopher Bryant, *The Third Death of Federalism*, 17 CORNELL J.L. & PUB. POL'Y 101, 149 (2007); Morgan, *supra* note 23.

29. The Federalist Society held a convention where the Roberts Court's federalism was a central point of discussion. *The Roberts Court and Federalism: Minutes from a*

argument about why a Justice might follow his or her traditional federalism positions in one substantive case, but not in others.

Some argue that this incoherence is a result of outcome determination—the Justices vary in their federalism approach in order to achieve the results they want from case to case.³⁰ Others have tried

Convention of the Federalist Society, 4 N.Y.U. J.L. & LIBERTY 330, 333 (2009); see also Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 431, 462 (2011) (“[T]he Rehnquist Court began a federalism revolution that now has been at least partially adopted by the Roberts Court.”); Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outterson, *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. 1, 4-5 (2013) (“[*National Federation of Independent Business v. Sebelius*] presented a prime opportunity for the Roberts Court to revive the Rehnquist Court’s ‘Federalism Revolution’ in the context of the Tenth Amendment.” (footnote omitted)); Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1610 (2012) (“Thus, if the Roberts Court really means what it says about the centrality of direct presidential oversight to the separation-of-powers doctrine, it should invalidate cooperative-federalism programs on the ground that they unconstitutionally delegate the enforcement of federal law outside the executive branch.”); Cedric Merlin Powell, *Harvesting New Conceptions of Equality: Opportunity, Results, and Neutrality*, 31 ST. LOUIS U. PUB. L. REV. 255, 325 (2012) (“The Rehnquist Court ushered in the New Federalism, and now the Roberts Court has gone even farther in promoting post-racial federalism.” (footnote omitted)); Dan Schweitzer, *Federalism in the Roberts Court*, NAT’L ASS’N ATTY’S GEN. (Nov. 6, 2007), http://www.naag.org/federalism_in_the_roberts_court.php (noting that in the first two years after Chief Justice Roberts joined “the certiorari process, the Supreme Court [did] not agree[] to hear a single case involving the constitutional federalism issues that formed the heart of the Rehnquist Court’s federalism revolution”). There is also some data suggesting that Chief Justice Roberts and Justice Alito are less pro-federalism than the Justices they replaced—Chief Justice Rehnquist and Justice Sandra Day O’Connor. J. Mitchell Pickerill, *Something Old, Something New, Something Borrowed, Something Blue*, 49 SANTA CLARA L. REV. 1063 (2009). However, the data was gathered only two years into Chief Justice Roberts’ and Justice Alito’s terms, so it may have been too early to tell.

30. See, e.g., A. Christopher Bryant, *Constitutional Newspeak: Learning to Love the Affordable Care Act Decision*, 39 J. LEGIS. 15, 41-42 (2012-13) (“Rather, the Court’s Commerce Clause conclusion is troubling because it demonstrates the inability of federal judges to rise above their own partisan sympathies.”); Ruth Colker & Kevin M. Scott, Essay, *Dissing States?: Invalidity of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301, 1343-45 (2002) (suggesting that the division corresponds to whether underlying state action is “liberal” or “conservative”); Fallon, *supra* note 5, at 474 (“[T]here are a number of doctrinal areas in which the Court is more substantively conservative than it is pro-federalism.”); Powell, *supra* note 29, at 325 (arguing that the Roberts Court “radically alter[s] its own precedent so that it directly contradicts the legislative purpose of Congress”). There is also an argument that the Court’s federalism is simply incoherent. It is not so much that the conservative and liberal factions behave counter to their federalism principles, but that the doctrine overall is messy. See Morgan, *supra* note 23, at 617-18 (“Since 2003, in cases dealing with the Commerce Clause, Section 5 of the Fourteenth Amendment, the Spending Clause, and the Eleventh Amendment, the Court has firmly held a confused (perhaps even inconsistent) line—refusing both to definitively strip Congress of substantial authority to regulate the states or to create individual rights that are enforceable against the states.” (footnotes omitted)).

to locate trends in the Court's jurisprudence and construct arguments that elegantly connect the alleged incoherence.³¹ What all of these scholars have in common, however, is that they generally focus their debate on substantive issues—civil rights legislation,³² election law,³³ the Establishment Clause,³⁴ health care law,³⁵ and other similarly controversial subjects.³⁶

B. Federalism in Procedural Cases

Procedural doctrine, and more specifically procedural doctrine in the context of private civil litigation, has been largely unexamined with respect to the Justices' federalism positions. This Article focuses on that gap—private civil litigation cases where the decision regarding a procedural question places federal power in tension with state power. The Article does not discuss procedural cases where the state is a party to that litigation—sovereign immunity cases, for example.³⁷ Those cases tend to follow the trends discussed in the substantive federalism arena.³⁸ Moreover, the focus of this Article is to unpack what drives

31. See Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL'Y REV. 33 (2009) (outlining changing conceptions of federalism throughout history); Ernest A. Young, "The Ordinary Diet of the Law": *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 255-56 (arguing that at least in the preemption context, the Court's cases can be explained without a resort to outcome determination).

32. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); Fallon, *supra* note 5; Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57 (2002).

33. See, e.g., *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013); *Bush v. Gore*, 531 U.S. 98 (2000).

34. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); Fallon, *supra* note 5.

35. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

36. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (state sovereign immunity); *Printz v. United States*, 521 U.S. 898 (1997) (firearm background checks); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (tribal relations).

37. I excluded cases addressing official and sovereign immunities. The focus of this Article is on civil litigation between private parties. The immunity cases, while presenting federalism issues, are different because the defendants are government entities or officials. I also excluded the sole abstention case because it was an anomalous case regarding *Rooker Feldman* abstention.

38. See, e.g., *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 359 (2006) (rejecting the sovereign immunity defense of state agencies in a proceeding by a bankruptcy trustee to recover a debtor's preferential transfers); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 725 (2003) (holding that a state's failure to comply with a provision of the Family and Medical Leave Act effectively abrogated its sovereign immunity from suit).

the Justices' decision making in the private civil litigation context because that is where, the Article argues, the Justices' views regarding civil litigation are most identifiable.³⁹

It is admittedly less common to see pure federalism issues arise in these kinds of federal procedural cases, however. There is simply less opportunity for federal and state procedural law to conflict. Many federal procedural cases interpret the federal rules of procedure. With the exception of *Erie*⁴⁰ cases where state and federal laws are potentially in conflict, cases interpreting the federal rules do not affect state procedure directly.⁴¹ In addition, many other procedural cases interpret federal statutes and their attendant procedures.⁴² These cases are much less likely to affect state courts and state law to any great degree.

However, there are private civil litigation cases where the resolution of the procedural issue implicates federalism, such as preemption cases where the critical legal question is whether federal or state substantive law will apply.⁴³ There are also the aforementioned *Erie* cases, a species of preemption, which present the question of whether a federal rule of procedure will trump state law.⁴⁴ Finally, there are cases where the Court limits a constitutional procedural doctrine like personal jurisdiction, which can sometimes prevent a

39. There are certainly cases involving state or federal officials that raise the narratives discussed in this Article. For example, conservative Justices are arguably hostile to 42 U.S.C. § 1983 claims against police officers. See, e.g., *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1241 (2012) (holding that, in an alleged Fourth Amendment violation action, police officers had qualified immunity because they had acted in an objectively reasonable manner and did not fit within the narrow exception that would have barred immunity). That position would fall under the substantive law claim hostility discussed below in Part IV.A. It would be interesting to look at all procedural cases and assess the trends discussed in this Article, but that is beyond the scope of this piece. For the purpose of this Article, the inquiry is limited to private civil litigation. By singling out private civil litigation, as opposed to all civil litigation, the Article focuses on how federalism should be treated even when the state is not a named party to the case.

40. *Erie R.R. v. Tompkins*, 304 U.S. 64, 80 (1938) (holding that in federal diversity cases, state substantive law and federal procedural law should apply).

41. For example, the most talked about pleading cases of late, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 548-49 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009), interpreted a federal rule of procedure governing pleadings. Those cases do not implicate state courts unless those courts elect to follow what the federal courts have done. See, e.g., *McCurry v. Chevy Chase Bank*, 233 P.3d 861, 867 (Wash. 2010) (refusing to apply *Iqbal* to Washington state procedure).

42. See, e.g., *Fox v. Vice*, 131 S. Ct. 2205, 2211 (2011) (interpreting the requirements of 42 U.S.C. § 1988 and whether attorneys' fees were allowed).

43. See discussion *infra* Part III.

44. See discussion *infra* Part IV.

state court from litigating a state law remedy.⁴⁵ These types of procedural cases are the subject of this Article.

C. Methodology

In order to determine which cases to review for this Article, I looked at all of the procedural cases decided by the Roberts Court during the 2005 through 2013 Terms.⁴⁶ The term “procedural cases” was defined to include any cases interpreting the Federal Rules of Civil Procedure, cases interpreting procedural doctrines such as personal jurisdiction or subject matter jurisdiction, and cases interpreting standard court procedures like attorneys’ fees and costs.⁴⁷

45. See discussion *infra* Part III.

46. There are markedly more procedural cases in the Roberts regime. As Howard M. Wasserman reveals in *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 314 (2012), the Court in its first six terms “heard and decided more than twenty cases in core civil procedure areas.”

47. One case, *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), was not included in this initial collection of procedural cases. The Court found that the Oregon Supreme Court had used the wrong constitutional standard when reviewing a punitive damages award. *Id.* at 357-58. This had the effect, at least initially, of striking down a state court’s award of punitive damages. The Court seemed to base its reasoning on procedural due process grounds. *Id.* at 357. However, many commentators have observed that the Court in this case (and similar cases that preceded it, like *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)) was more accurately basing its decision on substantive due process grounds. See Erwin Chemerinsky, Foreword, *The Constitution and Fundamental Rights*, 18 U. FLA. J.L. & PUB. POL’Y, at xii (2007) (listing *Philip Morris* as a substantive due process case); Jill Wieber Lens, *Procedural Due Process and Predictable Punitive Damage Awards*, 2012 BYU L. REV. 1, 19 (“Despite the procedure-looking language in *Phillip* [sic] *Morris*, just as with *BMW*, many believe *Philip Morris* was based on substantive due process grounds—substantively prohibiting a punitive damage award from punishing the defendant for harm caused to nonparties.”). Because of the incoherence of the Court’s reasoning in this area, the case was excluded. However, even if the case were included in the data set, the Court’s decision largely supports this Article’s thesis. Justices Scalia and Thomas, as they did in *BMW*, dissented from the opinion rejecting the state’s punitive damage award. *Philip Morris*, 549 U.S. at 362-64 (Ginsburg, J., dissenting). This was a traditionally conservative federalism position because it maintained the state court’s (and the state jury’s) damage award in a state law case. As Justice Ginsburg explained in her dissent, “I would accord more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent.” *Id.* at 364. (Justice Stevens similarly dissented, using conservative federalism language. *Id.* at 358 (Stevens, J., dissenting).) While Justices Scalia and Thomas joined these two liberal Justices in taking a conservative federalism position, their fellow conservative Justices—Chief Justice Roberts and Justices Kennedy and Alito—did not. This breakdown of Justices, while not cleanly along liberal and conservative lines, demonstrates the arguments made in Part III regarding the Justices’ shifting positions when federalism and private-party civil litigation intersect with regard to state courts and state juries. See discussion *infra* Part III. Ultimately, the jury verdict stood because, upon remand, the Oregon Supreme Court concluded that *Philip Morris* was procedurally barred from contesting the jury instructions that served as the basis for their challenge to the punitive damage award. See Lyle Denniston, *Tobacco Punitive Verdict Stands*, SCOTUSBLOG (Mar.

Once that batch of cases was collected, I excluded any cases where the state government, federal government, or a foreign entity was a party.⁴⁸ That left forty-seven cases in the pool. Of those forty-seven cases, fifteen cases presented questions implicating federalism principles.

Among those fifteen cases, five general categories of cases emerged: arbitration, consumer preemption,⁴⁹ class action, personal jurisdiction, and subject matter jurisdiction. Once these categories were determined, I then went back to the data set and pulled all of the cases in each of these categories, without regard to whether they presented federalism issues or not. The point of looking at the nonfederalism cases in each category, as will be discussed in the following Parts, was to gain a fuller understanding of what other ideological principles might be determinative for the Justices in the private civil litigation context.

From the analysis of these fifteen cases and the related cases in those categories, three distinct narratives about private civil litigation emerged. Those narratives are as follows: (1) the Justices' attitudes toward state courts, state law, and civil juries; (2) the Justices' positions regarding certain substantive law claims; and (3) the Justices' views about the value of private civil litigation. This Article argues that these narratives tend to animate the Justices' decision making in the procedural context far more than any specific federalism ideological position might. In the Parts that follow, this Article will examine each

31, 2009, 10:05 AM), <http://www.scotusblog.com/2009/03/ruling-on-jury-seating/>. The Court refused to revisit this case and denied certiorari to review the state court's decision. See *id.*

48. See *supra* notes 37-38 and accompanying text.

49. Preemption is a subject that is often discussed in the substantive federalism literature. See, e.g., Kerry Abrams, Essay, *Plenary Power Preemption*, 99 VA. L. REV. 601, 601-06 (2013) (discussing preemption in the immigration context). Yet, preemption is a complex and multifaceted area of the law. See *id.* at 608 ("[P]reemption doctrine is messy"); Geoffrey C. Hazard, Jr., *Quasi-Preemption: Nervous Breakdown in Our Constitutional System*, 84 TUL. L. REV. 1143, 1154-55 (2010) (noting that "issues of federal preemption are . . . badly handled" in the courts). In many of the articles cited above, scholars discuss all preemption cases in the context of substantive legal developments. This Article focuses on consumer preemption cases, meaning that it only looks at litigation by private litigants against business entities. The point is to put this subset of preemption cases in the context of other procedural cases that tend to make it more difficult for individual or small business plaintiffs to bring their claims against business entities. See *infra* note 50 and accompanying text. The inclusion of preemption cases here and in articles regarding substantive federalism also shows the complexity of dividing substance and procedure. That discussion, however, is also not the focus of this Article. See John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724 (1974) ("We were all brought up on sophisticated talk about the fluidity of the line between substance and procedure. But the realization that the terms carry no monolithic meaning at once appropriate to all the contexts in which courts have seen fit to employ them need not imply that they can have no meaning at all." (footnote omitted)).

of these narratives in turn. Within that analysis, the Article will highlight how each respective narrative provides a compelling justification for why the Justices tend to abandon their traditional federalism positions when making procedural decisions in the context of private civil litigation.

III. STATE COURTS, STATE LAW, AND CIVIL JURIES

The first narrative finds the conservative Justices questioning the competency of state courts and, by extension, their laws and juries. This distrust of civil juries and state court systems leads the Justices to utilize certain procedural devices that are more likely to locate cases in federal court. In contrast, the liberal Justices tend to favor civil juries and, in that vein, are more deferential to state courts and state law in this context. Thus, the liberal Justices are often in the position of arguing in favor of keeping a case in state court.

A. *Keeping Cases out of State Courts*

The complex relationship between federal and state courts becomes tense when federal courts appear to take claims away from the states. Yet, this is exactly what consumer preemption cases do—they take a state law claim away. A related tension arises when the Court does not allow a state court to exercise personal jurisdiction over a defendant that has injured one of its citizens. There, one could argue, the federal court is also taking a state law remedy away. In other words, these decisions would appear to be an affront to the Justices who wish to protect states' rights because they are taking away the states' power to adjudicate their citizens' claims.

1. The Federalism Procedural Cases

Yet, in recent consumer preemption cases,⁵⁰ the conservative Justices have repeatedly taken positions that disfavored the state. For

50. The nonconsumer preemption cases will not be addressed in this Article. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2260 (2013) (holding that the National Voter Registration Act preempted Arizona's "evidence-of-citizenship" requirement); *Hillman v. Maretta*, 133 S. Ct. 1943, 1947 (2013) (holding that the Federal Employees' Group Life Insurance Act of 1954 preempted a Virginia statute); *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1775 (2013) (holding that the Federal Aviation Administration Authorization Act did not preempt the plaintiff's state law claims related to the storage and disposal of a towed vehicle); *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) (holding that sections of Arizona statute SB 1070 were preempted by federal law); *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (holding that Arizona's licensing laws were not preempted by the Immigration Reform and Control Act); *Rowe v.*

example, in *Altria Group, Inc. v. Good*, the question was whether federal law preempted the plaintiffs' state law claim that advertising was fraudulent when it conveyed the inaccurate message that so-called "light" cigarettes delivered less tar and nicotine.⁵¹ Justice Thomas, Chief Justice Roberts, and Justices Scalia and Alito argued in the dissent that federal law expressly preempted state law claims that would affect the warning labels on cigarettes.⁵² Similarly, the same Justices minus Justice Thomas dissented in *Wyeth v. Levine*.⁵³ They argued that the Federal Drug Administration's (FDA) approval of the drug's warnings preempted the plaintiff's state law claim.⁵⁴

In *PLIVA, Inc. v. Mensing*,⁵⁵ *Mutual Pharmaceutical Co. v. Bartlett*,⁵⁶ and *Bruesewitz v. Wyeth LLC*,⁵⁷ Justices Alito and Kennedy, Chief Justice Roberts, and Justices Scalia and Thomas held that federal law prevented plaintiffs from bringing their state tort law claims.⁵⁸ In all of those cases, the plaintiffs had allegedly suffered serious consequences from taking a particular pharmaceutical product. For example, in *Bartlett*, the plaintiff was prescribed and took a generic form of an anti-inflammatory pain reliever called sulindac.⁵⁹ She had a

N.H. Motor Transp. Ass'n, 552 U.S. 364, 367 (2008) (holding that Maine's state laws regulating the delivery of tobacco were preempted); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 74 (2006) (holding that plaintiff's claims were preempted by Title I of the Securities Litigation Uniform Standards Act of 1998). While these cases certainly implicate federalism, they are less important from a procedural standpoint. In other words, these cases are less likely to prevent individual plaintiffs from bringing state law claims the way that the consumer preemption cases do.

51. 555 U.S. 70, 73 (2008). The Court found that the plaintiffs were not making an argument based on Altria Group's failure to warn, but were instead making a fraud claim—the defendant knew that its statements about the benefits of light cigarettes were not true because it knew that cigarette smokers would smoke more and in such a way as to defeat the benefit of the filters. *Id.* at 87.

52. *Id.* at 107-08 (Thomas, J., dissenting).

53. 555 U.S. 555, 604 (2009) (Alito, J., dissenting). Levine brought state law claims of negligence and strict liability against Wyeth, arguing that its failure to instruct clinicians against the use of the IV-push method of administering the drug was inadequate. *Id.* at 558 (majority opinion). The state court rejected the preemption argument, and at trial, the jury found for Levine and awarded her over \$7 million in damages. *Id.* at 562-63. The Supreme Court affirmed. *Id.* at 563.

54. *Id.* at 604 (Alito, J., dissenting).

55. 131 S. Ct. 2567, 2572 (2011).

56. 133 S. Ct. 2466, 2470 (2013).

57. 131 S. Ct. 1068, 1082 (2011).

58. *PLIVA*, 131 S. Ct. at 2572; *Bartlett*, 133 S. Ct. at 2476; *Bruesewitz*, 131 S. Ct. at 1075. As will be discussed, Justice Breyer wrote separately to concur in *Levine*. 555 U.S. at 582.

59. 133 S. Ct. at 2470.

"horrific" reaction to the drug, developing toxic epidermal necrolysis.⁶⁰ She sued Mutual Pharmaceutical Company (Mutual), the maker of the generic drug, in New Hampshire state court on a state law theory of design defect.⁶¹ She won over \$21 million in damages before a jury, but Mutual appealed, arguing that her claim was preempted according to the Court's decision in *PLIVA*.⁶² That decision held that because federal law required the generic drug label to be the same as the brand-name drug label, the generic brand could not just alter the label's warnings on its own.⁶³ Thus, a plaintiff was unable to challenge the inadequacy of the warning labels under state tort law.⁶⁴ In *Bartlett*, the conservative majority, as they did in *PLIVA*, found that it was impossible for Mutual to comply with both federal and state law.⁶⁵ *Bartlett*, like *PLIVA* and *Bruesewitz*, ultimately prevented a private plaintiff from utilizing state law to remedy her grievance against a corporate defendant.

Similarly, in a recent personal jurisdiction case, a largely conservative block found that a state court had incorrectly asserted personal jurisdiction over a company whose product had injured a state citizen. In *J. McIntyre Machinery Ltd. v. Nicastro*, Robert Nicastro sued J. McIntyre Machinery Ltd. (J. McIntyre) in a New Jersey state court after his hand was seriously injured using one of the company's metal-shearing machines.⁶⁶ J. McIntyre was a British company that manufactured scrap metal machines.⁶⁷ J. McIntyre did not have any direct contact with New Jersey.⁶⁸ At least four of its machines were

60. *Id.* at 2472. This led to almost 65% of her body being burned off or turned into an open wound. *Id.* She was treated, but was left severely disfigured and lost most of her eyesight. *Id.*

61. *Id.*

62. *Id.*

63. *PLIVA*, 131 S. Ct. at 2575-76.

64. *Id.* at 2573.

65. *Bartlett*, 133 S. Ct. at 2473. Complying with New Hampshire law would have required the company to change its warning labels, something that is not allowed under federal law. *Id.* at 2476.

66. 131 S. Ct. 2780, 2786 (2011). The Court's other personal jurisdiction decision, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), was a relatively uncontroversial decision. See Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 U. KAN. L. REV. 549, 550-51 (2012) ("[*Goodyear*] received less attention than *Nicastro*, which provoked a spirited dissent and was greeted with much criticism and alarm." (footnote omitted)).

67. *Nicastro*, 131 S. Ct. at 2786.

68. *Id.* at 2790. Justice Kennedy argued, "The British manufacturer had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State." *Id.*

sold to clients in New Jersey, but the sales took place through an independent distributor.⁶⁹

When Nicastro sued J. McIntyre in a New Jersey state court, that court determined that it had personal jurisdiction over J. McIntyre.⁷⁰ The New Jersey Supreme Court affirmed.⁷¹ The United States Supreme Court reversed in a fractured opinion. First, Justice Kennedy wrote an opinion that was joined by Chief Justice Roberts and Justices Scalia and Thomas. In that opinion, he argued that J. McIntyre had not “purposefully avail[ed] itself of the privilege of conducting activities within [New Jersey].”⁷² More specifically, he argued that J. McIntyre had in no way “targeted” New Jersey.⁷³ It was “not enough that the defendant might have predicted that its goods [would] reach the forum State.”⁷⁴ Instead, the defendant needed to do more to demonstrate that it meant to take advantage of New Jersey’s benefits and laws. Simply distributing the machines nationally in the United States, attending shows throughout the United States (but not in New Jersey), and selling only four machines in the state was not enough to meet this standard.⁷⁵

Justice Kennedy acknowledged that personal jurisdiction was a concept grounded in the Due Process Clause and thus was a matter of personal liberty.⁷⁶ However, in a move that bespoke federalism, he also argued that state sovereignty was in play.⁷⁷ If New Jersey were to assert personal jurisdiction over a defendant when it did not properly obtain it, “it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.”⁷⁸ In other words, if another state properly had personal

69. *Id.* at 2786. Instead, an independent distributor, McIntyre Machinery America, Ltd., was J. McIntyre’s exclusive distributor in the United States. *Id.* at 2796. Plaintiff could not sue McIntyre Machinery America, however, because it declared bankruptcy and was no longer operating at the time of the suit. *Id.* at 2796 n.2.

70. *Id.* at 2786.

71. *Id.* at 2785. The New Jersey Supreme Court found that the “injury occurred in New Jersey” and that the company “reasonably should have known ‘that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states.’” *Id.* at 2786 (quoting *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575 (N.J. 2010)).

72. *Id.* at 2787 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) (internal quotation marks omitted).

73. *Id.* at 2788.

74. *Id.*

75. *Id.* at 2790.

76. *Id.* at 2789.

77. *Id.*

78. *Id.*

jurisdiction over J. McIntyre,⁷⁹ allowing New Jersey to assert personal jurisdiction improperly would not only offend the liberty rights of J. McIntyre, but would also offend the sovereign rights of that other state.⁸⁰

Justices Breyer and Alito wrote separately to concur in the judgment finding that New Jersey did not have personal jurisdiction over J. McIntyre, but they backed away from Justice Kennedy's "seemingly strict no-jurisdiction rule."⁸¹ In a more limited fashion and under existing law, Justices Breyer and Alito found that on the facts before them—four machines in New Jersey, but otherwise no other contact with the state—there was not enough for New Jersey to assert personal jurisdiction.⁸²

2. Federalism Falls to State Court Distrust

In all of these cases, the conservative Justices do not mention any federalism principles that would defend that state's ability to provide a state law remedy to its citizens. As will be discussed in the next Part, it is instead the liberal Justices who praise a system that is deferential to states. Even when Justice Kennedy discussed federalism in *Nicastro*,

79. This premise is questionable because J. McIntyre had similarly slim contacts with each of the individual states. Its aggregate contacts with the United States were significant, but because it used a distributor, its state-to-state contacts were minor.

80. *Id.* Justice Kennedy acknowledged that the "state sovereignty" argument justifying personal jurisdiction had been abandoned, but he included this section regarding state sovereignty nonetheless. See *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 n.10 (1982) (holding that personal jurisdiction is guided by a constitutional due process analysis and not by state sovereignty).

81. *Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring).

82. *Id.* at 2791. Justices Breyer and Alito form the key concurrence in *Nicastro*, which allowed the conservative Justices to prevail in the case, but did not give them the critical votes they needed to solidify their narrow reading of personal jurisdiction. They both deserted their traditional ideological allies. Part of the Justices' hesitancy in finding personal jurisdiction in this case centered on the concern that a small business owner could unwittingly be subject to the varying tort laws of the fifty states by selling his product. *Id.* at 2794. At the same time, the Justices were concerned that siding with the plurality would result in a "strict no-jurisdiction rule" in future cases, which would involve how Internet commerce figured into the entire personal jurisdiction schema. *Id.* at 2793. These Justices kept the law from moving in either direction, so it is interesting that their concurrence consists of one liberal Justice and one conservative Justice. Perhaps their defections, for lack of a better term, simply demonstrate prudence. By allying with one another, they prevented the law from moving at all. Because of this alliance, however, it is difficult to know how they might vote in the next personal jurisdiction case the Court takes. For a detailed account of *Nicastro*, see Paper Symposium, *Making Sense of Personal Jurisdiction After Goodyear and Nicastro*, 16 LEWIS & CLARK L. REV. 827 (2012); Symposium, *Personal Jurisdiction for the Twenty-First Century: The Implications of McIntyre and Goodyear Dunlop Tires*, 63 S.C. L. REV. 463 (2012).

it was not with an eye toward the federal/state distribution of power, it was instead about the power relationship between the states themselves.⁸³

For the conservative Justices, their positions are converse to their traditional federalism stance. Yet, put in a different context, the Justices are fairly consistent. That context is not a federalism one, but is instead the context of attitudes regarding the civil justice system and how it affects business interests. When it comes to state courts, and oftentimes their juries, the conservative Justices are much more likely to work to keep cases out of the state system.⁸⁴ By keeping cases out of the state courts and closing off state law remedies, businesses benefit.⁸⁵ Thus, in the cases discussed above and in the related opinions from the Roberts Court, there is a strong narrative of state court distrust.

The Court's preemption jurisprudence provides ample opportunity to understand the conservative Justices' views of state court civil juries. For example, in *Levine*, the dissent articulated the conflict as one between a federal agency and a "state tort jury."⁸⁶ On at least six occasions, the dissent called out the jury and its decision as being in conflict with the FDA.⁸⁷ The dissent's language is dismissive, referring to the jury as some "jury in Vermont" and stating that the case had allowed "drug labeling by jury verdict."⁸⁸ The dissent's contemptuous attitude about juries' competence and inability to understand complex cases is implicit in the Justices' language. For

83. 131 S. Ct. at 2789.

84. See Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1107-08 (2006) ("Indeed, a plausible case can be made that the vehemence with which the Court's majority reacted to the Florida Supreme Court's decisions in the 2000 presidential election cases stems as much from their hostility towards the role the Florida Supreme Court carved out for itself in resolving the dispute as from the political valence of the state court decision.").

85. See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593 (1998) (finding that plaintiffs' win rates in federal civil cases were 57.97%, but when a case was removed from state to federal court, the win rate dropped to 36.77%); Symeon C. Symeonides, *Choice of Law for Products Liability: The 1990s and Beyond*, 78 TUL. L. REV. 1247, 1315 n.333 (2004) (stating that in the study of 80 product liability cases decided between 1990 and 2003, "[p]laintiffs fared slightly better in state courts (57% pro-plaintiff law) than in federal courts (46% pro-plaintiff)").

86. *Wyeth v. Levine*, 555 U.S. 555, 605 (2009) (Alito, J., dissenting).

87. *Id.* at 604-05, 628 ("jury in Vermont"); *id.* at 606, 612 ("drug labeling by jury verdict"); *id.* at 626-27 ("jury's cost-benefit analysis in a particular case may well differ from the FDA's").

88. *Id.* at 605, 612, 628.

instance, the conservative Justices argued that the FDA had decided against ordering the labeling that would have been required by *Levine* for more dangerous drugs like mustard gas. The insinuation there was that the FDA—far more expert in the field—must have known what it was doing, while the civil lay jury had gotten it wrong.⁸⁹ The dissent expressed distaste for this result when it stated that “a jury in Vermont can now order for Phenergan what the FDA has chosen not to order for mustard gas.”⁹⁰

Justices Breyer and Alito have also overtly questioned the competence of juries, state courts, or both in the personal jurisdiction context. In *Nicastro*, the Justices expressed concern about small business purveyors who distribute their products throughout the United States.⁹¹ They argued that a broad reading of personal jurisdiction would mean that these small businesses would be subject to “the wide variance in the way courts within different States apply” their respective tort laws.⁹² They cited statistics showing the range of “plaintiff winners in tort trials” in a number of counties across the United States.⁹³ That range—17.9% to 69.1%—was intended to show volatility in the respective states’ tort regimes and was in the very least meant to suggest that the win rates were a proxy for the inaccuracy of those regimes.⁹⁴

A related theme in these cases is that business interests are not well served by a fifty-state court system. For example, in *Altria Group*, Justice Thomas bemoaned that the case would allow “juries to decide, on a state-by-state basis, whether petitioners’ light and low-tar descriptors were in fact fraudulent.”⁹⁵ In another section, Justice

89. *Id.* at 628.

90. *Id.* Questioning the competence of civil juries is not wholly the province of conservative Justices, however. For example, Justice Breyer in his concurrence in *Bruesewitz* explicitly questioned whether it makes sense to allow a jury to “second-guess” the determinations made by the experts in the National Childhood Vaccine Injury Act’s no-fault compensation regime. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1085 (2011) (Breyer, J., concurring). In that case, however, it seemed that Justice Breyer was not so much questioning the competence of a civil jury, but was instead arguing that Congress has created a regime where experts are weighing in on the safety of the drugs in an effort to minimize tort litigation. To that end, one could argue he was simply being deferential to these experts. Even still, his rhetoric about civil juries can be interpreted as a criticism of their functionality.

91. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2794 (2011) (Breyer, J., concurring).

92. *Id.*

93. *Id.* (citing Thomas H. Cohen, *Tort Trials and Verdicts in Large Counties*, 2001, BUREAU JUST. STAT. BULL. 12 (Nov. 2004), <http://www.bjs.gov/content/pub/pdf/ttvlc01.pdf>).

94. *Id.* (citing Cohen, *supra* note 93, at 11).

95. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 107 (2008) (Thomas, J., dissenting).

Thomas argued that the case would “open[] the door to an untold number of deceptive-practices lawsuits across the country” that “would almost certainly be [decided] differently from State to State.”⁹⁶ The inconsistent results to be obtained across different states would lead to the kind of indeterminacy that the conservative Justices find so troublesome. Indeed, how can businesses plan ahead and comply with the law when that law is subject to the whim of juries in fifty different states?⁹⁷

This point was also made in *Levine*, where the conservative Justices questioned the ability of a jury to conduct the kind of complex cost-benefit analysis required to regulate pharmaceutical drugs.⁹⁸ The dissent argued that “juries are ill equipped to perform the FDA’s cost-benefit-balancing function” because they “tend to focus on the risk of a particular product’s design or warning label that arguably contributed to a particular plaintiff’s injury, not on the overall benefits of that design or label.”⁹⁹ Because the parties who benefited from the drug are not in the court and the jury is unable to appreciate the vast benefits the drug may have had, all they can see is the devastation that the drug has caused.¹⁰⁰ Thus, juries are unreliable in their ability to weigh the drug’s benefits against the explicit cost they witness in the courtroom. The same theme emerged in *Bruesewitz*, where the conservative majority argued that Congress and the National Childhood Vaccine Injury Act had done what was necessary to preserve public safety in the vaccine market, such that any intermeddling by civil tort juries would upset that system.¹⁰¹

Relatedly, the conservative Justices worry that tort litigation can be a societal harm because it affects business incentives. In *Bruesewitz*, the majority wrote that civil litigation had driven vaccine manufacturers out of business and created shortages in the vaccine

96. *Id.* at 108 (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 553 (1992)) (internal quotation marks omitted).

97. A somewhat related sentiment is found in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* One of Justice Scalia’s main concerns in *Erie* cases is to maintain uniformity in how the Federal Rules of Civil Procedure are applied. He wrote of the “very real concern that Federal Rules which vary from State to State would be chaos.” *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 413 (2010). Uniformity in the federal rules of procedure is a benefit to business interests, who can obtain top-notch legal counsel with the capability of practicing in federal courts all across the United States. Justice Thomas’s concerns about different substantive tort standards in *Altria Group* are just like Justice Scalia’s concerns about different procedural standards from state to state.

98. *Wyeth v. Levine*, 555 U.S. 555, 626 (2009) (Alito, J., dissenting).

99. *Id.*

100. *Id.*

101. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1079 (2011).

market.¹⁰² There was concern for public safety, of course, but there was also concern for corporate profit margins and economic incentive structures. For example, the majority noted that one of the manufacturers “estimated that its potential tort liability exceeded its annual sales by a factor of 200.”¹⁰³ Similarly, in *Altria Group*, the conservative dissent worried that business interests would be burdened if there were fifty different rules across the United States.¹⁰⁴ The concern that businesses be free of a litigation burden, or in the very least be able to predict potential exposure to liability, is especially pronounced in an area like product liability.¹⁰⁵

The conservative Justices’ hostility to state law claims because of the harm they might do to business interests is also found in the personal jurisdiction case of *Nicastro*. There, the plurality expressed concern about a “small Florida farm[er]” who “might sell crops to a large nearby distributor,” only to have them distributed across the country.¹⁰⁶ That farmer, Justice Kennedy argued, might be “sued in Alaska or any number of other States’ courts without ever leaving town.”¹⁰⁷ The conservative Justices repeatedly argue that small businesses might not engage in commerce if there is a possibility of being held accountable in all fifty states. The irony in *Nicastro*, of course, is that the company—like all of the companies in the preemption cases—was not a small business. In fact, it was a large international company.¹⁰⁸ Nonetheless, a paramount concern for the

102. *Id.* at 1073.

103. *Id.*

104. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 108 (2008) (Thomas, J., dissenting).

105. This line of reasoning is not confined to conservative Justices, however. At least in the context of statutory damages and class actions, Justice Ginsburg in *Shady Grove* used similar language to warn against abuse of class actions. She stated that New York’s law in that case was meant to “prevent the exorbitant inflation of penalties—remedies the New York Legislature created with individual suits in mind.” *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 (2010) (Ginsburg, J., dissenting). Moreover, she noted that “[w]hen representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury.” *Id.* at 445 n.3. Her language seems critical of class actions, but unlike the conservative Justices’ opinions, it is limited to class actions in the context of statutory damages—a context that many commentators and judges, whether they are liberal or conservative, might reasonably agree is ill-suited to the class action mechanism. Indeed, as Justice Ginsburg noted in *Shady Grove*, Congress has limited the availability of class actions in certain legislation providing for statutory penalties. *Id.* at 450.

106. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2790 (2011).

107. *Id.*

108. *Id.* at 2786. For a discussion of how a formalist approach to the conception of sovereignty in *Nicastro* was a mistake, see Glenn S. Koppel, *The Functional and Dysfunctional Role of Formalism in Federalism: Shady Grove Versus Nicastro*, 16 LEWIS & CLARK L. REV. 905, 963 (2012) (“However plausible the formalist justification of state

conservative wing appears to be how business incentives are affected by a fifty-state tort regime.¹⁰⁹

B. *State Courts as Regulators*

In the previous Subpart, the Article examined how conservative Justices do not raise federalism concerns in the context of private civil litigation, even when the states' power is being diminished by federal power. This is in stark contrast to liberal Justices who regularly rehearse pro-states' rights rhetoric in this context. This plays out in both preemption and personal jurisdiction cases.

1. The Federalism Procedural Cases

For example, in *Altria Group*, the majority, which included Justices Stevens, Breyer, Ginsburg, Kennedy, and Souter, determined that the Federal Cigarette Labeling and Advertising Act did not expressly or impliedly preempt state law.¹¹⁰ The Justices made strong federalist statements, arguing that federal law should not supersede state law without a clear statement by Congress, especially "when Congress has legislated in a field traditionally occupied by the States."¹¹¹ Similarly, in *Levine*, these same Justices held that Wyeth could be held liable for its failure to instruct clinicians against particular uses of its drug, even when the drug had already been approved by the FDA.¹¹² The majority stated that in all preemption cases, there is a presumption against preemption out of "respect for the States as 'independent sovereigns in our federal system.'"¹¹³

territorial sovereignty's role in personal jurisdiction doctrine domestically, the plurality's concern with upsetting the federal balance of sovereign power among the states is misplaced in the international context of national sovereignties." (footnote omitted)).

109. In fact, even Justice Breyer in his concurrence with Justice Alito made the same kind of argument. They worried about the "small manufacturer" like "an Appalachian potter" and whether it would be fair to subject him to personal jurisdiction in every state. *Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring). The Justices also worried about international manufacturers ("a small Egyptian shirt maker") for the same reason—that those small purveyors, by selling their product to an American distributor, could be subject to the tort law of every state. *Id.* at 2794.

110. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 73 (2008).

111. *Id.* at 77.

112. *Wyeth v. Levine*, 555 U.S. 555, 558-59 (2009).

113. *Id.* at 565 n.3 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Justice Thomas concurred in the judgment, arguing that Wyeth could have complied with both state and federal law. *Id.* at 583 (Thomas, J., concurring). In other words, there was no impossibility. He wrote separately, however, to step away from the majority's discussion of the "purposes and objectives" line of preemption cases. *Id.* at 583, 594. Justice Thomas has been wary of "purposes and objectives" preemption cases because the "potentially

When dissenting in preemption cases, the liberal Justices articulate similar states' rights concerns. In *PLIVA*, these Justices stated that the majority's decision "threaten[ed] to infringe the States' authority over traditional matters of state interest—such as the failure-to-warn claims here—when Congress expressed no intent to pre-empt state law."¹¹⁴ In *Bartlett*, the dissenting Justices¹¹⁵ argued that Mutual could have complied with both state and federal law "either by not doing business in the relevant State or by paying the state penalty, say damages, for failing to comply with, as here, a state-law tort standard."¹¹⁶ Justice Sotomayor criticized the majority for "its revision of [the plaintiff's] state-law claim through an implicit and undefended assumption that federal law gives pharmaceutical companies a right to sell a federally approved drug free from common-law liability."¹¹⁷ As in *PLIVA*, the liberal Justices argued that state law was "complementary" because "Congress' preservation of a role for state law generally, and common-law remedies specifically, reflects a realistic understanding of the limitations of *ex ante* federal regulatory review in this context."¹¹⁸ Finally, in *Bruesewitz*, Justices Sotomayor and Ginsburg argued in the dissent that the plaintiffs should not have been prevented from bringing their claims against a vaccine manufacturer because of federal law.¹¹⁹

In the *Nicastro* dissent, Justices Ginsburg, Kagan, and Sotomayor used similar pro-state language when discussing personal jurisdiction. These Justices completely reset the narrative of the case, casting J. McIntyre as a "foreign industrialist" whose company's "goal [was] simply to sell as much as it can, wherever it can," meaning that it

boundless" doctrine relies on the Court's "interpretation of broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law." *Id.* at 587.

114. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2589 (2011) (Sotomayor, J., dissenting).

115. The dissent included Justices Breyer, Kagan, Sotomayor, and Ginsburg.

116. *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2481 (2013) (Breyer, J., dissenting).

117. *Id.* at 2482-83 (Sotomayor, J., dissenting).

118. *Id.* at 2484.

119. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1086 (2011) (Sotomayor, J., dissenting). Justice Kagan did not sit for this case. Justice Breyer concurred in the judgment. While he generally sided with the liberal block on these issues, he did not here. He argued that the majority's textual argument was good, but that what really decided the issue for him was the legislative history and statutory purpose. *Id.* at 1083. Largely because the congressional history indicated that Congress determined that the increase in tort suits had led manufacturers to begin thinking about getting out of the market, Justice Breyer concluded that the plaintiff's suit was preempted. *Id.* at 1084.

“exclude[d] no region or State from the market it wishe[d] to reach.”¹²⁰ Justice Ginsburg argued that, against existing precedent, the Court had allowed the manufacturer to escape jurisdiction by simply “engag[ing] a U.S. distributor to ship its machines stateside.”¹²¹ Citing the fact that New Jersey processed the most metal recyclables of any state, that Nicaastro’s boss first learned of the offending machine while at a convention in Las Vegas, and the company’s profits and general targeting of the U.S. market, the dissent argued that jurisdiction was appropriate.¹²² Justice Ginsburg wrote, “On what sensible view of the allocation of adjudicatory authority could the place of Nicaastro’s injury within the United States be deemed off limits for his products liability claim . . . ?”¹²³ In contrast to Justice Kennedy’s version of federalism, which worried about the other states that might have a claim to personal jurisdiction in this case, the dissent worried about the state where the injury occurred and its interest in protecting its citizens from products directed there.¹²⁴

2. Federalism Used To Bolster State Court Access

What these cases generally reveal is that, like the conservative Justices, the liberal Justices tend to sound different federalism themes in these procedural cases. Instead of relying on their traditional federalism arguments that generally place more stock in federal authority, the liberal Justices use language that lauds the states and questions the authority of the federal government.

This is because, like the conservative Justices, the liberal Justices tend to elevate their concern for particular litigation stakeholders over their federalism principles. In the context of their regard for plaintiffs and their claims, the liberal Justices suspect that state courts, state law remedies, and civil juries might provide a more winnable set of circumstances for individual plaintiffs than the federal regime.¹²⁵ Thus, as opposed to narratives about federal power, the liberals highlight what they see as the benefits of a robust state law system.

120. *J. McIntyre Mach., Ltd. v. Nicaastro*, 131 S. Ct. 2780, 2794 (2011) (Ginsburg, J., dissenting).

121. *Id.*

122. *Id.* at 2797.

123. *Id.*

124. Justice Ginsburg also pointed out that there was no other state who had a better claim to this case because the injury occurred in New Jersey. *Id.* at 2798; see Koppel, *supra* note 108.

125. See Clermont & Eisenberg, *supra* note 85; Symeonides, *supra* note 85.

First, according to the liberal Justices, the state court system provides a regulatory function that supplements a resource-strapped federal regulatory regime. For example, in *Levine*, the liberal majority argued that “state law offers an additional, and important, layer of consumer protection that complements FDA regulation.”¹²⁶ Because of incentives that state tort suits provide, the Court argued, manufacturers are more likely to disclose risks quickly, victims are more likely to come forward with important information, and hazards are more likely to be discovered.¹²⁷ Essentially, the Court maintained that the FDA had only “limited resources” with which to monitor all of the drugs hitting the market, making state tort suits essential to the regulation of potentially dangerous drugs.¹²⁸ Similarly, in *Bartlett*, the liberal Justices discussed the “significant resource constraints” of federal agencies that limit their ability to “protect the public from dangerous” products.¹²⁹

A related theme was found in *PLIVA*. There, the Justices stated that the majority decision “creates a gap in the parallel federal-state regulatory scheme in a way that could have troubling consequences for drug safety.”¹³⁰ Because there was no longer a state law route to regulating generic drug manufacturers, the Justices argued that the decision “eliminate[d] the traditional state-law incentives for generic manufacturers to monitor and disclose safety risks.”¹³¹ This “additional . . . layer of consumer protection” is a critical concern for the liberal Justices.¹³² The same was true in *Bruesewitz*, where the liberal dissent argued that the majority’s decision left “a regulatory vacuum in which no one ensures that vaccine manufacturers adequately take account of scientific and technological advancements when designing or distributing their products.”¹³³

In addition, the liberal Justices counter the narrative that businesses cannot successfully account for litigation risks in their business models. In *Nicastro*, for example, the dissent argued that companies can and do purchase insurance in case their products prove

126. *Wyeth v. Levine*, 555 U.S. 555, 578 (2009).

127. *Id.* at 579.

128. *Id.* at 578.

129. *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2485 (2013) (Sotomayor, J., dissenting).

130. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2592 (2011) (Sotomayor, J., dissenting).

131. *Id.*

132. *Id.* at 2593 (quoting *Levine*, 555 U.S. at 579) (internal quotation marks omitted).

133. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1086 (2011) (Sotomayor, J., dissenting).

defective.¹³⁴ This insurance is not prohibitively expensive; in fact, J. McIntyre had such insurance.¹³⁵ Moreover, states, in an effort to protect their citizenry, enact state statutes that are meant to reach offending companies when defective products injure their citizens.¹³⁶ These statutes and the states' efforts to protect their citizens, the dissent argued, should be respected. And because businesses like J. McIntyre are fully aware of these litigation risks, defending a case in New Jersey should be considered a "reasonable cost of transacting business internationally."¹³⁷

Finally, the liberal Justices tend to focus on the aggrieved party. The dissent in *Nicastro* argued that the company's burden to litigate in New Jersey was small, especially when contrasted with the burden the plaintiff would incur by travelling overseas to bring his case "for an injury he sustained using McIntyre's product at his workplace in Saddle Brook, New Jersey."¹³⁸ In contrast to the conservative Justices' concern about business defendants, the liberal Justices expressed concern about the individual plaintiffs.¹³⁹ *Bartlett* also demonstrated this divide. The conservative Justices accused the liberal Justices of being too emotional about the "tragic" events of that case.¹⁴⁰ The liberal dissent countered that the Court had "turn[ed] Congress' intent on its head" and that "[a]s a result, the Court ha[d] left a seriously injured consumer without any remedy despite Congress' explicit efforts to preserve state common-law liability."¹⁴¹ In other words, each faction tends to focus on the party which they believe needs the most protection in civil litigation. Doing so leads them into narratives about the benefits and costs of state courts, state laws, and state remedies—narratives that divide depending on how each of these respective parties are best served.

134. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2799 (2011) (Ginsburg, J., dissenting).

135. *Id.* The study cited by the dissent stated that the insurance could cost "only sixteen cents for each \$100 of product sales." *Id.* (citation omitted) (internal quotation marks omitted).

136. *Id.* at 2800.

137. *Id.* at 2800-01.

138. *Id.* at 2801.

139. *Id.* at 2801-02.

140. *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2478, 2480 (2013).

141. *Id.* at 2496 (Sotomayor, J., dissenting).

IV. SUBSTANTIVE LAW CLAIMS

In the second narrative set, the conservative Justices appear dubious of certain kinds of substantive cases like discrimination and product liability. This doubt emerges in their opinions and may seem overtly anti-plaintiff. But, it is certainly not the case that the conservative Justices always find against plaintiffs.¹⁴² To the contrary, the conservative Justices' suspicions are aimed at a subset of substantive claims. In contrast, the liberal Justices appear to support plaintiffs who bring substantive claims in the areas where conservative Justices seem to apply more scrutiny.

A. *Skepticism of Particular Substantive Law Claims*

When it comes to state-created substantive claims, one might expect conservative Justices to endeavor to preserve those rights in the face of federal conflict. Yet, that picture is far more complicated than it might seem. In the following Subpart, the conservative Justices demonstrate that in procedural cases, they are prone to use procedure to inhibit plaintiffs' access to adjudicating particular substantive claims.

1. The Federalism Procedural Cases

A complicated reversal of federalism principals also occurred in the context of a class action case, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*¹⁴³ *Shady Grove* defies categories, but for this Article, it will be treated as a class action case. Sonia Galvez was injured in an automobile accident and sought medical care for those injuries at Shady Grove Orthopedic Associates (Shady Grove).¹⁴⁴ In order to cover part of the cost of that care, she assigned her rights to certain insurance benefits under an Allstate policy. Shady Grove sought those benefits, which under New York law had to be paid or denied within thirty days of submission. While Allstate paid the claim,

142. For example, in the criminal context, the conservative Justices will often side with the state and against the individual defendant. Robert H. Smith, *Uncoupling the "Centrist Bloc"—An Empirical Analysis of the Thesis of a Dominant, Moderate Bloc on the United States Supreme Court*, 62 TENN. L. REV. 1, 39 (1994) (discussing the data showing that the "conservative justices were highly cohesive and strongly pro-prosecution in their voting, contrasted with the liberals who were extremely cohesive in voting in favor of defendants").

143. 559 U.S. 393 (2010). While the Court ultimately allowed the class action to go forward, and thus allowed the case to be adjudicated, it is an exception to the trend in most of these cases. See discussion *infra* Parts V.A.2, V.B.2.

144. *Shady Grove*, 559 U.S. at 397.

it was late doing so. Moreover, when it finally paid Shady Grove, it refused to pay the statutory interest that was due on the late payment.

Seeking this statutory interest, Shady Grove filed a suit on its behalf and on behalf of all others to whom Allstate had refused to pay statutory interest.¹⁴⁵ Shady Grove argued that Allstate routinely refused to pay this interest in violation of state law.¹⁴⁶ The federal district court dismissed the case because it determined that a New York state law precluded these types of suits.¹⁴⁷ More specifically, section 901(b) of the New York Civil Practice Law and Rules prohibited any litigation seeking a “penalty” from going forward as a class action.¹⁴⁸ Because Shady Grove could not bring a class action and because its alleged \$500 in individual damages did not satisfy the minimum amount in controversy, the court dismissed the case for lack of jurisdiction.¹⁴⁹ The United States Court of Appeals for the Second Circuit affirmed.¹⁵⁰

Justice Scalia wrote the plurality opinion, in which Chief Justice Roberts and Justices Thomas and Sotomayor joined.¹⁵¹ Justice Scalia’s position was fairly straightforward: section 901(b) directly conflicted with Federal Rule of Civil Procedure 23.¹⁵² Rule 23 allows for class actions, while section 901(b) did not. That, according to Justice Scalia, required the federal rule to trump.¹⁵³ He refused to look beyond the plain text of section 901(b) and take account of the law’s legislative history, arguing that doing so would make the *Erie* determination far too cumbersome for courts.¹⁵⁴

Following the Court’s *Erie* line of cases, Justice Scalia argued that Rule 23 regulated procedure, thus meeting the requirements of the Rules Enabling Act.¹⁵⁵ Once a state rule like section 901(b) conflicts with Rule 23 in federal court, then, the state rule cannot be applied. He wrote that a class action was “no less than traditional joinder (of which it is a species)” that “merely enable[d] a federal court to

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 398.

151. *Id.* at 395-96. Justice Sotomayor did not join the section of the Scalia plurality that takes Justice Stevens to task for his concurrence. Also, Justice Stevens wrote a separate concurrence and concurred in the judgment while Justices Ginsburg, Breyer, Kennedy, and Alito dissented. This will be discussed in greater detail in Parts V.A.2 and V.B.2.

152. *Shady Grove*, 559 U.S. at 399.

153. *Id.* at 399-400.

154. *Id.* at 405.

155. *Id.* at 408; see 28 U.S.C. § 2072 (2012).

adjudicate claims of multiple parties at once, instead of in separate suits.”¹⁵⁶ Further, “like traditional joinder, it leaves the parties’ legal rights and duties intact and the rules of decision unchanged.”¹⁵⁷ As to the argument that allowing the case to go forward turns the litigation from a \$500 suit to a \$5 million suit, Justice Scalia responded by acknowledging that “some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action.”¹⁵⁸ Yet, according to Justice Scalia, the inducement effect of the class action was just the “sort of incidental effect” that the Court held would not violate the Rules Enabling Act.¹⁵⁹

This plurality opinion is thus unusual for a couple of reasons. First, a largely conservative majority refused to apply a state law, calling into question their federalism allegiance. And, second, a largely conservative majority somewhat celebrated, and in the very least did not deride, the class action—a procedural device to which it has been otherwise quite hostile.¹⁶⁰ Finally, Justice Scalia did not make one mention of federalism. Only Justice Stevens in his concurrence and Justice Ginsburg in her dissent discussed that subject.¹⁶¹

2. Federalism Yields to Substantive Claim Skepticism

In the cases discussed in this Article, the conservative Justices have generally retreated from their traditional federalism positions. In this Subpart, the Article argues that these Justices’ distaste for particular kinds of substantive claims leads them to give a little on

156. *Shady Grove*, 559 U.S. at 408.

157. *Id.*

158. *Id.*

159. *Id.*

160. See discussion *infra* Part IV.B.1.

161. Justice Stevens complicates *Shady Grove* a bit more because he joined in the judgment, but wrote separately in a concurrence. The details on his concurrence are beyond the scope of this Article, but the upshot is that he agreed with the result in the case but wanted to reserve judgment on a case where the state procedural rule really did function “as a part of the State’s definition of substantive rights and remedies.” *Shady Grove*, 559 U.S. at 417 (Stevens, J., concurring). This is where Justice Stevens struck a states’-rights chord. He wrote:

In our federalist system, Congress has not mandated that federal courts dictate to state legislatures the form that their substantive law must take. . . . [T]o ignore those portions of substantive state law that operate as procedural devices . . . could . . . limit the ways that sovereign States may define their rights and remedies.

Id. at 420. For a detailed discussion of *Shady Grove*, see Adam N. Steinman, *Our Class Action Federalism: Erie and the Rules Enabling Act After Shady Grove*, 86 NOTRE DAME L. REV. 1131, 1134 (2011).

federalism in order to gain a little in discouraging particular kinds of substantive claims.

In the preemption context, it seems that the conservative Justices are arguably hostile to product liability cases. Whether this hostility comes from a view that the cases are frivolous is not entirely knowable. Even so, skepticism about product liability cases does not necessarily arise exclusively from a belief that the claims are frivolous. Aside from questions of legitimacy, what seems to motivate the Justices' concern about these types of claims is the sense that the civil justice system, specifically state tort law, is not the best vehicle to address product liability. This view was expressed in *PLIVA*, *Bartlett*, and *Bruesewitz*.¹⁶² To a large degree, the Justices argued that regulatory agencies have done the work of protecting numerous consumers, work that from an *ex ante* perspective may have protected far more consumers than we can ever know. To allow state tort systems to come in and question that system by protecting some of the consumers that were not otherwise protected is an inept *ex post* move. This is because it does not properly account for the careful decision making on the front end by the regulatory regime. For example, in *Bartlett*, the conservative majority acknowledged the plaintiff's "dreadful" injury, but warned that the Court's response could not be guided by passion and sympathy.¹⁶³ Instead, the Court had to follow the law, which, according to the majority, did not require the drug manufacturer to stop selling a potentially dangerous drug.¹⁶⁴ This world view—one that seems to defer to business actors—often leads the conservative Justices to take a position that looks quite hostile to product liability claims.¹⁶⁵

The conservative Justices' aversion to certain kinds of substantive claims is not limited to product liability, however. Looking more broadly at the procedural cases in these categories that do not present federalism issues, the Justices also demonstrate a distinct skepticism of discrimination claims.¹⁶⁶ For example, in the class action case *Wal-*

162. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011); *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068 (2011).

163. 133 S. Ct. at 2478.

164. *Id.* at 2477 ("Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability.").

165. See also Epstein, Landes & Posner, *supra* note 3 (arguing that the pro-business charge is misplaced and better explained by taking an *ex ante* view of what rule will work best for most, but not all, consumers).

166. See, e.g., Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501 (2012); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion,"*

Mart Stores, Inc. v. Dukes, the conservative Justices exhibited far more skepticism of the plaintiffs' claims than the liberal Justices did.¹⁶⁷ The *Dukes* plaintiffs alleged that Wal-Mart's policy of giving local managers discretion over pay levels and promotions, in addition to the company's overall culture of hostility to women, had resulted in an unlawful discriminatory impact on female employees.¹⁶⁸ All of the Justices agreed that the class should not have been certified under Federal Rule of Civil Procedure 23(b)(2), but the liberal Justices disagreed with the conservative Justices' treatment of commonality under that rule.¹⁶⁹ The specifics of that disagreement over commonality are beyond the scope of this Article, but because of that disagreement, the conservative and liberal Justices had to discuss the merits of the gender discrimination allegations.¹⁷⁰

What this exchange demonstrated was that the conservative Justices were not so much concerned about the nature of this substantive claim because of the harm the litigation might do to business interests, although there was some of that when the majority talked about the vast scope of the *Dukes* case.¹⁷¹ Unlike in the product liability cases, the conservative Justices actually appeared to overtly question the claim's legitimacy. To put it differently, the conservative Justices seemed to have a presumption against gender discrimination.

For example, the *Dukes* plaintiffs presented three different types of evidence for their claims. They offered statistical evidence about the alleged pay disparities, anecdotal evidence of discrimination from a subset of the plaintiff class, and sociological evidence about Wal-Mart's culture and its personnel practices.¹⁷² Justice Scalia, writing for the conservative majority, took issue with all of this evidence.

"Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. REV. 982, 984-87 (2003); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 766-67 (2007).

167. 131 S. Ct. 2541, 2555-56, 2562-63 (2011).

168. *Id.* at 254.

169. *Id.* at 2561 (Ginsburg, J., concurring in part and dissenting in part). The liberal Justices also left open the possibility that the class could have been certified under Federal Rule of Civil Procedure 23(b)(3). *Dukes*, 131 S. Ct. at 2561. For a detailed account of *Dukes*, see Symposium, *Class Action Rollback? Wal-Mart v. Dukes and the Future of Class Action Litigation*, 62 DEPAUL L. REV. 653 (2013).

170. *Dukes*, 131 S. Ct. at 2550-57 (majority opinion); *id.* at 2562-65 (Ginsburg, J., concurring in part and dissenting in part).

171. *Id.* at 2547 (majority opinion) ("most expansive class actions ever").

172. *Id.* at 2549.

Justice Scalia argued that Wal-Mart's express policy prohibited sex discrimination, and he was unwilling to accept the sociologist's expert opinion to the contrary. This was because the expert could not pinpoint how many of the employment decisions in the company were affected by the "strong corporate culture" that made it more susceptible to "gender bias."¹⁷³ Given this doubt, Justice Scalia defaulted to his presumption that "left to their own devices most managers in any corporation—and surely most managers in a corporation [like Wal-Mart] that [expressly] forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion."¹⁷⁴ In other words, instead of assuming that the sociological evidence might show that the corporate culture results in a large number of discriminatory decisions being made, the conservative Justices presumed the complete opposite—that most managers will do the "right" thing.¹⁷⁵ They could not believe that managers across the country would act in a discriminatory way, across the board, without direct orders from the company to do so.¹⁷⁶ Justice Scalia wrote, "In a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction."¹⁷⁷ Because the "common direction" was that managers could not discriminate on the basis of gender, the Justices assumed that most, if not all, managers followed that edict.¹⁷⁸ Justice Scalia also questioned the value of the statistical evidence.¹⁷⁹ He argued that looking at regional or national data did not demonstrate the "store-by-store" disparity that plaintiffs alleged.¹⁸⁰ Moreover, he asserted that most managers will claim to have used some "sex-neutral, performance-based criteria," a claim that he and the other conservative Justices seemed inclined to believe.¹⁸¹

173. *Id.* at 2553 (internal quotation marks omitted).

174. *Id.* at 2554.

175. *Id.*

176. *Id.* at 2555.

177. *Id.*

178. *Id.* at 2556-57.

179. *Id.* at 2555.

180. *Id.*

181. *Id.* The conservative Justices' scrutiny of discrimination claims is reflected in what many argue is a larger federal court hostility to discrimination claims. See sources cited *supra* note 166.

B. Greater Concern for Particular Substantive Law Claims

The conservative Justices' scrutiny of particular kinds of substantive rights is countered by the liberal Justices, who on many occasions take a friendlier stance. As this Subpart will discuss, the liberal Justices tend to take a pro-federalism position in an attempt to further the viability of certain substantive claims to which they are sympathetic.

1. The Federalism Procedural Cases

In *Shady Grove*, Justice Scalia did not overtly discuss the federalism issues in that case. Yet, it was that exact principle that animated Justice Ginsburg in her dissent. Justice Ginsburg argued strongly for resolving *Erie* questions in a way that would respect states' rights. She stated that she "would continue to interpret Federal Rules with awareness of, and sensitivity to, important state regulatory policies."¹⁸² *Erie* itself was one of the "cornerstones of our federalism," thus the Court must act "with an eye alert to . . . avoiding disregard of State law."¹⁸³ In *Shady Grove*, Justice Ginsburg argued that the state's interest in preventing excessive damages was a substantive rule deserving of deference under the Rules Enabling Act.¹⁸⁴ She argued, "The fair and efficient *conduct* of class litigation is the legitimate concern of Rule 23; the *remedy* for an infraction of state law, however, is the legitimate concern of the State's lawmakers and not of the federal rulemakers."¹⁸⁵ Because of "the impropriety of displacing, in a diversity action, state-law limitations on state-created remedies," Justice Ginsburg argued that the majority's decision "ero[ded] . . . *Erie's* federalism grounding."¹⁸⁶ Thus, like the other categories of cases in this Part, the liberal Justices strongly articulated positions protective of states' rights, while the conservative Justices tended to side with the federal government.

182. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 437 (2010) (Ginsburg, J., dissenting).

183. *Id.* at 438 (quoting *Guar. Trust Co. v. York*, 326 U.S. 99, 110 (1945)) (internal quotation marks omitted).

184. *Id.* at 442.

185. *Id.* at 447.

186. *Id.* at 457-58.

2. Federalism Used To Further the Viability of Substantive Claims

In the context of these federalism cases, the conservative Justices' scrutiny of particular kinds of substantive rights is countered by the liberal Justices, who on many occasions take a friendlier stance. For example, in contrast to Justice Scalia's scrutiny of the plaintiffs' evidence in *Dukes*, Justice Ginsburg took a position that showed her confidence in the allegations made. While Justice Scalia was skeptical of the statistical evidence, Justice Ginsburg noted that while women held 70% of the hourly jobs at Wal-Mart, they only made up 33% of the company's management.¹⁸⁷ She also took issue with Justice Scalia's presumption that managers would act according to Wal-Mart's official policies. The managers' discretion to pay employees anywhere within a \$2 band at every level, Justice Ginsburg argued, left open the distinct possibility that management's "unconscious bias" would win out and result in Wal-Mart's notable gender pay gap.¹⁸⁸ In other words, Justice Ginsburg approached this gender discrimination case from a position that was far more likely to accept the possibility of such discrimination. She stated, "Managers, like all humankind, may be prey to biases of which they are unaware."¹⁸⁹ Justice Ginsburg's opinion discussed unconscious bias and drew an inference from the evidence in that direction, while the conservative Justices inferred the opposite behavior—one of nondiscrimination—from the same evidence. This distinction demonstrates that the liberal Justices tend to be more receptive to certain kinds of substantive claims than their conservative counterparts.

This same distinction is apparent in the Court's consumer preemption cases. The liberal Justices do not give as much scrutiny to the potential frivolity of product liability claims, for example. Instead, the Justices focus on the consumer protection function served by the operation of state law in the product liability arena. Thus, in *PLIVA*, Justice Sotomayor lamented that the "traditional state-law incentives" for ensuring that manufacturers "monitor[ed] and disclose[d] safety risks" were severely threatened by preemption cases that closed off a state law route to litigation.¹⁹⁰ This was especially true in *PLIVA* because, as Justice Sotomayor argued, generic drugs make up 75% of

187. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2563 (2011) (Ginsburg, J., concurring in part and dissenting in part).

188. *Id.*

189. *Id.* at 2564.

190. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2592 (2011) (Sotomayor, J., dissenting).

the pharmaceutical drugs dispensed in the United States.¹⁹¹ Similarly, in *Bruesewitz*, Justice Sotomayor wrote of the “regulatory vacuum” created because plaintiffs could not bring state law claims.¹⁹²

Moreover, just as the conservative Justices tend to focus on the defendant corporations in product liability and discrimination cases, the liberal Justices tend to focus on the plaintiffs. The plaintiffs and their claims, more than the defendant businesses, are at the forefront of the liberal Justices’ opinions. For example, in *Nicastro*, Justice Ginsburg argued that the plurality’s opinion not only negatively impacted plaintiffs with domestic product liability claims, it also put those plaintiffs at a disadvantage relative “to similarly situated complainants elsewhere in the world.”¹⁹³ In other words, Justice Ginsburg argued that plaintiffs with tort claims in other countries, like the United Kingdom, had more access to their respective court systems than plaintiffs in the United States did.¹⁹⁴

The narratives regarding substantive claims further demonstrate the proclivity the conservative and liberal factions have for protecting certain parties. In this context, across product liability and discrimination claims, the Justices can generally be categorized by their support for corporate defendants or their support of individual or small business plaintiffs. As these narratives demonstrate, this division ends up being a better predictor of how the Justices will vote than any concerns about federalism might be.

V. CIVIL LITIGATION

Finally, the third narrative set involves the Court’s view of the civil litigation system and its efficiency. The conservative Justices express skepticism regarding the civil justice system, criticizing the cost of litigation and the impact of frivolous claims.¹⁹⁵ The liberal Justices express concern about failures in the civil litigation system, but are more concerned about access.

191. *Id.* at 2583.

192. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1086 (2011) (Sotomayor, J., dissenting).

193. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 (2011) (Ginsburg, J., dissenting).

194. *Id.*

195. This is arguably a continuation of the Rehnquist Court’s similar hostility. *See* Siegel, *supra* note 84 (examining the Rehnquist Court’s hostility toward civil litigation); *see also* Wasserman, *supra* note 46, at 332 (“The Roberts Court has shown similar hostility to litigation as a means of vindicating legal rights, the apparent difference being that this Court’s hostility manifests itself in general procedural doctrine.”).

A. *Cost and Inefficiency*

The final narrative in the conservative Justices' civil litigation opinions is a critique of the cost and inefficiencies of civil litigation.¹⁹⁶ The concern is that the amount of time and money it takes to defend a case is prohibitive. This leads to what the conservative Justices argue are coerced settlements—litigation where the defendant, while perhaps right on the merits, will settle instead of risking costly litigation.¹⁹⁷

1. The Federalism Procedural Cases

AT&T Mobility LLC v. Concepcion perfectly models the federalism quandary discussed in this Article.¹⁹⁸ *Concepcion* involves arbitration, class action, and consumer preemption. It is ultimately thought of as an arbitration case because it demonstrates the degree to which the Court's conservative faction will use the Federal Arbitration Act (FAA) to support arbitration, as well as the ways in which the Court's liberal faction will attempt to restrain arbitration and allow plaintiffs to bring cases in state or federal court.

In *Concepcion*, the plaintiffs purchased cellular service with AT&T.¹⁹⁹ They became part of a class action filed against AT&T for false advertising and fraud because the company's advertised "free" phones actually cost about \$30 each.²⁰⁰ AT&T moved to compel arbitration according to its cellular service agreement with its customers.²⁰¹ That agreement provided for arbitration of all disputes and prohibited any class or representative proceedings.²⁰²

The Supreme Court of California, in a case called *Discover Bank v. Superior Court of Los Angeles*, had already held that class action waivers in consumer contracts of adhesion were unconscionable, and thus void, under California law.²⁰³ Citing *Discover Bank*, the United

196. See Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1073 (2013) (discussing the lack of empirical data supporting the argument that there is too much civil litigation).

197. See Miller, *supra* note 166.

198. 131 S. Ct. 1740 (2011).

199. *Id.* at 1744.

200. The Concepcions and other purchasers had to pay sales tax in order to get the "free" phones. *Id.*

201. *Id.* at 1744-45.

202. *Id.* at 1744.

203. *Id.* at 1745-46. The *Discover Bank* court held:

[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers

States District Court for the Southern District of California found that AT&T's arbitration provision prohibiting class or representative actions was unconscionable under California law.²⁰⁴ The question was whether this finding of unconscionability was enough to invalidate the contract under the FAA.²⁰⁵ Section 2 of the FAA provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract."²⁰⁶ According to the district court, AT&T's contract failed under generally applicable California law. In other words, arbitration was not singled out, and thus the finding of unconscionability rendered the arbitration agreement void under the FAA.²⁰⁷ The United States Court of Appeals for the Ninth Circuit affirmed, stating, "*Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration."²⁰⁸

The majority of the Court—Justice Scalia, Chief Justice Roberts, and Justices Kennedy, Thomas and Alito—disagreed.²⁰⁹ They found that the *Discover Bank* reading of state law singled out arbitration agreements and frustrated the purpose of the FAA.²¹⁰ The Court stated, "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."²¹¹ After assessing bilateral and class arbitration, the Court determined that "[a]rbitration is poorly suited to the higher stakes of class litigation."²¹² This determination ultimately led the Court to reject the California Supreme Court's interpretation of

out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

Discover Bank v. Superior Court of L.A., 113 P.3d 1100, 1110 (Cal. 2005) (citation omitted) (quoting CAL. CIV. CODE § 1668 (2012)).

204. *Concepcion*, 131 S. Ct. at 1745.

205. See 9 U.S.C. § 1 (2012).

206. *Id.* § 2 (emphasis added).

207. *Concepcion*, 131 S. Ct. at 1745.

208. *Id.* (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 990 (9th Cir. 2007)) (internal quotation marks omitted).

209. Justice Thomas wrote separately in a concurrence. *Id.* at 1753-56 (Thomas, J. concurring). He argued that the savings clause of section 2 of the FAA applied only to the formation of the contract, while the *Discover Bank* rule discussed contracts that would not be enforced as against public policy. *Id.* at 1756. Thus, according to Justice Thomas, section 2 was not even implicated by the *Discover Bank* rule in the first place.

210. *Id.* at 1748 (majority opinion).

211. *Id.*

212. *Id.* at 1752.

its own state law. It did so by arguing that federal law under the FAA trumped state law. In other words, the conservative Justices elevated their view of what the FAA allowed over that of the states.

2. Efficiency Concerns Elevated over Federalism

In civil litigation, the conservative Justices express doubt about plaintiffs' and their lawyers' motivations and credibility. In *Concepcion*, for example, the Court noted that even though potential plaintiffs could use bilateral arbitration, they would not.²¹³ The Court stated that "there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process."²¹⁴ The insinuation being made, as is often made in the civil context, is that many lawyers are driven by fees alone and not by the validity of their clients' legal disputes.²¹⁵ This is especially true in consumer cases where those consumers are challenging allegedly unfair business practices or product safety.

Along with this distrust of some of the players in the civil litigation game, the conservative Justices express a related skepticism of how well the civil justice system works. In *Concepcion*, the Court determined that class arbitration, as opposed to bilateral arbitration, was antithetical to the FAA because it "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."²¹⁶ Class arbitration is governed by rules that are based on the federal class action rules.²¹⁷ Thus, while bilateral arbitration offers a respite from the slow, costly morass that is our civil litigation system, class arbitration would not.²¹⁸

The Justices' concern was one-sided, however. When it came to plaintiffs, the Court dismissed out of hand the unfairness of contracts of adhesion by noting that "the times in which consumer contracts were anything other than adhesive are long past."²¹⁹ For business defendants, it was a different story. The conservative Justices focused

213. *Id.* at 1750.

214. *Id.*

215. This insinuation is common among the public and politicians as well. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 302 (2013) ("Politicians and special interests . . . vilify the plaintiffs' bar as fee-hawking ambulance chasers.").

216. 131 S. Ct. at 1751.

217. *Id.*

218. *Id.*

219. *Id.* at 1750.

on the necessity of bilateral arbitration. The lack of meaningful appellate review in arbitration, the Justices thought, would make class arbitration much too risky for businesses. After all, arbitration does not provide for de novo review because review “under § 10 focuses on misconduct [by the arbitration panel] rather than mistake.”²²⁰ The Justices explained that given these limitations, “[a]rbitration is poorly suited to the higher stakes of class litigation.”²²¹ Indeed, “[t]he point is that in class-action arbitration huge awards (with limited judicial review) will be entirely predictable.”²²² This led them to conclude that “defendants would [not] bet the company” if class arbitration was an option for plaintiffs.²²³ In other words, to the extent class arbitration looked like civil litigation, defendants would not choose arbitration at all.

Setting aside whether the Justices’ critique of the civil litigation system is empirically supported or not,²²⁴ as the *Concepcion* dissent pointed out, it is undisputed that there is no empirical evidence to support the conservative Justices’ arguments about class action arbitration.²²⁵ Yet, these Justices maintained that if class arbitration was allowed to become the norm, it would undoubtedly lead to a system that is as dysfunctional as they perceive our civil justice system to be.²²⁶ Predicting this fate, the Justices made comparisons that, while not empirically supported, fit into their negative civil litigation narrative perfectly.

220. *Id.* at 1752.

221. *Id.*

222. *Id.* at 1752 n.8.

223. *Id.* at 1752.

224. There is good evidence that it is not. See, e.g., Marc Galanter, *News from Nowhere: The Debated Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 77-79 (1993) (demonstrating that many of the statistics and much of the rhetoric criticizing civil litigation are inaccurate); Miller, *supra* note 166.

225. The dissent challenged as unfounded the majority’s assertion that class arbitration was so complex that it would discourage arbitration altogether. *Concepcion*, 131 S. Ct. at 1759 (Breyer, J., dissenting). The dissent stated that the majority had no empirical support for its argument and that comparing class arbitration to bilateral arbitration was the wrong metric. A more accurate comparison—from the defendant’s perspective—would be to pit class arbitration against class action litigation. That comparison would show that class arbitration is preferable. *Id.* at 1759-60.

226. At least one commentator has predicted that the Court’s hostility to class arbitration in *Concepcion* is a means to an end with regard to class actions more generally. Cliff Palefsky, *Closing Thoughts on the Arbitration Symposium*, SCOTUSBLOG (Sept. 26, 2011, 6:41 PM), <http://www.scotusblog.com/2011/09/closing-thoughts-on-the-arbitration-symposium/> (“My sense is that the elimination of class actions is not merely a possible result of the [*Concepcion*] decision; rather, it was pretty clearly the goal of the majority.”).

Thus, the conservative Justices' opinions attempt to maintain much of what they see as the advantages of arbitration intact. In this case, it meant closing off the possibility of class arbitration. The premium these Justices place on maintaining arbitration as a perceived efficient and fair system for defendants is also borne out by other arbitration decisions during this period. These opinions do not involve federalism issues like *Concepcion*, but collectively, they lend support to the argument that the conservative Justices view the civil litigation system as costly and inefficient.²²⁷

For example, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,²²⁸ the Court took the rather rash step of overturning an arbitration panel's decision, which requires a finding of misconduct and not a mere mistake.²²⁹ *Stolt-Nielsen* involved a maritime dispute among parties who were all agreeably subject to an arbitration provision. When the complaining parties demanded class arbitration even though the arbitration agreement was silent on the issue, the parties agreed to submit the class question to their arbitration panel.²³⁰ That panel decided to allow class arbitration, but stayed the proceeding in order to allow for judicial review.²³¹ The district court reversed the arbitration decision, but the Second Circuit disagreed.²³²

The majority of the Court—Justice Alito, Chief Justice Roberts, and Justices Scalia, Kennedy, and Thomas—reversed the Second Circuit and held that allowing class arbitration when the parties had not explicitly agreed to it was not in line with the FAA.²³³ Acknowledging that the interpretation of arbitration agreements is generally done under state law, the Court highlighted the importance of the purposes of the FAA—namely the enforcement of the contractual agreement between the parties.²³⁴ Here, the parties' silence could not be read as consenting to class arbitration, which, as the Court argued in *Concepcion*, was so inferior to bilateral arbitration. The Court stated, "We think that the differences between bilateral and class-action

227. For a detailed discussion of recent arbitration cases, including *Concepcion*, see Symposium, *U.S. Arbitration Law in the Wake of AT&T Mobility v. Concepcion*, 4 Y.B. ON ARB. & MEDIATION 1 (2012).

228. 559 U.S. 662, 671 (2010).

229. Under section 10(a)(4) of the FAA, an arbitration panel's decision can only be vacated if the moving party shows that the arbitrator "exceeded [his or her] powers." *Id.* at 670.

230. *Id.* at 666-69.

231. *Id.* at 669.

232. *Id.* at 669-70.

233. *Id.* at 683.

234. *Id.* at 682.

arbitration are too great for arbitrators to presume . . . that the parties' mere silence . . . constitutes consent to resolve their disputes in class proceedings.²³⁵

In *Stolt-Nielsen*, the conservative wing once again prevented class arbitration from easily finding its way into the arbitration process. The other three five-to-four decisions in the arbitration context, *14 Penn Plaza LLC v. Pyett*,²³⁶ *Rent-A-Center, West, Inc. v. Jackson*,²³⁷ and *American Express Co. v. Italian Colors Restaurant*,²³⁸ similarly enforced arbitration agreements against the individual or small-business plaintiffs in those cases, keeping the case out of the civil litigation system.²³⁹ In each of those cases, the plaintiffs attempted to litigate in the civil justice system, but the Court decided arbitration provided their sole recourse.²⁴⁰

235. *Id.* at 687.

236. 556 U.S. 247 (2009).

237. 561 U.S. 63 (2010).

238. 133 S. Ct. 2304 (2013). The vote was actually five-to-three because Justice Sotomayor did not take part in resolving the case.

239. In *Pyett*, the question was whether a collective bargaining agreement requiring union members to only arbitrate their Age Discrimination in Employment Act claims was enforceable under federal law. The Court's majority—Justice Thomas, Chief Justice Roberts, and Justices Scalia, Kennedy, and Alito—found that it was, while the dissent—Justices Souter, Stevens, Ginsburg, and Breyer—disagreed. *Pyett*, 556 U.S. at 274 (Stevens, J., dissenting); *id.* at 278 (Souter, J., dissenting). In *Rent-A-Center*, the majority, which was the same as in *Pyett*, held that a clause requiring the parties to arbitrate the enforceability of the arbitration contract was enforceable. 561 U.S. at 72. The dissent—Justices Stevens, Ginsburg, Breyer, and Sotomayor—rejected this assertion and argued that the enforceability of the arbitration agreement should be decided by the court, not the arbitrator. *Id.* at 80 (Stevens, J., dissenting). In *Italian Colors Restaurant*, the same *Pyett* and *Rent-A-Center* majority upheld a waiver of class arbitration even though an individual's recovery in the antitrust claim would far exceed the cost of proving the antitrust violation. 133 S. Ct. at 2312. The dissent—Justices Kagan, Ginsburg, and Breyer—disagreed, arguing the arbitration clause was antithetical to federal law because it prohibited a party from bringing a federal claim. *Id.* at 2313 (Kagan, J., dissenting).

240. *Pyett*, 556 U.S. 247; *Rent-A-Ctr.*, 561 U.S. 63; *Italian Colors Rest.*, 133 S. Ct. 2304. The outlier cases in this category, *Preston v. Ferrer*, 552 U.S. 346 (2008), and *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), were not close splits and involved businesses on both sides of the dispute, so they will not be addressed in detail here. Similarly, *Marmet Health Care Center v. Brown*, 132 S. Ct. 1201 (2012), and *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500 (2012), were unanimous opinions (per curiam in the case of *Nitro-Lift*) holding that state courts blatantly disregarded the FAA. In addition, *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), was a unanimous opinion that upheld the arbitration panel's decision to allow class arbitration. But that case pitted a business interest against another business interest, so it does not implicate the concerns discussed in this Article. Finally, *Vaden v. Discover Bank*, 556 U.S. 49 (2009), while ostensibly about arbitration, was really a case about federal question jurisdiction and whether a federal court could take subject matter jurisdiction over an otherwise state law case on the basis of a federal counterclaim. It is discussed in Part VI *infra*.

In sum, all of the five-to-four arbitration cases show the conservative Justices' negative view of the civil litigation system. By giving primacy to arbitration over civil litigation, the Justices demonstrate their skepticism of the civil litigation system overall.

This negative view of civil litigation is similarly visible in the Court's class action opinions. Much like the rhetoric discussed in the arbitration opinions addressing the availability of class-wide relief, the conservative Justices are skeptical of the benefits of the class action device. To that end, they seem primed to strike down class actions, especially when the defending party is a corporate entity. For example, in *Comcast Corp. v. Behrend*, the conservative Justices scrutinized evidence the plaintiffs presented in order to certify the class, even though by all accounts that question was not properly before the Court.²⁴¹ *Behrend* did not raise any federalism issues, but the case further demonstrates the conservative Court's hostility towards class actions. Similarly, *Dukes* did not raise federalism concerns, but the conservative Justices' efforts to completely prohibit that class action by effectively closing down any certification under Rule 23(b) show again that corporate interests are elevated by the conservative members of the Court.²⁴²

This skepticism of procedural mechanisms like the class action may explain why some of the federalism cases discussed in this Article have been decided by the Justices in ways, which at first blush, might seem unexpected. *Shady Grove* provides the most interesting of shifts among the Justices. The combination of *Erie* and class actions created some strange bedfellows indeed. However, there is a tenable explanation that still fits with the main argument in this Article. The lineup of Justices depends, in large part, on whether a Justice is playing a long game or a short game. For Chief Justice Roberts and Justices Scalia, Thomas, Ginsburg, and Breyer, the game is a long one.

241. 133 S. Ct. 1426, 1436 (2013) ("Abandoning the question we instructed the parties to brief does not reflect well on the processes of the Court." (quoting *Redrup v. New York*, 386 U.S. 767, 772 (1967) (Harlan, J., dissenting)) (internal quotation marks omitted)).

242. There are two other class action cases that were decided by the Roberts Court. In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), Chief Justice Roberts and Justice Alito joined the majority to find in favor of class certification, while Justices Kennedy, Scalia, and Thomas dissented, taking a more ideologically typical position against class certification. In *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), the Court was unanimous in holding that the plaintiffs did not have to prove loss causation in order to certify their class. Like in *Amgen*, the parties in *Erica P. John Fund* were both moneyed interests. *Id.* at 2183. Like many of the opinions discussed in *supra* note 240, where business interests are on both sides of the litigation, the civil litigation narratives discussed in this Article are less salient.

As this Subpart has argued, the conservative Justices are generally hostile to class actions. Why then would they be in the majority of a case allowing a class action to go forward?²⁴³ One reason is that because the class action is a device that is unlikely to be eliminated altogether, the better course—and long game—is to get as many class actions into federal court as possible. In federal court, the law is far more hostile to class actions because of the narrowing and scrutiny of class certification.²⁴⁴ In addition, because of CAFA,²⁴⁵ more class actions are being funneled from state court into federal court.²⁴⁶ *Shady Grove* continues this trend by allowing a class action to go forward, but in federal court only. The Justices were possibly willing to take the hit of allowing a class action to be filed in the short term for the long-term gain of continuing to restrict class actions at the federal level.²⁴⁷ Justices Kennedy and Alito were playing the short game, however. They took the position that honored the arguably substantive

243. Even Justice Ginsburg points out the irony of this result in her *Shady Grove* dissent. She argued that Congress passed CAFA in order “to check what it considered to be the overreadiness of some state courts to certify class actions.” *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 459 (2010) (Ginsburg, J., dissenting) (“In other words, Congress envisioned fewer—not more—class actions overall. Congress surely never anticipated that CAFA would make federal courts a mecca for . . . class actions seeking state-created penalties for claims arising under state law—claims that would be barred from class treatment in the State’s own courts.”).

244. David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1281 (2007) (“[F]ederal courts have demonstrated a systematic impatience with the aggressive use of Rule 23 in multistate cases with state law causes of action. This hostility . . . appears to reflect an emerging consensus against certain uses of the class action device.” (footnote omitted)).

245. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 18 U.S.C.); see Marcus, *supra* note 244, at 1252 (“CAFA supporters hope that this federalization of multistate class actions will result in fewer certified classes and thereby relieve defendants of liability for state law causes of action.”).

246. A 2008 study performed by the Federal Judicial Center revealed a 72% increase in class action suits filed in or removed to federal district courts since the passage of CAFA. Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, PUBLIC.RESOURCE.ORG 1 (Apr. 2008), <https://bulk.resource.org/courts.gov/fjc/cafa0408.pdf>.

247. There is also no doubt that *Shady Grove* is consistent with Justice Scalia’s previous and fierce defense of the Federal Rules of Civil Procedure. Where he sees a conflict between state law and a federal rule of procedure, he has consistently argued that the federal rule trumps. See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 467 (1996) (Scalia, J., dissenting) (arguing that Federal Rule of Civil Procedure 59 trumps any state law in conflict); *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001) (finding that Rule 41(b) was not in conflict with state law and thus allowing the district court to apply state preclusive law in evaluating the effect of another district court’s dismissal). Uniformity in the civil rules largely benefits business interests, so these cases, while decided outside the window of the Article’s timeline, are in line with the Article’s argument. See *supra* note 97 and accompanying text.

law of the state—a strong conservative federalism position—and they were also able to side with stronger business interests.²⁴⁸

The conflict of all of these different interests can result in some anomalies with how the Justices line up on federalism cases that include procedural issues. But, the conservative Justices' general predisposition for business interests and the liberal Justices' predisposition for plaintiffs remain fairly constant.

B. Access to Justice

As much as the conservative wing can be said to feed into a negative view of civil litigation, the liberal wing's narrative reveals a view of the civil litigation system focused on access. In procedural opinions more generally, these Justices often place a premium on minimizing procedural barriers and allowing for access to the civil justice system.

1. The Federalism Procedural Case

In *Concepcion*, the liberal Justices—Breyer, Ginsburg, Sotomayor, and Kagan—took the completely opposite position of their conservative counterparts. First, the dissent argued that the *Discover Bank* rule was generally applicable to all contracts and therefore did not single out arbitration agreements.²⁴⁹ The dissent noted that California had the right to decide that the incentives created by prohibiting class arbitration were too dangerous. Such a prohibition would encourage commercial actors to fraudulently take a small amount of money from a large number of consumers.²⁵⁰ Because no lawyer would represent one client for such insignificant damages, the prohibition on class arbitration effectively insulates this kind of behavior from any legal action.²⁵¹ California decided to eliminate this perverse incentive by finding that some class arbitration waivers were unconscionable. For the Court to then upend this decision by the state of California was, according to the dissent, an affront to federalism.²⁵²

Concepcion was a case that so clearly placed state law in opposition to federal law; yet, the liberal Justices advocated for state law to override the FAA. They made statements that, without knowing

248. *Shady Grove*, 559 U.S. at 437 (Ginsburg, J., dissenting).

249. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting).

250. *Id.*

251. *Id.*

252. *Id.* at 1762.

who wrote them, one might assume had been drafted by the Court's conservative wing. For example, the dissent stated, "California is free to define unconscionability as it sees fit, and its common law is of no federal concern so long as the State does not adopt a special rule that disfavors arbitration."²⁵³ It is less common to see the liberal Justices making this kind of pro-state statement, yet, in the procedural context, the Justices' ideological commitment to their view of federalism seems to wane.

2. Federalism as a Means to Access

Concepcion exemplifies the degree to which the liberal Justices will attempt to maintain access to the civil justice system. In that case, the liberal wing argued against the FAA and for the state law. One can assume that these Justices are skeptical of arbitration, especially in situations where the resource disparity between the parties is so great. Yet, having accepted the reality of arbitration, the Justices focus on pro-plaintiff decisions within that context. Thus, if adhesion contracts requiring arbitration are in fact the norm, then it is better for plaintiffs to have access to class arbitration than solely to bilateral arbitration. These Justices' support for class actions in the civil litigation context is echoed in their support of class arbitration. In civil litigation, the Justices argue that potential plaintiffs will not have access to the legal help they need if they are unable to aggregate their claims into a class action. Similarly, the *Concepcion* dissent argued that plaintiffs like the *Concepcions* would be unable to find an attorney to take on a \$30 damages lawsuit.²⁵⁴ Without class arbitration, claims like these—which are now generally subject to arbitration—will not be pursued.²⁵⁵ Instead of viewing this issue through a lens of efficiency, these Justices look to access.

253. *Id.* at 1760.

254. *Id.* at 1761.

255. See, e.g., David L. Noll, *Rethinking Anti-Aggregation Doctrine*, 88 NOTRE DAME L. REV. 649, 650 (2012) (explaining that the basic premise behind aggregate claiming is to lessen the burden of process costs overtaking the stakes in individual proceedings and encourage private attorneys to prosecute violations of law without concern for a money-losing proposition); Benjamin Sachs-Michaels, *The Demise of Class Actions Will Not Be Televised*, 12 CARDOZO J. CONFLICT RESOL. 665, 676-79 (2011) (noting a trend among courts that finds class waivers unconscionable and the aggregate claim a fundamental right of the plaintiff). But see David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217 (2013) (arguing that *Concepcion* may possibly be read to allow judges to strike down arbitration provisions that would be in furtherance of state interests).

Consequently, just as the conservative Justices' nonfederalism arbitration opinions demonstrate their civil justice narrative, the liberal Justices' positions in these opinions is similarly telling. *Stolt-Nielsen* is an apt example because the liberal Justices argued in favor of the arbitration panel's decision in that case.²⁵⁶ They did so in the face of their skepticism of the arbitration system as a whole because that particular arbitration panel allowed the plaintiffs to proceed as a class.²⁵⁷ Because the liberal wing believes that class arbitrations might provide a more just proceeding for plaintiffs than bilateral arbitration, as they described in *Concepcion*, the Justices were more willing to enforce an arbitration panel's pro-class decision.

This is in contrast to *Rent-A-Center*, where the liberal Justices argued that the court and not the arbitration panel should decide the arbitration agreement's enforceability.²⁵⁸ But, that case involved bilateral arbitration and pitted an individual plaintiff against a large corporate defendant.²⁵⁹ In other words, the access-based decision in that case was to take enforceability from the panel, while in *Stolt-Nielsen*, the access-based position was to sustain class arbitration in any way possible. *Pyett* also involved an individual plaintiff against a corporate defendant in bilateral arbitration. There again, the liberal Justices dissented in favor of the individual plaintiff, finding that he should not have to arbitrate solely under the collective bargaining agreement.²⁶⁰

Similarly, in the class action context, the liberal Justices appear more willing to certify classes in order to allow them to try to prove their claims. In *Behrend*, the liberal dissent argued that the majority improvidently reviewed the issue of whether the lower courts can certify a class without resolving whether evidence probative of damages is admissible.²⁶¹ Moreover, Justice Ginsburg argued that

256. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 688 (2010) (Ginsburg, J., dissenting).

257. Even though both the plaintiff and defendant were businesses, the liberal Justices may have dissented in hopes that their argument would help individual or small business plaintiffs. A finding of class arbitration in this context could lead to the allowance of class arbitration when smaller plaintiffs are involved. Perhaps the result in *Oxford Health Plans*, discussed *supra* note 240, portends this argument.

258. *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 76 (2010) (Stevens, J., dissenting).

259. *Id.* at 65 (majority opinion).

260. 14 Penn Plaza LLC v. *Pyett*, 556 U.S. 247, 274 (2009) (Stevens, J., dissenting); *id.* at 278 (Souter, J., dissenting).

261. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1435 (2013) (Ginsburg, J., dissenting).

Comcast had waived any such argument by failing to object to the evidence at issue.²⁶² Finally, even on the merits, Ginsburg argued that the majority was overreaching certification requirements.²⁶³ The liberal Justices' willingness to allow for certification when they believe the requirements are met was also echoed in *Dukes*. While agreeing with the conservative Justices that certification was not correct under Rule 23(b)(2), the liberal Justices argued that Rule 23(b)(3) was and should still be potentially available.²⁶⁴ It is not as if the liberal Justices have a blanket position to certify classes—they scrutinize the application of the rules just as the conservatives do.²⁶⁵ However, there is a notable difference in result, as demonstrated by these opinions, that where a corporate interest will benefit, the conservative Justices are less likely to support the class action and the liberal Justices are more likely to do just the opposite.

As for *Shady Grove*, as discussed in the previous section, the Justices may have different means to their respective ends. Liberal Justices like Ginsburg and Breyer may have been willing to concede some of the breadth and reach of the Federal Rules of Civil Procedure in order to clear the way for innovation in the way states address civil litigation. The short game would have been to prohibit the state law because it eliminated class actions in that context. Yet, Justices Ginsburg and Breyer fought to allow the state law to survive, elevating their federalism position in the short term. In the long term, however, those Justices might hope that states will fill the gap in the other direction.²⁶⁶ For example, when it comes to civil litigation, states may find ways to substantively allow for certain kinds of cases, cases that are all but effectively thwarted in federal courts. As for the short game, Justice Sotomayor took the position that would allow the class action to be filed immediately and preserve a pro-plaintiff result.²⁶⁷ In spite of these periodic diversions, however, what the liberal Justices

262. *Id.* at 1436.

263. *Id.* at 1437.

264. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (Ginsburg, J., dissenting).

265. *Id.*

266. See Steinman, *supra* note 161, at 1170-71 (arguing that the text of Rule 23 is ambiguous enough to "avoid a preemptive clash with [some] state policies regarding class actions"); Wasserman, *supra* note 46, at 330 ("But in the long run, plaintiffs are more likely to benefit from favorable state rules and thus more likely to want state law to apply in federal court, the position that the more liberal Justices Ginsburg and Breyer urged; looking forward, therefore, the line-up of the Justices makes ideological sense.").

267. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010).

arguably have in common is their effort to maintain the efficacy of the class action mechanism, however it might be achieved.

VI. FEDERALISM'S PLACE IN PROCEDURAL CASES

This Article argues that the Justices' respective concerns for business interests on the one hand and plaintiffs on the other might lead them to subordinate their traditional federalism positions in procedural cases. The desire to restrict or expand procedure in order to serve these interests takes primacy over their otherwise strongly held federalism positions. Taking a pro-business stance requires the Justices to restrict procedure, thereby reducing what those Justices would argue is frivolous litigation. In contrast, a pro-plaintiff stance requires the Justices to expand procedure in order to arguably increase access to the courts. In the context of procedural cases, these competing goals, which are based on the Justices' opposing perceptions of the civil litigation system, lead them to stray from the positions they take in traditional federalism cases. In this Subpart, the Article will begin to chip away at this party bias and consider what the Court's federalism principles should be in private civil litigation cases.

A. *A Federalism-Procedural Law Prescription*

First, the question of how federalism concerns should impact procedural cases in the context of private civil litigation requires resolution of a different prerequisite question. That question is: should federalism concerns even animate these cases in the first place? Taking a look at private civil litigation, this Article argues the answer is a qualified yes.²⁶⁸ Private civil litigation provides an important mode of regulation, and states and their citizens have a strong interest in accessing that system. Moreover, states want to protect their citizenry and state laws intended to provide that protection should, to the extent possible, be actionable. To that end, the Court, when weighing a procedural question that also places federal and state power in tension, should consider what the state and federal interests in that litigation might be.

This consideration should not be determinative, however, hence the qualified yes. Part of this Article's critique is that federalism is

268. The question of how substantive or constitutional federalism cases should be resolved is beyond the scope of this Article. In that context, different concerns are at play. See sources cited *supra* note 22. This Article's focus is on procedural cases and more specifically, procedural cases in the private civil litigation context.

used as a proxy for ideological positioning.²⁶⁹ The Article would fall victim to the same criticism were it to advocate for a full-throated states' rights position. Instead, using Edward Rubin and Malcolm Feeley's summary of the standard arguments in favor of federalism, the Article begins to sketch out how the Court might think about the intersection of federalism and private civil litigation.²⁷⁰

In their article, *Federalism: Some Notes on a National Neurosis*, Rubin and Feeley pronounced (and critiqued) four standard justifications for federalism—federalism, in this case, meaning a deference to the states.²⁷¹ Those principles are “public participation, effectuating citizen choice through competition among jurisdictions, achieving economic efficiency through competition among jurisdictions, and encouraging experimentation.”²⁷² The public participation justification argues that “locating various decisions at the regional or local level will enable more people to participate in these decisions.”²⁷³ Citizen choice is the argument that by decentralizing government, it will “be more sensitive to the diverse needs of a heterogeneous society [and will] make[] government more responsive

269. This criticism is well-covered in literature about whether federalism is a constitutional or prudential value. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 935 (1994) (“[B]ecause federalism’s force is symbolic and not truly normative, it quickly becomes a proxy for more compelling substantive views that it happens to support.”); *id.* at 948 (“[C]laims of federalism are often nothing more than strategies to advance substantive positions or, alternatively, that people declare themselves federalists when they oppose national policy, and abandon that commitment when they favor it.”); Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: “The Political Safeguards” of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929 (2008) (discussing the federalization of class actions from the 1960s through 2005 and arguing that the “underlying national norms change, but the method [of federalization] does not”).

270. Rubin & Feeley, *supra* note 269, at 914. Edward Rubin and Malcolm Feeley’s controversial article ultimately rejected these common justifications for constitutional federalism. *Id.* at 909. They argued that these justifications were not arguments that supported constitutional federalism, but were instead arguments in favor of decentralization. *Id.* This Article does not profess to enter this controversial fray. Many scholars have already done so. See Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 380-85 (1997) (discussing Rubin and Feeley’s argument regarding the value of federalism); Jackson, *supra* note 22, at 2213-22 (same). Even though there is disagreement about which principles should guide the determination of whether federalism should be a constitutional or prudential value, the principles Rubin and Feeley marshal are, in some shape or form, accepted as justifications for federalism and, more importantly, used by the Court.

271. Rubin & Feeley, *supra* note 269, at 949.

272. *Id.* at 914. As discussed *supra* note 270 and accompanying text, Rubin and Feeley’s normative justifications for federalism are also met in this context.

273. *Id.* at 915.

by putting the states in competition for a mobile citizenry.”²⁷⁴ Similarly, state competition is the “idea . . . that jurisdictions will compete for productive assets . . . and desirable people . . . by creating a favorable economic climate.”²⁷⁵ Finally, the experimentation argument posits that “federalism gives the states an opportunity to experiment with different programs.”²⁷⁶

Parts III through V of this Article examined a number of instances where the Court has not adhered to traditional federalism principles. For example, in the consumer preemption context, state substantive law was not applied. Those cases generally limited the states’ ability to protect their own citizens.²⁷⁷ In cases like *PLIVA* and *Bartlett*, where there was a state law remedy available to a private citizen, the states had a meaningful interest in seeing those matters adjudicated, yet the Court prevented the states from doing so.²⁷⁸ Similarly, there were cases where plaintiffs attempting to get into relatively plaintiff-friendly state courts were prevented from doing so or were funneled into relatively hostile federal courts. For instance, in *Concepcion*, California’s law was disregarded in the face of the FAA. Like the preemption cases, *Concepcion* effectively resulted in cutting off a remedial path for aggrieved individuals because of the Court’s hostility toward class arbitration.²⁷⁹

Applying the four justifications articulated by Rubin and Feeley to these examples demonstrates that, in the run of private civil litigation cases, the Court should give greater deference to the states. First, as to public participation, these state laws reflect the localized

274. *Id.* at 917 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)) (internal quotation marks omitted).

275. *Id.* at 920.

276. *Id.* at 923.

277. See, e.g., Michelle L. Caton, *Form Over Fairness: How the Supreme Court’s Misreading of the Federal Arbitration Act Has Left Consumers in a Lurch*, 21 GEO. MASON L. REV. 497, 518 (2014) (arguing that broad preemption of state law creates a significant impediment for state legislation aimed at protecting state citizens from resulting drawbacks of consumer arbitration); Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 187, 259 (2013) (concluding that *Shady Grove* allows the Court and the Advisory Committee to dictate the kind of state legislation used to regulate matters that Congress has historically left to the states’ “sphere of competency”); Richard C. Worf, Jr., *The Effect of State Law on the Judge-Jury Relationship in Federal Court*, 30 N. ILL. U. L. REV. 109, 162-163 (2009) (arguing that courts should not hold the Seventh Amendment in conflict with the *Erie* Doctrine with respect to state law rights to jury trial in diversity cases, as the Framers’ intent was to avoid any threats made by Article III power to review questions of fact or by Congress’s power to create lower federal courts).

278. See discussion *supra* Part III.A.

279. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

consciousness that federalism professes to cultivate. Individual citizens elect local officials to enact these very laws or, in some cases, elect the judges that will decide these cases. In addition, different state laws are reflective of a heterogeneous society, and depending on the degree to which the laws differ, they arguably create competition for a "mobile citizenry." These variant state laws arguably would create a more favorable economic climate because competition among states will drive different people and assets to different states. If one state adopts a particular substantive regime and another state does not, that is the exact kind of competition that proponents of traditional federalism principles want. If those laws are not enforced or otherwise actionable, however, there will be no competition. Finally, the states can function as laboratories by experimenting with different legal standards that might also vary from state to state. This is the kind of experimentation that federalism is arguably meant to foster.

In sum, all four of the standard justifications for federalism apply to these cases. Thus, based on these justifications, in a context where the state has a localized interest in enforcing a particular state law or where the state court offers a friendly forum to its citizens, federalism concerns that potentially animate resolution of the procedural issue should be sensitive to state interests. Again, this deference should not be determinative, but if federalism is a value that the Justices are weighing, these criteria suggest that the private civil litigation context is a valid place to consider a more conservative federalism position.

In addition to the standard justifications articulated above, Rubin and Feeley also offered two alternative justifications for federalism.²⁸⁰ They argued that federalism is justified as a constitutional principle if it furthers the "division of political power" and "secure[s] the promise of liberty."²⁸¹ Some examples from the cases discussed in this Article illustrate these alternative criteria as well.

For example, with respect to the division of political power, the consumer preemption cases demonstrate that federal interests are complicated at best. While there is strong interest in facilitating the supremacy of federal law, federal regulatory agencies are quite resource-strapped. In the face of that, society's dependence on individuals to bring litigation enforcing the safety of products is

280. As discussed *supra* note 270, Rubin and Feeley criticized the standard justifications. A detailed account of that criticism is beyond the scope of this Article. In the interest of beginning the discussion of how federalism should be treated in private civil litigation cases, however, their alternative justifications are briefly discussed.

281. Rubin & Feeley, *supra* note 269, at 949-50 (internal quotation marks omitted).

paramount.²⁸² In other words, the division of political power is served by allowing state law to comfortably coexist with federal law. This means that, on this measure at least, the states' interest in protecting their own is quite strong and, in this private civil litigation context, deserves credibility.

The goal of securing the promise of liberty is also met by giving due consideration to state interests in this context. In private civil litigation cases, state citizens generally seek relief for alleged injuries suffered at the hands of foreign—meaning out-of-state—defendants. Access to state law remedies and/or the state court system is necessary for the state to fulfill the role of protecting the best interests of its citizenry. In contrast, the federal government's interest on this count is far less pronounced. In cases where a state government actor is a defendant, the federal government's interest is higher because those cases function as a check on state power and go a long way toward protecting personal liberty.²⁸³ While there might be similar power-

282. See, e.g., J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012) (proposing a framework that is tailored to support the structural role of private litigation within the public regulatory regime); Sarah Staszak, Review Essay, *Realizing the Rights Revolution: Litigation and the American State*, 38 LAW & SOC. INQUIRY 222, 228 (2013) (stressing the pivotal role that private litigation plays in enforcing policy among multiple industries and revealing the importance of courts in filling the vacuum left by politicians to control the administrative state); Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 971-74 (suggesting that the tort system is a more flexible form of obtaining relief, avoids agency capture, and is more effective than regulatory agencies at exposing "bad acts").

283. The dual court system is, of course, a product of the Madisonian Compromise. Some of the framers wanted lower federal courts specifically because they feared that state courts would be unfriendly to federal interests. Martin H. Redish & Curtis E. Woods, *Congressional Power To Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 53-54 (1975). Others believed that Supreme Court appellate review of those decisions was enough protection and feared the presence of federal trial courts in the states. *Id.* The resulting compromise produced Article III, Section 1, which leaves the formation, if any, of lower federal courts to Congress. *Id.* at 47, 54-55. This distrust is emblematic of the tensions discussed in this Article. In cases where federal interests are not being enforced by state courts, it is clear why this distrust is at its highest. See generally MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, at 60 (1993) (arguing that challenges to states' handling of federal need-based programs were taken through the federal courts because "state courts were notoriously hostile to the interests of blacks"); Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 YALE L.J. 1423, 1465-79 (1994) (examining southern states' hostility to federal constitutional claims about racial discrimination); Paul B. Stephan, *Redistributive Litigation—Judicial Innovation, Private Expectations, and the Shadow of International Law*, 88 VA. L. REV. 789, 872 (2002) ("During both the nineteenth and twentieth centur[ies], the Supreme Court not only engaged in substantive review of state court decisions that it regarded as hostile to federal interests, but tweaked the rules governing federal court jurisdiction to make it easier for persons likely to

checking concerns in the private civil litigation context, they are less pronounced because the state is not acting as an adjudicator *and* a party. The state, at most, acts as an adjudicator. As a result, there is less opportunity for the state to exceed its authority and harm an individual citizen.²⁸⁴

What all of this means is that both the traditional and alternative justifications for federalism generally map onto the private civil litigation context. Thus, on balance, the Court should endeavor to give some deference to state power in the private civil litigation context when deciding procedural issues. This does not mean that the Court should be led blindly by state laws and state courts, but it should give their interests due consideration. That consideration may, in some cases, mean deferring to a state law or allowing a case to proceed in a state court.

B. Optimal Federalism-Procedural Law Balance in Action

There is at least one procedural area where the Court has more consistently adhered to traditionally conservative federalism principles in this context. That area is subject matter jurisdiction. Like all of the cases discussed in this Article, there is some variance, but on the whole, the Court is deferential to state court systems by adhering to the principle that federal courts are courts of limited jurisdiction. Moreover, the Court has done this in spite of its proclivity for siding with business or plaintiff interests in other procedural cases.

During the period covered by this Article, five subject matter jurisdiction cases were decided by the Court. Four of the five were unanimous decisions. *Watson v. Philip Morris Cos.*,²⁸⁵ *Mims v. Arrow Financial Services, LLC*,²⁸⁶ *Smith v. Bayer Corp.*,²⁸⁷ and *Gunn v.*

suffer at the hands of state judges to obtain a federal hearing.”). *But see* Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 214-15 (1983) (“[S]tate courts are no more ‘hostile’ to the vindication of federal rights than are their federal counterparts, and . . . the opportunity for review by state appellate courts and the United States Supreme Court significantly mitigates concern over the institutional competence of state trial courts.” (footnote omitted)).

284. And, assuming the state exceeds its authority in adjudicating a claim, the plaintiff will have recourse through a separate due process claim.

285. 551 U.S. 142 (2007).

286. 132 S. Ct. 740 (2012).

287. 131 S. Ct. 2368, 2373 (2011). While *Bayer* was also about class actions, it is better categorized as a subject matter jurisdiction case because the Court had to determine whether a federal court has the authority to enjoin a state court action.

*Minton*²⁸⁸ were unanimous, while *Vaden v. Discover Bank*²⁸⁹ was split five-to-four. In three of the unanimous opinions, *Watson*, *Mims*, and *Bayer*, the plaintiffs were individuals and the defendants were corporations, and in all three cases a unanimous court found in favor of the plaintiffs. This does not mean, however, that the Court took a significantly limited view of its subject matter jurisdiction.

In *Mims*, the issue was whether Congress intended for states to have exclusive jurisdiction over private actions brought under the Telephone Consumer Protection Act of 1991 (TCPA).²⁹⁰ A consumer brought a claim under the Act against a debt-collection agency.²⁹¹ He filed his suit in federal court, arguing that the court had federal question jurisdiction.²⁹² The district court and the United States Court of Appeals for the Eleventh Circuit disagreed and found that the TCPA's provision stating that a private person could seek remedy under the Act "in an appropriate court of [a] State," "if [such an action is] otherwise permitted by the laws or rules of court of [that] State," meant that the action could only be filed in state court.²⁹³ The Court rejected that reading of the statute and found that unless Congress explicitly states otherwise, in a federal action created by federal statute, state and federal courts have concurrent jurisdiction.²⁹⁴ Thus, the Court allowed the case to stay in federal court.

In *Watson*, the other unanimous opinion with a corporate defendant, the Court limited its subject matter jurisdiction.²⁹⁵ In that case, the plaintiffs filed a civil lawsuit in state court against a cigarette manufacturer alleging state law claims of unfair and deceptive business practices.²⁹⁶ The defendants attempted to use the federal officer removal statute²⁹⁷ to argue that because their industry was so heavily regulated by federal agencies, the suit was one ripe for removal on that basis.²⁹⁸ The Court rejected this argument and found that simply "complying" with federal law did not bring private actors under the federal officer umbrella.²⁹⁹

288. 133 S. Ct. 1059 (2013).

289. 556 U.S. 49 (2009).

290. 132 S. Ct. at 744.

291. *Id.*

292. *Id.*

293. 47 U.S.C. § 227 (2012).

294. *Mims*, 132 S. Ct. at 745.

295. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 145 (2007).

296. *Id.* at 146.

297. 28 U.S.C. § 1442(a)(1) (2012).

298. *Watson*, 551 U.S. at 146.

299. *Id.* at 152.

Bayer allowed a state court to move forward with its class action adjudication even in the face of a contrary federal court decision.³⁰⁰ In that case, two similar class action cases were filed—one ended up in federal court and one stayed in state court. The federal court declined to certify the class and attempted to enjoin the state court from separately certifying a similar class in its case.³⁰¹ Justice Kagan wrote a unanimous opinion and explained that the West Virginia Supreme Court had “declar[ed] its independence from federal courts’ interpretation of the Federal Rules—and particularly of Rule 23,” meaning that the state court’s resolution of class certification was different from the federal court’s resolution of the same.³⁰² More specifically, the state’s supreme court had distinguished its Rule 23(b)(3) predominance inquiry from the federal standard.³⁰³ This, according to the Court, meant that the relitigation exception to the Anti-Injunction Act should not apply in this case, and the state court should be free to decide for itself whether to certify the class or not.³⁰⁴

The final unanimous opinion, *Gunn*, involved a malpractice suit by an individual against his attorney.³⁰⁵ The plaintiff argued that his state law malpractice claim should be subject to federal question jurisdiction because an issue of patent law had to be resolved in order to resolve the malpractice claim.³⁰⁶ The Court disagreed, finding that even though Congress had reserved patent litigation exclusively to the federal courts, it did not intend for the courts’ subject matter jurisdiction to be so expansive as to include a state malpractice claim that happened to raise an issue of patent law.³⁰⁷ The federal issue was simply not substantial enough to justify such capacious jurisdiction.³⁰⁸

The only subject matter opinion that was divided was *Vaden*. In that case, the corporate credit card company sought past-due charges from one of its credit card holders.³⁰⁹ It filed its complaint in state court because the claim was based on state law and the parties did not

300. The Court spoke with one voice, but because Justice Kagan was the authoring Justice, this Article attributes much of the federalism discussion to her.

301. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2373-74 (2011).

302. *Id.* at 2377-78.

303. *Id.* at 2378.

304. *Id.* In addition, the Court rejected Bayer’s argument that the plaintiff in the state court case was bound as a potential class member in the federal case. *Id.* at 2379.

305. *Gunn v. Minton*, 133 S. Ct. 1059, 1063 (2013).

306. *Id.*

307. *Id.* at 1066-67.

308. *Id.*

309. *Vaden v. Discover Bank*, 556 U.S. 49, 53 (2009).

meet the diversity requirements.³¹⁰ The defendant counterclaimed, alleging that the company's charges and interest violated state law.³¹¹ The plaintiff invoked its arbitration clause from its cardholder agreement and petitioned a federal district court to compel arbitration.³¹² The Court's majority—Justices Ginsburg, Scalia, Kennedy, Souter, and Thomas—determined that the federal court did not have jurisdiction over that part of the entire action on the basis of a federal counterclaim.³¹³ In order for the federal court to assert jurisdiction on the basis of the FAA, the whole action had to meet the requirements of federal question jurisdiction.³¹⁴ The Court argued, "[I]t makes scant sense to allow one of the parties to enlist a federal court to disturb the state-court proceedings by carving out issues for separate resolution."³¹⁵

The dissent in *Vaden*, however, argued that because the specific claim was subject to the FAA, the Court should not be concerned with whether the underlying action itself is subject to federal question jurisdiction. Chief Justice Roberts and Justices Stevens, Breyer, and Alito did not dispute the premise that federal question jurisdiction is limited and generally only attaches when the federal issue is well-pled.³¹⁶ Yet, because the specific issue raised, even as a counterclaim, was subject to an arbitration agreement, it should still be subject to the FAA because it reaches controversies even when embedded in a state law claim.³¹⁷ The dissent more broadly articulated distrust of state courts and reservations about the civil litigation system. The Justices argued that while they agreed with the majority that the state courts have a duty to follow the law with respect to the arbitration agreement, the FAA provides a federal remedy that should be respected. It stated, "We do not, however, narrowly construe the federal remedies—say, federal antitrust or civil rights remedies—because state law provides remedies in those areas as well."³¹⁸ As for the civil litigation system, the dissent stated, "A big part of arbitration is avoiding the procedural niceties of formal litigation; it would be odd to have the authority of a

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 54.

314. *Id.* at 69.

315. *Id.*

316. *Id.* at 79 (Roberts, C.J., concurring in part and dissenting in part).

317. *Id.*

318. *Id.*

court to compel arbitration hinge on just such niceties in a pending case.³¹⁹

What these cases demonstrate is that, in general, the Court has recently taken a more conservative approach to federal subject matter jurisdiction. Moreover, the cases show that the Justices are not guided as strongly by their interests in protecting particular parties. *Gunn*, *Watson*, and *Bayer* took a traditional conservative federalism approach by finding that the federal court did not have subject matter jurisdiction. *Watson* and *Bayer* pitted an individual against a corporation, yet the Court was unanimous in its decision against the corporation.³²⁰ *Gunn* involved two private litigants, but that decision is critical for its respect of the states' interest in regulating lawyers. As for *Mims*, the Court arguably expanded federal subject matter jurisdiction, although the better argument is that it maintained the default of concurrent jurisdiction and affirmed that Congress had the authority to explicitly provide otherwise in its legislation. Key to *Mims*, however, is the fact that the unanimous Court decided a case in favor of an individual and against a corporation.

The final case, *Vaden*, took a limited position on federal subject matter jurisdiction, but it also critically split the traditional factions, with Justices Ginsburg, Souter, and Kennedy joining traditionally conservative Justices Scalia and Thomas in the majority, and Chief Justice Roberts and Justice Alito joining traditionally liberal Justices Breyer and Stevens. An opinion like *Vaden* reflects a departure from many of the split cases discussed in this Article because the traditional factions part ways.³²¹ Together, these cases demonstrate that the Court is staying closer to a model of limited federal subject matter jurisdiction. Consequently, any particular bias toward business or plaintiffs is less pronounced. In other words, the civil litigation narratives discussed in Parts III through V seem to have less currency.

319. *Id.* at 76.

320. The holding in *Bayer* can be overstated in this regard, however. It is true that the Court was unanimous in allowing a state court to continue with its class certification decision; thus, this case seems to be a traditional conservative federalism case and, moreover, appears to be less hostile to class action cases than is the Court's norm. See *supra* notes 241-246 and accompanying text for a discussion of the Court's class action jurisprudence. Yet, this case was decided after CAFA was adopted. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2381-82 (2011). The Court understood that in the future, the state court class action in *Bayer* would be removable to federal court under CAFA. *Id.* at 2382. Thus, *Bayer* is a case that has limited application, and it therefore has less to say about the Justices' proclivity for siding with business interests in the context of a case that presents federalism concerns.

321. While there were certainly factional departures in the cases discussed in Parts III through V, they were the exception, not the rule. See discussion *supra* Parts V.A.2, V.B.2.

A response might be that the Court is more sensitive to federalism in this context because Article III of the Constitution created a dual court system where the federal courts would play a limited role.³²² Thus, it makes sense that in federal subject matter jurisdiction cases, conservative federalism principles would prevail—the Constitution requires as much. In the other cases discussed in this Article, however, it is not Article III, but federal statutory law,³²³ the Supremacy Clause,³²⁴ and due process³²⁵ concerns at play. In those latter cases, the federal government is not limited and is, in fact, more concerned with enforcing its law.

It is true that in each specific case, Article III concerns are not explicitly at issue. Yet, the policy behind a dual court system is still paramount. As discussed in Part VI.A above, applying the standard and alternative justifications for federalism to these kinds of cases demonstrates that the federal government's interest in this litigation is lower. In that sense, all of the cases discussed in this Article implicate the federalism concerns readily apparent in subject matter jurisdiction cases.

The overarching issue is whether the state laws and the state court system are available to state citizens. In most of the cases discussed in this Article, the conservative faction has generally prohibited application of state law, kept cases out of the state forum altogether, or placed the cases in an arguably more hostile federal forum. Yet, deference to the state system is not only a more appropriate approach as a matter of access to civil justice, it is also a more appropriate response as a matter of federalism. To the extent the two collide—procedure and federalism—the Court's approach in subject matter jurisdiction cases stands as a ready example of how the Court might weigh federalism in the private civil litigation context.

322. U.S. CONST. art. III, § 2.

323. The FAA, for example, is statutory.

324. The preemption cases implicate the Supremacy Clause. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (stating that the preemption doctrine is derived from the Supremacy Clause).

325. The Fourteenth Amendment is at issue in personal jurisdiction cases. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“[N]ow that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” (citation omitted)).

VII. CONCLUSION

Traditional conservative and liberal approaches to federalism tend to prevail in contentious cases where substantive claims are at stake. Yet, in the procedural context, where federalism concerns also loom, the Court does not divide along these predictable lines. These federalist diversions are due, at least in part, to the Justices' inclination to protect certain parties' interests: conservatives want to protect business interests and liberals want to protect plaintiffs' access to the civil justice system. Yet, in private civil litigation, a place where the state has a strong interest in protecting its citizenry, the Court's federalism principles should be more traditionally conservative. In short, a more "civil-ized" form of federalism might be more attentive to state interests.

APPENDIX

Roberts Court Procedural Cases in Consumer Preemption,
Arbitration, Class Action, Personal Jurisdiction, and
Subject Matter Jurisdiction Categories³²⁶

	CONSUMER PREEMPTION	ARBITRATION	CLASS ACTION	PERSONAL JURISDICTION	SUBJECT MATTER JURISDICTION
2005-06	--	--	--	--	--
2006-07	--	--	--	--	--
2007-08	<i>Altria Grp., Inc. v. Good</i> , 555 U.S. 70 (2008); <i>Riegel v. Medtronic, Inc.</i> , 552 U.S. 312 (2008).	Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008); <i>Preston v. Ferrer</i> , 552 U.S. 346 (2008).	--	--	<i>Watson v. Philip Morris Cos., Inc.</i> , 551 U.S. 142 (2007).
2008-09	<i>Wyett v. Levine</i> , 555 U.S. 555 (2009).	14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).	--	--	<i>Vaden v. Discover Bank</i> , 556 U.S. 49 (2009).
2009-10	--	Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010); <i>Rent-A-Ctr., West, Inc. v. Jackson</i> , 561 U.S. 63 (2010).	<i>Shady Grove Orthopedic Assocs., P.A. v. Allstate</i> , 559 U.S. 393 (2010).	--	--

326. Procedural cases implicating federalism are in italics.

	CONSUMER PREEMPTION	ARBITRATION	CLASS ACTION	PERSONAL JURISDICTION	SUBJECT MATTER JURISDICTION
2010- 11	<i>Bruesewitz v. Wyeth LLC</i> , 131 S. Ct. 1068 (2011); <i>PLIVA, Inc. v. Mensing</i> , 131 S. Ct. 2567 (2011); <i>Williamson v. Mazda Motor of Am.</i> , 131 S. Ct. 1131 (2011).	<i>AT&T Mobility LLC v. Concepcion</i> , 131 S. Ct. 1740 (2011).	<i>Erica P. John Fund, Inc. v. Halliburton</i> , 131 S. Ct. 2179 (2011); <i>Wal-Mart Stores, Inc. v. Dukes</i> , 131 S. Ct. 2541 (2011).	<i>Goodyear Dunlop Tires Operations S.A. v. Brown</i> , 131 S. Ct. 2846 (2011); <i>J. McIntyre Mach. Ltd. v. Nicastro</i> , 131 S. Ct. 2780 (2011).	<i>Smith v. Bayer Corp.</i> , 131 S. Ct. 2368 (2011).
2011- 12	--	<i>Marmet Health Care Ctr., Inc. v. Brown</i> , 132 S. Ct. 1201 (2012).	--	--	<i>Mims v. Arrow Fin. Servs., LLC</i> , 132 S. Ct. 740 (2012).
2012- 13	<i>Mut. Pharm. Co. v. Bartlett</i> , 133 S. Ct. 2466 (2013).	<i>Oxford Health Care Plans LLC v. Sutter</i> , 133 S. Ct. 2064 (2013); <i>Am. Exp. Co. v. Italian Colors Rest.</i> , 133 S. Ct. 2304 (2013); <i>Nitro-Lift Techs. L.L.C. v. Howard</i> , 133 S. Ct. 500 (2012).	<i>Amgen Inc. v. Conn. Ret. Plans & Trust Funds</i> , 133 S. Ct. 1184 (2013); <i>Comcast Corp. v. Behrend</i> , 133 S. Ct. 1426 (2013).	--	<i>Gunn v. Minton</i> , 133 S. Ct. 1059 (2013).