

KEYNOTE ADDRESS

The American Class Action: From Birth to Maturity

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I am honored to be here among the Conference's distinguished guests and speakers. Because I cannot pretend to be a comparativist, my focus is on the class action in the United States, which I have been involved with for over fifty-five years. If I have an overarching theme, it is simply this. The history and current status of the American class action is a product of a number of forces — historical, political, and sociological — that reflect various aspects of the civil litigation scene in my country that are constantly changing. If my description occasionally seems idiosyncratic or eccentric, that is because in many respects litigation in the United States usually appears idiosyncratic and eccentric to those outside the system. Moreover, at some points I will be impressionistic and somewhat personal. And, at times, I will wander outside the domain of class actions into other parts of the aggregate litigation world of which it is a part.

I. A SHORT HISTORY OF THE CLASS ACTION IN THE UNITED STATES

First some history. In most of the American colonies prior to our Revolution, the procedure of the English courts, including its dual system of law and equity

* University Professor, New York University. This Keynote was given at the Conference *Fifty Years of Class Actions — A Global Perspective, Fifty Years After the 1966 Amendment of the American Class Action Rule 23*, Tel Aviv University, January 4, 2017. I have expanded and updated my lecture, but tried to preserve much of the conversational and personal tone of my presentation at the Conference, but at certain points that did not translate into a written medium. The substance of my remarks has not been changed, however. Citations are designed to be illustrative rather than exhaustive.

courts,¹ was incorporated into local practices. As was true of the British system, claim and party joinder existed primarily in the colonial equity courts given the restrictions and highly technical and formal character of the procedure in the law courts. That was true of the ancient equity Bill of Peace practice² from which the modern class action eventually evolved.³

After independence was secured, the prior colonial practices were preserved in most state courts as well as in the federal courts established by Congress pursuant to the United States Constitution. In the federal courts the nascent class procedure was characterized as “a general rule in equity.”⁴ The early class action provisions and judicial constructs that did exist typically consisted of a single sentence phrased in terms of an action raising a common question involving too many people to make joinder practicable. Some state codes also required that the members of the group share a common interest.

Relatively few actions resembling what today we would call class actions appear to have been instituted under these provisions. The largely agrarian nature of the society simply did not require their use. This continued to be true under the Federal Equity Rules of 1842 and 1912, perhaps because the nature and effect of a class action were unclear.⁵ Rule 48 of the 1842 Rules, for example, curiously said “the decree shall be without prejudice to the rights and claims of all the absent parties.” That sentence occasionally was ignored and the passage was omitted from the 1912 Equity Rule. Nonetheless, confusion about the character and consequences of a class action judgment on absentees continued.

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- 1 The development of the class action in England and the United States is admirably set out in STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987). See also 1 BASIL MONTAGU, DIGEST OF PLEADING IN EQUITY (London, J. & W.T. Clarke 1824); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874 (1958). Contemporary federal courts continue to recognize the equitable roots of the class action. E.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999); see also Stephen Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).
 - 2 See, e.g., *How v. Tenants of Bromsgrove*, 1 Vern. 22, 23 Eng. Rep. 277 (Ct. Ch. 1681). In its earliest form, the practice was a citizen’s direct appeal to the king’s or queen’s conscience.
 - 3 See generally ZECHARIAH CHAFEE, SOME PROBLEMS OF EQUITY 200-01 (1950).
 - 4 *West v. Randall*, 2 Mason 181, F. Cas. 17,424 (1820) (Story, J., on circuit).
 - 5 See JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES (8th ed. 1933). Perhaps the most important class actions prior to the Federal Rules were *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) and *Smith v. Swormstedt*, 16 How. (57 U.S.) 288 (1853).

A serious attempt to formulate a more meaningful and comprehensive class action rule was included in Rule 23 of the Federal Rules of Civil Procedure,⁶ which were promulgated in 1938 and survive to this day. The drafters of the Rule probably were motivated by the growth of federal regulation, enhanced modes of industrialization, transportation, and communication, and the development of a national marketplace. That period also saw the completion of the merger of federal law and equity into one form of action under the simple designation “civil action.”⁷ The 1938 Rule described three categories of class actions based on the nature of the relationship among the class members. These came to be known as “true,” “hybrid,” and “spurious,”⁸ words that confused both judges and lawyers.

Even though the situations for utilizing group or representative litigation were increasing because of the United States’ emergence as an industrial and complex society that was producing larger and more complicated litigation, and Federal Rule 23 was designed to be class action-friendly, such actions continued to be infrequent because of the Rule’s metaphysical language and the profession’s lack of familiarity with its operation and effect.⁹ In addition, there has been a longstanding tradition in the United States, as is true elsewhere, of an individual’s right to control the course of his or her litigation fortunes as well as a reluctance to bind people who were not actually before the rendering court. In short, there has been a commitment to a citizen’s right to a literal, rather than a representative, day in court. The original Federal Rule also was subject to inconsistent judicial constructions and failed to provide guidance on various procedural matters such as what constitutes a “class” and whether its members had to be given notice of the action.

6 See 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1752 (3d ed. 2001); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941). The Federal Rules were completely transformative of practice in the national courts and became a model for many state court procedural systems.

7 See FED. R. Civ. P. 2. The unification of law and equity at the state level had started almost a century earlier. See 4 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 1041-1045 (4th ed. 2015).

8 Professor (later Judge) Charles Clark, the Reporter for the Advisory Committee that drafted the original Federal Rules, described the categories in this fashion in the AM. BAR ASS’N RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES PROCEEDINGS OF THE INSTITUTE ON THE FEDERAL RULES AT CLEVELAND, OHIO 254 (1938).

9 The Rule’s deficiencies are discussed in CHAFEE, *supra* note 3, at 199-295.

In the early 1960s a new Advisory Committee on Civil Rules was appointed by the Chief Justice of the United States pursuant to the congressional grant of rulemaking power to the Supreme Court.¹⁰ It was tasked with monitoring the performance of the Rules and proposing revisions to them. The Committee was composed of a number of the finest proceduralists in the nation. Because of some curious circumstances, I became an unofficial assistant to the Advisory Committee's Reporter, Professor Benjamin Kaplan of the Harvard Law School, who had been my mentor and had fostered my love of civil procedure when I was his student and research assistant there.¹¹ He and I also had collaborated in several academic adventures in the years following my graduation. Thus began my life with class actions.

Early on the Committee set out to revise, rationalize, and expand the existing party and claim joinder provisions of the Federal Rules.¹² As the rulemaking process, which is very elaborate and deliberative, progressed, it became apparent that revising the class action rule was central to the overall effort regarding the

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- 10 28 U.S.C. §§ 2072, 2073 (1966). The activities of that Committee are described by one of its members, a distinguished federal Judge, in Albert Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A.B.A. J. 772 (1961). See also David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953-1980*, 90 WASH. U. L. REV. 587 (2013). The multi-tiered federal rulemaking process is discussed in Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); and David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969 (1989).
- 11 My indebtedness to Ben is recorded in Arthur Miller, *In Memoriam: Benjamin Kaplan*, 124 HARV. L. REV. 1345, 1354-57 (2011). My involvement in what became the 1966 amendments is described in Arthur R. Miller, *Some Very Personal Reflections on the Rules, Rulemaking, and Reporters*, 46 U. MICH. J.L. REF. 651 (2013).
- 12 Committee members felt they had to honor the trans-substantive character of federal procedure, which meant that any Rule amendment had to be “general” and speak with a single voice in all cases regardless of the substantive nature of the underlying claims. In recent times, the concept has come under attack. See, e.g., Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1940 (1989) (“[U]niformity and trans-substantivity . . . are a sham.”); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trial on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 370 (2013) (“For example, consideration should be given to abandoning the trans-substantive principle requiring that the Federal Rules be ‘general’ and applicable to all cases — a notion that supposedly is embedded in the Rules Enabling Act.”). Additional citations can be found *infra* note 144.

joinder rules. Although there was consensus on making Rule 23 more user-friendly, certain aspects of the revision effort proved to be a source of significant disagreement among the Committee members, particularly regarding how broad to make the range of matters that could be certified for class treatment.

The entire Committee understood and agreed that the confusing categories established by the 1938 Rule were retarding its utility and had to be replaced by more functional language. It also was clear to the members that an effective class action procedure was critical to the implementation of the United States Supreme Court's 1954 decision in *Brown v. Board of Education of Topeka, Kansas*¹³ that segregating schools by race violated the Constitution, surely one of the most important decisions by the Court in the history of the United States. They also understood that a new Rule undoubtedly could prove effective in connection with an as yet undefined but anticipated range of civil rights cases involving other types of discrimination, for example, in the use of transportation facilities, as well as securing equal access to various social amenities and vocational opportunities. That was true even though the broad-ranging civil rights statutes had not yet been enacted by Congress.¹⁴ Several Committee members also believed that the proposed extended joinder provision in what is now Rule 23(b)(3) would be useful in actions under federal remedial statutes, such as those dealing with antitrust and securities matters, when the defendant's conduct was claimed to have had a class-wide impact.

Professor Kaplan and several Committee members also were of the opinion that a new rule should be flexible and allowed to function beyond the existing boundaries for class actions as changes in substantive law and society might warrant. In particular, they thought the procedure should be available to aggregate small claims that economically could not be brought as individual cases — what we now call negative value cases.¹⁵ This view reflected the

13 *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483, 873 (1954); see David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011). *Brown* actually was not a class action; it was a consolidation of cases from five different jurisdictions but had the trappings of a class action.

14 The civil rights bill of 1963 (submitted to the House Rules Committee on November 20, 1963) became the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as 42 U.S.C. §§ 2000e *et seq.*), and was enacted after the revision of FED. R. CIV. P. 23 was well advanced, which was true by 1964. The Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 43, came into force the following year.

15 Benjamin Kaplan, *A Prefatory Note, The Class Action — A Symposium*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (expressing the views of the Advisory Committee's Reporter); see also Benjamin Kaplan, *Continuing Work of the*

liberalism and egalitarianism of the day, which considered access to the courts to be part of the nation's growing commitment to social justice under the Constitution, as the *Brown* decision had evidenced in the discrimination context. It also seemed consistent with the flexibility and judicial discretion that historically characterized both English and American equity practice.

Some Committee members, however, argued against any extension of the then existing class action practice, feeling that it was inappropriate to aggregate people who were dispersed and had no prior nexus with each other or to bind absentees to the results of a proceeding that they might be unaware existed. Fears were expressed that the procedure might be misused by lawyers who put their own financial or other interests ahead of those of the absent class members or engage in settlements that were not in the best interest of their clients or bring suits that would threaten the economic viability of companies and governmental programs. In particular, they opposed the inclusion of what is now Rule 23(b)(3).

The compromise was to limit that provision, which in many respects is simply an open-ended joinder device, by imposing several procedural safeguards that would ensure systemic economies and efficiency, provide procedural regularity, especially consistency of outcome, promote notions of due process, protect absent class members, and legitimize giving the resulting judgment binding effect. These include the requirements that class-wide common questions predominate over individual questions, that a class action must be superior to other dispute resolution possibilities, such as individual lawsuits or administrative adjudication, that absent class members be given individual notice of the action, and that class members be permitted to opt out of the action, thereby permitting them to decide for themselves whether to remain in the class or absent themselves.¹⁶ None of these limitations and safeguards, however, were made applicable to class actions under Rule 23(b) (1) or (b)(2) — the so-called anti-prejudice and injunction class actions. These were thought to be “natural” (or “traditional”) class actions that did not necessitate special safeguards or permit individual action by class members.¹⁷

Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 HARV. L. REV. 356, 397-98 (1967) (arguing that requiring class members to opt-in would “freez[e] out” “small claims”); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the Class Action Problem*, 92 HARV. L. REV. 664, 674 (1979) (discussing misconceptions about the 1966 Rule 23 revision and of the utility of class actions).

16 See 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 1777-1780, 1787, 1793 (3d ed. 2005).

17 The categories of class actions in the Federal Rule and their spheres of application are discussed *id.* §§ 1772-1784.1, 1790.

The Rule was written in an open-textured and readable fashion. This was a recognition that many aspects of class action practice would have to be left to development by trial court judges, which necessitated giving them considerable discretion and encouraging judicial control and oversight.¹⁸ This was thought appropriate because the lifetime appointment of federal judges protects them from political and special interest pressures. This judicial independence reflects a basic characteristic of the American legal system — one inherited from the English — a trust in judges justifying giving them considerable freedom of action. It also reflected the then embryonic recognition that judges had to assume significant case management burdens, particularly in large or complex lawsuits. This transition in judicial function from passive umpire to active manager has grown enormously and is now a basic characteristic of civil litigation in the United States. Managerial judging has been transformative (and controversial) in several respects.¹⁹

In retrospect, I think it is unrealistic to have expected that anyone, even those extraordinarily gifted Advisory Committee members, could have predicted the tremendous increase in class actions that followed the 1966 revision or the concomitant changes in their dimension or the ways in which they are processed. Several external forces were at work that clearly contributed to the emergence of the modern class action. American society was changing radically at that time and the liberal Congress and judiciary in place in the fifteen to twenty years following the 1966 revision created a significant number of new statutory rights for people and expanded a variety of common law doctrines that could be effectuated by using the class procedure under the revised Federal Rule, which seemed to fit comfortably in many substantive contexts. There were comparable developments in most states. These new bodies of law involved

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- 18 Several judicial management provisions in FED. R. CIV. P. 23 offer some guidance and provide “safeguards” in addition to those mentioned in text. These include the court’s duties to determine the adequacy of class representation (FED. R. CIV. P. 23(a)(4)), to select class counsel (FED. R. CIV. P. 23(g)), to ensure that any proposed settlement is “fair, reasonable, and adequate” (FED. R. CIV. P. 23(e)), and to decide the reasonableness of class counsel’s fee award (FED. R. CIV. P. 23(h)).
- 19 See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378-80 (1982). Professor Resnik expressed concern over the possibility that judges would abuse their discretionary power under a case management regime. Others argued that the values of management outweigh its risks. See Steven Flanders, *Blind Umpires: A Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984) (critiquing Professor Resnik’s concerns and arguing that judicial management is beneficial); see also 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* §§ 1521-1531 (3d ed. 2010).

such matters as the environment, credit, privacy, products liability, especially litigation involving their quality, warranties, and safety, as well as ensuring people due process and equal protection of the law. The federal judges of that era generally had a rather receptive attitude toward these actions. Moreover, national marketing, scientific and technological sophistication, and other large-scale societal phenomena provided natural contexts for using the class action for the growing number of events or activities that generated numerous claimants when a misadventure occurred.

There is another element among the factors that contributed to the growth of the class action in the years following the 1966 revision. The composition of the legal profession as well as its economics and culture were shifting significantly — indeed dramatically — as it has continued to do throughout my professional lifetime. Ever since, the 1960s law has been a career for social activism and securing professional positions that enable young graduates to participate in formulating or enforcing public policy.²⁰ In addition, more and more women were going to law school and over the years many other populations have been entering the profession, making it — both Bench and Bar — far more diverse (as is true of the people seeking relief) than it had been. Moreover, the scale of everything began magnifying and has continued to do so — particularly in terms of the size of lawsuits, law firms, and the fees that could be earned in litigation. All of this enhanced the attractiveness of and opportunities for using the class action.

In many ways, these factors created a perfect storm. The creation of various new rights of action, the changing orientation and composition of the legal profession, the larger scale and economic stakes of litigation, the egalitarian composition of Congress and the courts, and the increasingly complex social and commercial environments provided many new contexts and attractions for using the class action. As a result, many federal as well as state courts vitalized the procedure by certifying cases for class treatment, occasionally, I must acknowledge, without demanding the strictest compliance with the technical requirements of Rule 23 or appreciating the complexity of what might follow.

II. A DIGRESSION

At this point let me digress to describe an interesting piece of Americana. The extraordinary extensions of the class action's scope of application during the

20 See Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131 (2009).

past half century reflect a basic characteristic of the American litigation scene. The United States has constitutionally based separation of powers and checks and balances principles governing a triumvirate of governmental branches, the Executive (the President), the Congress, and the Judiciary. Stated simply, the Judiciary has the responsibility of restraining the other two branches and the states from exceeding their constitutional or statutory limitations. For example, it was obvious in the early 1950s that if there was to be racial equality in my country, it would not be decreed by the President and it would not result from statutes enacted by Congress, for the simple reason that both of those branches were absolutely paralyzed by the nation's politics and attitudes regarding that subject. No one could be elected President and realistically no political party could secure control of the Congress based on promoting racial equality. That would be politically inexpedient, so it was not surprising that the Supreme Court undertook the task in 1954 in the *Brown* case.

American lawyers understand this and are accustomed to resorting to the courts to press sensitive issues of public policy and to challenge governmental conduct even absent Legislative or Executive Branch guidance. Thus, in many contexts the nation's least democratic branch — in the sense that federal judges are not elected and have lifetime appointments — is asked to formulate policy on various emotional and contentious matters, often because the elected branches are politically paralyzed by a division of viewpoints or political inexpediency, as has been true of such matters as abortion, single-sex marriage, affirmative action, campaign financing, and capital punishment. It is an aspect of American exceptionalism. Lawyers in the United States are not bashful about heading to the courts on such matters whether for ideological or entrepreneurial reasons, and many judges do not shy away from policy issues. In some contexts, the private bar acts as a second regulatory system, which is an especially valuable attribute when the official regulatory system fails to act for any number of reasons. Some of these lawyers are even referred to as private attorneys general.²¹ Not surprisingly, the class action became the natural and frequently employed procedural vehicle for pressing policy issues

21 See, e.g., *Herman & MacLean v. Huddleston*, 459 U.S. 375, 377-84 (1983); see also SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES (2010); Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation*, 26 YALE J. INT'L L. 219 (2001); William B. Rubenstein, *On What a "Private Attorney General" Is — And Why It Matters*, 57 VAND. L. REV. 2129 (2004) (discussing the history and the role of private attorneys general). The origins of the private enforcement of public policy is traced in Stephen C. Yeazell, Brown, *The Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1977-85 (2004).

of every kind. After all, the courts' ability to aggregate parties and claims often has tactical, economic, political, and media advantages for the class.

The most striking example of this willingness to resort to the courts that I can offer, at least based on my personal experience, are the lawsuits designed to provide some legal redress through compensation and recognition of what the victims suffered as a result of the illegal and inhumane behaviors of the Nazi era in Germany — these have been dubbed the Holocaust cases.²² They took various forms;²³ I will focus on two that were class actions.

The first was against a number of Swiss banks because they had failed to acknowledge the existence of the numbered accounts opened initially by Europeans in the 1920s and 1930s who were trying to protect their assets from the threat of Eastern European anti-Semitism and then from the Nazi regime. The banks had stonewalled Holocaust survivors and their offspring for a half century, often imposing identification demands they knew could not be met. According to the banks, no such accounts existed.²⁴ Pressure had to be employed. So, a group of American lawyers instituted a class action in the federal court for the Eastern District of New York, which is located in Brooklyn.²⁵

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- 22 A full account of the Holocaust Litigation is found in MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS (2003). See also JOHN AUTHERS & RICHARD WOLFFE, THE VICTIM'S FORTUNE (2002); LEORA BILSKY, THE HOLOCAUST, CORPORATIONS AND THE LAW (2017); STUART E. EIZENSTAT, IMPERFECT JUSTICE (2003).
- 23 Although group Holocaust litigation has ended, individual cases, typically involving property illegally seized by the Nazi regime, appear from time to time. For example, on March 3, 2017 an action was brought in Manhattan federal court against a German bank to recover a painting by Kandinsky allegedly taken from a Dutch family following the German invasion of the Netherlands in 1940. Colin Moynihan & Alison Smale, *Heirs Sue for Return of a Kandinsky, Saying It Was Looted by Nazis*, N.Y. TIMES, Mar. 4, 2017, at C2.
- 24 Starting early in the 1950s, there had been many attempts to get the Swiss to investigate and distribute dormant accounts. Several times over the decades the banks said they had looked and only found 75 accounts, then 250, then a few more. When the pressure was heightened they announced that they had found some of Hitler's and his henchmen's accounts, including Hitler's trademark income account for the use of his likeness on stamps and from the royalties for his book *Mein Kampf*. That seemed to be an attempt to embarrass people to stop them from asking.
- 25 As some of you know, that's where I grew up — in Brighton Beach, Brooklyn — when it was a middle and east European Jewish neighborhood, long before the Russians arrived. This is my first visit to Israel. I had a marvelous *déjà vu* two days ago when I found myself in the center of Tel Aviv. Looking at the people

The complaints alleged that the Swiss banks had accounts they were obliged to turn over to the rightful owners — survivors, first generation, and second-generation descendants of Holocaust victims. Think about how extraordinary a case this was. It involved events that happened more than fifty years earlier, 4000 to 6000 miles away, brought on behalf of people, most of whom had passed away, against the most powerful Swiss banking entities, and involved hundreds of millions if not billions of dollars. There is a wonderful American lawyer (also an extremely accomplished professional French horn player) in the audience — Deborah Sturman — who had a big part in the litigation. I had a small part in it on behalf of the class regarding some procedural matters.

I remember one day in particular. The district judge was listening to the arguments advanced by some of the best defense law firms in the country on behalf of the Swiss banks concerning a dozen technical but critical issues about why a federal court in Brooklyn shouldn't hear the case. I watched the judge's face carefully and after about an hour said to the other lawyers for the class, I know exactly what he's going to do. That got the team's attention! What? — they asked nervously. I said he will not rule on any of the points. He is going to let the parties live with the risk of an adverse decision. The case is a black mark on the Swiss banks (who at the time were trying to establish themselves as a force in the New York financial market) and the class faces the risk of a dismissal for lack of jurisdiction. He knows that given time the parties will see the wisdom of a settlement. And that is what happened. The case settled for over one billion dollars — plus interest.²⁶ Shortly thereafter numerous accounts — over 50,000 — were "found" by the banks.

This story reflects another aspect of American litigation. Legal disputes often are not solely conducted in the courtroom; they frequently are pursued in the media or the political world, in order to impact public opinion. One of the realities of those worlds in the Swiss banks case was that the New York, and banking officials elsewhere, indicated they would not act on various applications by the banks until the claims were resolved. Some might say this is not appropriate litigation conduct; it is a form of coercion. Others would say it simply is pressuring the other side to do the right thing. In the United States, tactics such as these are part of the litigation landscape. If my country's courts can order school desegregation for the entire nation and reapportion state legislatures and change public policies through the judicial process, why couldn't it make the Swiss banks look harder for the dormant accounts?

and the stores and listening to the sounds of the city, I said to myself I'm back in Brighton Beach; this is exactly where I was born.

26 The lead lawyers for the class did not take a fee for their services.

To me, the most extraordinary of all the Holocaust cases are called the slave labor cases. These are the cases that Deborah Sturman conceptualized and investigated, and was active in from beginning to end.²⁷ As a result of academic work starting in the 1990s, it became widely known that many German companies used slave labor from the concentration camps and the ghettos. Sometimes people were apprehended and shipped directly to factory labor camps. There was an arrangement between the SS and German industry to use the “slaves” that was economically beneficial to the companies and was essential to the German war effort because there was a severe manpower shortage and there were not enough women available to produce various things needed by the military.

In the late 1990s, cases were brought against two dozen significant German companies — including Daimler, Siemens, BMW, Bayer, BASF, and Volkswagen — in the Federal District Court in New Jersey, invoking the most basic precepts of common and civil law — the right to be paid for work and labor performed and the discouragement of unjust enrichment. The notion was simple. German industry should compensate the laborers and their heirs because they had worked and made profits for the companies before they died.²⁸ The cases satisfied all the class action prerequisites, but again there were procedural and jurisdictional obstacles. There had never been a case like these. They were brought almost sixty years after the slave labor was performed, concerned events that had happened thousands of miles away from New Jersey, and were on behalf of people who were dispersed all over the globe, some in the United States, many here in Israel, some in South Africa, Australia, and numerous other places.

When the initial jurisdictional decisions didn’t go well for the classes,²⁹ the lawyers went to Plan B — the publication of embarrassing advertisements chronicling the companies’ wartime activities. Because these were suits against

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- 27 Some of Ms. Sturman’s recollections are recorded in Deborah Sturman, *Germany’s Reexamination of Its Past Through the Lens of the Holocaust Litigation*, in HOLOCAUST RESTITUTION, PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 215 (Michael J. Bazylor & Roger P. Alford eds., 2005) (a compendium of essays by the major participants in the litigation).
- 28 The Germans were relying on the traditional long-term economics of slavery — work them and have them reproduce to create more slaves. However, the Jews were to be worked to death.
- 29 Two federal judges dismissed the cases before them, concluding that they could not be heard in the United States. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999); Burger-Fischer v. Degoussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999). Both dismissals were appealed but they were never heard because the matter was resolved.

German companies, there was extralegal leverage because the defendants had major stakes in the American market and needed to protect their images. An ad in the *New York Times* said: “Daimler — Design, Performance, Slave Labor,” accompanying a picture of a military touring car with a big Mercedes star on the front. Another ad relating to Bayer’s support of Dr. Mengel proclaimed: “Bayer’s biggest headache: Human Medical Experimentation and Slave Labor.” Again, some might say this was inappropriate. Others might say, no, this is just applying pressure against adversaries. The cases and the ads created an international controversy. Eventually, eight nations became involved and the matter was resolved diplomatically with a letter of agreement signed by President Clinton and Chancellor Schroeder obligating the defendants to create a ten billion Deutschmark fund — 6.7 billion dollars — for “remembrance,” and everyone agreed to discontinue the class actions. Many of the class members were economically viable because they had successful and productive careers after World War II. Others needed compensation and were helped. Beyond the money, however, the one common theme sounded by class members was that they wanted what they or their parents or grandparents had endured remembered.³⁰ The fund enabled that.

III. EXPERIENCE UNDER THE REVISED CLASS ACTION RULE

Back to the story of the American class action. The revised Rule has been subject to almost constant academic and judicial scrutiny and controversy since its promulgation and has been amended several times. Perhaps the most consequential amendment has proven to be the 1998 addition of a provision for discretionary interlocutory appellate review of class certification decisions, which has had significant pragmatic effects.³¹ The provision represents a dramatic departure for a legal system that basically has limited the availability of appellate review to final judgments.³² The remaining amendments have been textual modifications or codifications of judicially established “best practices” regarding such matters as notice-giving, the selection of class counsel, and

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- 30 Approximate \$500,000,000 were devoted to museums and monuments. Another aspect of the “settlement” was that the President of Germany made a public apology for the inhumanity of the Nazi era — the first ever.
- 31 FED. R. CIV. P. 23(f); see 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1802.3 (3d ed. 2005). As a member of the present Advisory Committee has concluded, this amendment primarily has worked in favor of defendants. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 741 (2013).
- 32 See 28 U.S.C. § 1291.

attorneys' fees.³³ Because of the extremely divergent opinions about the class action, in recent years few proposed amendments of significance have been approved by the Advisory Committee and survived the rulemaking process. The most recent group of amendments to Rule 23 to go through the rulemaking process do not appear to be controversial or represent any fundamental shift in direction.

But the most significant changes in class action practice since the 1966 revision have resulted from decisions by the federal courts. Not surprisingly, within a few years, the class action slowly but predictably began to be employed outside the world of racial segregation and entered many other areas of discrimination — gender, ethnicity, disability, age (given mine, it is my favorite) — as the encompassing civil rights commitment and the legislation of the era took hold. This growth extended to other constitutional and public policy contexts. These included the reapportionment of legislative bodies, free speech, prisoner rights, the environment, various governmental programs and benefits, due process and equal protection issues, even the legality of the Vietnam War.³⁴ Substantive fields not expressly visualized by the people who drafted the 1966 amendment, including mass accidents, product defects and other tort matters, employment, privacy, and consumer matters, also responded to societal centrifugal forces and became the subjects of class actions.

Elements of the plaintiffs' bar and the emerging public interest bar applauded the expanded use of class actions, occasionally characterizing them — as did some judges and academics — as a “panacea” for remedying various social ills and compensating small claimants who had no effective access to the courts except by proceeding on a collective basis.³⁵ In due course an emboldened and highly aggressive entrepreneurial segment of the American plaintiffs' bar took the class action into other private law fields such as complex antitrust and securities claims, products liability, unfair trade practices, personal injury, mass disasters, and a wide range of consumer injuries.³⁶

33 FED. R. CIV. P. 23(g), 23(h); *see* WRIGHT, MILLER & KANE, *supra* note 31, §§ 1802.3-1803.3.

34 Striking examples include the Supreme Court's decisions in *Brown v. Plata*, 563 U.S. 493 (2011) (prison overcrowding); *Abermarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (discrimination); and *Dunn v. Blumstein*, 405 U.S. 330 (1972) (voter residency law).

35 *See, e.g.*, *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980); *Eisen v. Carlisle & Jaquelin*, 147 U.S. 156 (1974).

36 *E.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) (antitrust); *In re Katrina Canal Breaches Litigation*, 628 F.3d 185 (5th Cir. 2010) (hurricane damages); *see also* WRIGHT, MILLER & KANE, *supra* note 16, §§ 1777-1784.1, 1804-1805 (discussing cases brought under FED. R. Civ. P. 23(b)(3)); David Rosenberg,

As intimated earlier, that is what American plaintiffs' lawyers do — they are very adventuresome, innovative, and risk-assumptive, as the Holocaust cases evidenced. They often attempt to push out the boundaries of the substantive law, encouraged by three aspects of the economics of civil litigation in my country: the availability of contingent fee arrangements, the fact that litigation costs are left where they fall — there is no loser pays rule — and numerous federal and state statutes provide for court-awarded legal fees if they prevail, and there is a common law principle that a fee can be awarded to lawyers who produce a common benefit for the class members.³⁷ Today, third-party funding is a growing practice in the United States, as it is elsewhere, and may prove to be a significant fourth element in this economic picture if a sensible model for supporting class actions can be developed.³⁸

But the growth of the class action predictably caused various defense-oriented individuals and institutions to begin to condemn it as a "Frankenstein monster" and resist class certification by raising a range of objections.³⁹ Defense interests recognized the economic and philosophical threat that the proliferation of class actions posed. In addition, a number of federal courts became concerned with the non-commonality of the factual or legal positions of absent class members and the perceived threat to the economic viability of some business enterprises and governmental programs. A few judges in

The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System, 97 HARV. L. REV. 849 (1984) (arguing that the class action is useful in mass disputes).

37 See, e.g., *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Trustees v. Greenough*, 105 U.S. 527 (1881). The contemporary expansion of public and private substantive law coupled with the attraction of attorney fee shifting provisions in statutes and the general acceptance of the common fund fee sharing principle obviously made the class action attractive to both public interest and entrepreneurial plaintiffs' lawyers. See 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 1803-1803.2 (3d ed. 2005). The latter doctrine, of course, has been of limited application when injunction or declaratory relief rather than damages is sought. See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975).

38 See Symposium, *Proceedings of the 2015 Fall Conference with the Center on Civil Justice: Litigation Funding: The Basics and Beyond*, 12 N.Y.U. J.L. & BUS. 511 (2016); Anthony J. Sebok, *Private Dollars for Public Litigation: An Introduction*, 12 N.Y.U. J.L. & BUS. 813 (2016).

39 See Miller, *supra* note 15.

these and other cases raised the specter of unfair and *in terrorem* settlement pressures they thought some class actions created.⁴⁰

The effects of this campaign were particularly effective in contexts involving classes with members from multiple states whose individual rights often were governed by varying state substantive laws; many of these cases involved tort claims stemming from alleged product failures or nationwide misrepresentations and other commercial practices.⁴¹ This multiplicity of applicable state law poses a problem in class actions because American federalism recognizes the sovereignty of each state and respects variations in the fifty-one bodies of state and federal substantive law and the same number of court systems. Some federal judges confronted with a national class and the task of determining and applying the laws of all those jurisdictions concluded the action was unmanageable and dismissed.⁴²

The pressure for containment of the class action became particularly acute with regard to multi-state classes asserting claims for personal injuries under multiple state laws, as evidenced by the almost contemporaneous rejection in the mid-1990s of certification by three federal courts of appeals

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- 40 E.g., *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 747 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995), cert. denied, 516 U.S. 864 (1995). The reality of these concerns has been challenged. See, e.g., Charles Silver, “*We're Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).
- 41 See, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002) (explaining that class certification requires that “all litigants are governed by the same legal rules”); see also Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839 (2006) (noting the mismatch between current choice-of-law rules and the concept of the United States being a national market, and arguing for a default rule of applying the laws of the defendant's home state); Genevieve G. York-Erwin, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1794, 1802-10 (2009) (noting that the denial of certification is normal in such situations and describing the shift in attitude by the federal judiciary toward class actions with choice-of-law implications).
- 42 The leading case on this subject is *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). See Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1 (1986); sources cited *infra* note 85. In the judicial sphere American federalism is different from the federalism in other countries because there is a dual system of state and federal courts that have partially overlapping subject matter jurisdiction in cases in which citizens of different states are opposing each other.

of proposed classes involving tobacco addiction,⁴³ the lack of purity of the blood supply,⁴⁴ and allegedly defective penile implants.⁴⁵ In addition, small claim class actions based on state law, which included most consumer cases, ran into the federal courts' amount in controversy requirement for cases that depend on the diversity of citizenship of the opposing parties.⁴⁶

Courts also contributed to the growing resistance to class actions by insisting that judges engage in a "rigorous" examination of the Rule 23 certification prerequisites and became far more willing to find intra-class differences that led them to conclude that common issues did not predominate in actions brought under Rule 23(b)(3).⁴⁷ The Supreme Court echoed this resistance, most notably by twice rejecting proposed class-wide settlements of asbestos cases.⁴⁸ Asbestos litigation has been one of the — if not the — greatest litigation catastrophes in American civil litigation history, one that has cried out for aggregate resolution.⁴⁹ And a few years ago, in *Wal-Mart*

43 Castano v. Am. Tobacco, 84 F.3d 734 (5th Cir. 1996).

44 Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 51 F.3d 1293 (3d Cir. 1995), *cert. denied*, 516 U.S. 867 (1995).

45 *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996). I note with some embarrassment that I was the oral advocate for the losing class in two of the three cases.

46 *E.g.*, Zahn v. Int'l Paper Co., 414 U.S. 291 (1973).

47 The judicial scrutiny of the class certification requirements has expanded dramatically. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (voting rights); Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982) (demand for judicial "rigorous" analysis of the certification requirements); Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592, 594, 596-97, 605 (3d Cir. 2012) (reversing class certification and demanding higher factual proof of class definition, class ascertainability, numerosity, and causation); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (3d Cir. 2008) (remanding certification because the district court occasionally departed from the "rigorous analysis" standard); Oscar Private Equity Inv. v. Allegiance Telecom, Inc., 487 F.3d 261, 268 (5th Cir. 2007) ("Rule 23's requirements must be given their full weight independent of the merits."), *abrogated on other grounds by* Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804 (2011); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006) (class certification requires a ruling on each Rule 23 requirement regardless of any overlap with merit issues).

48 Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997).

49 See Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97 (2013) (presenting the views of the present asbestos MDL transferee judge);

Store, Inc. v. Dukes,⁵⁰ the Court made the requirement of “commonality” of the defendant’s conduct challenged by the class, far more demanding than it had been previously.

This counterpoint of conflicting receptivity and resistance pressures over the past half century has led to an ebb and flow in the judicial treatment of the class action, particularly with regard to the certifiability of classes seeking damages under Rule 23(b)(3). A class-based tension about the merits and demerits of the class action — and that is what it is — has persisted for almost forty years. At times the debate has been conducted with a quasi-religious fervor at a high decibel level with significant political manifestations and pressure on the rulemaking, judicial, and legislative processes. It also has tended to obscure the general effectiveness of the class action in the public interest sphere; the heated debate over the class action has centered on the Rule 23(b)(3) damage action because, after all, that is where the money is.⁵¹

As a result, when I look over the class action panorama in the United States since the 1966 revision of the Federal Rule, one word comes to my mind today — “unstable.” In the beginning, there was widespread receptivity for the procedure; this was followed by increased adversarial combat and heightened judicial scrutiny, only to be followed by a period in which the survivability of the class action in several substantive contexts came to be seriously questioned by some scholars.⁵² It is understandable that application

Edward F. Sherman, *The Evolution of Asbestos Litigation*, 88 TUL. L. REV. 1021 (2014) (offering a brief description of the asbestos crisis).

- 50 Wal-Mart Store, Inc. v. Dukes, 564 U.S. 338 (2011). The Court was divided five to four. Class action advocates were greatly dispirited by the result. *E.g.*, Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34 (2011).
- 51 Actions under FED. R. CIV. P. 23(b)(1) to avoid prejudice have virtually disappeared and actions under FED. R. CIV. P. 23(b)(2) for injunctions primarily to stop discrimination or public policy violations seem to have avoided much of the controversy and criticism levelled at FED. R. CIV. P. 23(b)(3).
- 52 See, *e.g.*, Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161 (2015); Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) (asserting that class actions will soon be “virtually extinct”); see also MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009); Linda S. Mullenix, *Ending Class Actions As We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399 (2014); Martin H. Redish, *Rethinking the Theory of the Class Action: The Risks and Rewards of Capitalistic Socialism in the Litigation Process*, 64 EMORY L.J. 451 (2014). The reader will not be surprised by my doubts (or perhaps it

of the Rule always has been somewhat unpredictable, given that a number of critical issues are subjective and discretionary in character, often depending on specific facts and legal contexts (as well as the predilections of particular judges, as intimated earlier). These include: What are common issues and when do those issues predominate? When is the class action superior to other adjudicative methods? Who is a proper class representative? When is a settlement fair, reasonable, and adequate? And, of course, what is a reasonable attorney's fee for a successful class counsel?

Inevitably, the "proper" or "correct" answers to these questions lie in the eyes of the judicial beholder, leading to varied results depending on substantive, geographic, and other differences. Put another way, it is impossible to align the judicial decisions on class certification in a straight line. But, of course, that is an inherent characteristic of the common law system, at least as it exists in the United States, particularly with regard to a procedure that had its genesis in equity; certification involves matters that always have been marked by judicial discretion. And, that ever will be so.

Not surprisingly, many plaintiffs' lawyers today, whether they be entrepreneurial in outlook or seek to promote what they believe to be in the public interest, fear that the federal judicial appointments in the coming years — not simply for vacancies on the Supreme Court but throughout the federal system — will be antagonistic to plaintiffs' interests and anti-litigation in outlook. This concern is compounded by the Republican Party's control of both the Congress and the Presidency and the already manifested intent to undermine aggregate litigation.⁵³ So today there is renewed talk about the possible demise of the class action.

Although I share the concern about judicial appointments and the direction of Congress, I have faith in the independence of federal judges and the judicial process. Indeed, it has been the courts that for years have consistently recognized the propriety of certifying a class for settlement as well as for litigation purposes, although that result is not expressly authorized by the text of Rule 23. However, the American practice is not as adventuresome as the Dutch legislation regarding judicial approval of settlement.⁵⁴ And, in a

is wishful thinking) about these calamitous forebodings. Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293 (2014).

- 53 The Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. (1st Sess. 2017), which was rushed through the House of Representatives without hearings and now sits in the Senate, could have a devastating effect on the ability to certify many class actions if enacted.
- 54 The Amsterdam Court of Appeals can approve a settlement on petition of an association (the class) and the opposing party absent actual litigation without

recent development, some courts have recognized partial class actions and certified important single issues for common (or class) adjudication even if the entire case might not be certifiable for class treatment — a technique also not expressly recognized by Rule 23's text — leading some to be more optimistic about the future.⁵⁵ Indeed, both one of the nation's leading class action litigators and a distinguished academic experienced in complex litigation have opined that class actions "continue to thrive."⁵⁶ I hope they are right.

A good example of a single-issue certification is *Butler v. Sears Roebuck & Co.*,⁵⁷ a product defect class action involving mold in washing machines. The United States Court of Appeals for the Seventh Circuit reversed a denial of certification of one of two separate classes advancing two different breach of warranty theories. The opinion is a very pragmatic one, focusing on the need for courts to handle partially overlapping cases efficiently. Judge Richard Posner, writing for the court, concluded that the central liability question of whether the washing machines were defective could be determined on a class-wide basis, leaving damage matters to individual proceedings if liability was established.⁵⁸

a burdensome process. See Arts. 7:908-7:910, The Law for the Collective Resolution of Mass Torts (WCAM) BW (Neth.); Arts. 103-1018 RV (Neth.). American class action lawyers in conjunction with defense counsel have tried to take advantage of this procedure by taking a settlement to Amsterdam for judicial approval. Questions about the resulting judgment's enforceability outside the Netherlands remain. The Dutch collective settlement process is described in Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 810-16 (2017).

55 See Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475 (2005); see also Symposium, *Class Actions and Access to Justice*, 82 GEO. WASH. L. REV. 595 (2004). An excellent description of the current state of affairs is provided in Klonoff, *supra* note 31. The author offered a somewhat more optimistic appraisal four years later in Robert H. Klonoff, *Class Action Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971 (2017).

56 Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846 (2017).

57 *Butler v. Sears Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); see also *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 727 F.3d 838 (6th Cir. 2013) (holding that the class action prerequisites were satisfied in a related washing machine mold case), *cert. denied*, 134 S. Ct. 1277 (2014).

58 Judge Posner's opinion can be traced back to his earlier opinion in *MacReynolds v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (certification issue of whether the defendant's practices had a discriminatory effect).

In 2014, a year after the *Butler* decision, the Seventh Circuit reiterated its receptivity to the aggregation of consumer claims in *In re IKO Roofing Shingle Products Liability Litigation*,⁵⁹ when it again vacated a denial of class certification in another home products case. The court of appeals rejected the district court's conclusion that "commonality of damages" among class members was "legally indispensable."⁶⁰ The class's two theories of damages both matched its liability theory. The *IKO* court acknowledged, but was not concerned, that one of the damage theories would require buyer-specific hearings and could not be handled on a class-wide basis in the event that the common liability questions were established in favor of the class; it simply cited *Butler*.⁶¹ These two opinions show that some judges are willing to employ the class action whenever the resolution of one or more common issues will meaningfully advance the litigation's resolution.⁶² This "single issue" class action, if it is accepted by more courts (and ultimately the Supreme Court) and survives overruling by Congress,⁶³ holds great promise for the future of the class action.

Without question, class certification is much more difficult to achieve today in various contexts, particularly personal injury, employment, civil rights, and pharmaceutical matters, as well as in certain parts of the country, than it was

59 *In re IKO Roofing Shingle Prod. Liab. Litig.*, 757 F.3d 599 (7th Cir. 2014).

60 *Id.* at 603.

61 *Id.*

62 The Seventh Circuit explicitly expressed this view more recently in *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750 (7th Cir. 2014), another consumer products case reversing the district court's denial of class certification. *See also In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1253 (10th Cir. 2014) (common antitrust questions of conspiracy and impact "drive the resolution of litigation") (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011)) (internal quotation marks omitted); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) ("materially advance the litigation"); *In re Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006) (certification of a single issue relating to the propriety of strip searches); Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855 (2015). Another case in the same vein, although not phrased in single-issue terms, is *Klay v. Humana, Inc.*, 382 F.3d 1241 (5th Cir. 2004) (common question in RICO action, held to predominate).

63 If enacted, the Fairness in Class Action Litigation Act of 2017, H. Rep. 985, 115th Cong., 1st Sess. (2017) would prohibit certifying any single-issue class unless all class action certification requirements are satisfied with regard to all the issues in the case, effectively overruling *Butler*, 727 F.3d 796 and *IKO*, 757 F.3d 599.

fifteen or twenty years ago.⁶⁴ The litigation risk profile has shifted markedly against class actions and more broadly against plaintiffs. The most obvious reason for this retreat from the days in which certification was comparatively easily and simply obtained is the increasingly conservative Supreme Court and lower federal courts, as is true of Congress over the last thirty years.⁶⁵ And more recently, that seems to match the mood of the citizenry, as I think was reflected in the 2016 presidential and congressional elections. Moreover, there is a lessened commitment to the pursuit of social justice in some parts of the United States and among certain people than there was in the 1960s, 1970s, and early 1980s; this retreat is particularly evident in the employment and civil rights fields.

But other (related) reasons should be mentioned. As already noted, defense interests in both the business and legal worlds have waged a strident and successful campaign against the class action — as well as against litigation in general — in the courts and in the public arena. This activity undoubtedly affects judges at all levels — indeed it impacts who are elected and appointed as judges — as well as discouraging some plaintiffs' lawyers from bringing risky or high-cost cases regardless of their possible merit.⁶⁶ The defense bar and its clients have expended extraordinary resources that cannot be matched by the interests on the plaintiffs' side, which historically has not been able to organize itself effectively. They have played on the distrust many Americans have of lawyers, particularly plaintiffs' lawyers,⁶⁷ characterized class cases

64 See David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777 (2016) (noting that public interest classes are rejected today in ways that would have been nearly unimaginable a decade ago); Miller, *supra* note 52, at 296-300.

65 That accounts for the enactment of such business-protective legislation as the Private Securities Litigation Reform Act of 1995, Pub. L. No. 105-67, 109 Stat. 737, the Securities Litigation Uniform Standard Act of 1998, Pub. L. No. 105-353, and the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, 1711 (2005). See generally STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT, THE BATTLE FOR CONTROL OF THE LAW (2008).

66 See STEPHEN BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT (2017) (chronicling the growth of the litigation state and the counterrevolution); CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) (claiming that judges' political convictions affect their decisions in cases when the law does not provide a clear answer); TELES, *supra* note 65 (charting the development of the conservative legal movement from the 1970s).

67 See Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014); Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the*

as abusive, frivolous, extortionate, and painted them as “lawyer’s cases” that give the class attorneys millions of dollars in fees and provide individual class members only pennies or a few dollars. In addition, the claim is made that these cases impose a “litigation tax” on Americans and impair the competitiveness of American businesses in the global marketplace.⁶⁸

In effect, an anti-litigation war has been underway and it has a serious political dimension. Populist judiciaries in certain states have been voted out and replaced with judges more sympathetic to business and government. This campaign has been assisted by rather one-sided media attention, which typically embraces the defense portrayal of litigation and depicts the plaintiffs’ bar in negative terms.⁶⁹ According to this anti-civil litigation crusade, the class action is the poster child of what defense interests claim to be wrong.⁷⁰

Solution, 54 DUKE L.J. 447, 450 (2004) (stating that people have “fulminated against the bar as . . . plagues of locusts”).

- 68 See Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986). For many years it has been fashionable to deplore the cost and delay of civil litigation, particularly class actions. There is evidence that casts doubt on this supposed “wisdom.” See Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085 (2012). The available empiric evidence suggests that litigation costs are tied to litigation stakes and may not be exorbitant when viewed from that perspective. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 61-71 (2010); Reda, *supra*, at 1111-32; see also THOMAS E. WILLGING, DONNA STIENSTRA, JOHN SHAPARD & DEAN MILFICH, FED. JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED CIVIL CASES 52 (1997); Thomas E. Willging, Donna Stienstra & John Shepard, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rules Amendments*, 39 B.C. L. REV. 525 (1998). My mentor who served as the Reporter of the Federal Rules Advisory Committee for the 1966 revision of FED. R. CIV. P. 23 expressed the view on the fiftieth anniversary of the 1938 Federal Rules that they were working well. He noted that they supported “revolutions in the substantive law” and asserted: “The much-criticized discovery function and class action remain together the scourge of corporate and governmental malefactors.” Benjamin Kaplan, *A Toast*, 137 U. PA. L. REV. 1879, 1891 (1989). Of course, that observation was made before the events described in text occurred.
- 69 See, e.g., WILLIAM HALTOM & MICHAEL McCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 39 (2004); Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, the Media, and Litigation Retrenchment*, 65 DEPAUL L. REV. 293 (2016).
- 70 See, e.g., Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559 (2015); Brooke

The result of these pressures has been predictable. As noted earlier, judicial resistance since the 1990s to the expansive use of the class action has resulted in decisions that impose more “rigorous” adherence to the Rule 23 requirements.⁷¹ It also has taken the form of attempts to create new procedural impediments, including an insistence that the ascertainability of each individual class member be established at the time certification is sought,⁷² the rejection of cases in which some of the class members may not have been injured,⁷³ a concern about the assumed burdensomeness or disproportionate impact

Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2015) (arguing that a professional “elite” is setting the agenda and determining the rules for “the entire civil procedure system”); Patricia H. Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083 (2016); Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752 (2013).

71 See sources cited *supra* note 47.

72 Fortunately, these efforts have largely — but not completely — failed thus far. *See, e.g.*, *In re Petrobras Secs.*, 862 F.3d 250, 265 (2d Cir. 2017) (no heightened ascertainability required by Rule 23); *Briseno v. ConAgra Foods, Inc.* 844 F.3d 1121 (9th Cir. 2017) (it is not necessary to show that it is administratively feasible to identify each class member); *Mullins v. Direct Dig., Inc.*, 795 F.3d 654 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016) (same). *But see Byrd v. Aarons Inc.*, 787 F.3d 154, 162-63 (3d Cir. 2015) (class ascertainability must be satisfied). *See generally* Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres*, 65 U. KAN. L. REV. 913, 923-39 (2017); Geoffrey C. Shaw, *Class Ascertainability*, 124 YALE L.J. 2354 (2015). The proposed Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. (1st Sess. 2017), if enacted, will give life to these requirements.

73 *See, e.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (plaintiff must show an injury in fact that is concrete and particularized), *on remand*, 867 F.3d 1108 (9th Cir. 2017) (website inaccuracies concerning age, marital status, educational background, and employment held concrete for purposes of Fair Credit Reporting Act standing); *Attias v. CareFirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017) (the court concluded there was a substantial risk of injury from a data breach); *In re SuperValu Inc.*, 870 F.3d 763 (8th Cir. 2017) (data breach not shown to create a “substantial risk” of injury); *Eike v. Allergen Inc.*, 850 F.3d 315 (7th Cir. 2017) (regret or disappointment about a product is not injury); *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511 (D.C. Cir. 2016) (defendant’s demand for customer’s ZIP codes in connection with credit card purchases did not plead cognizable injuries). Thus far the courts only have required that the named representatives show a cognizable injury to satisfy the standing-to-sue requirement. *See SuperValu*, 870 F.3d 763; *In re Deepwater Horizon*, 739 F.3d 790, 802 (5th Cir. 2014).

of the class's proposed remedy,⁷⁴ a preoccupation with the possibility of overcompensation or over-deterrance,⁷⁵ and attacks on the so-called "it ain't worth it" classes.⁷⁶ As a consequence, the likelihood of an action being certified has been constrained significantly and I believe the procedure's utility has been diminished because it now has:

- Reduced effectiveness as a means of private enforcement of public policies, particularly civil and employment rights, an important supplement to government enforcement of various statutory rights, which often is deficient because of a lack of regulatory resources or political inhibitions;
- Decreased utility as a deterrent to wrongdoing and the private bar's reduced effectiveness of the private bar to act as a de facto second regulatory system; and
- Compromised usefulness as a remedial mechanism for those injured by public or private wrongs.

Increased delays, expenses, and risks of early termination because of the procedural stop signs erected in recent years and an enormous procedural front-loading multiply the burdens that weigh particularly heavily on people represented by contingent fee lawyers because they can lead to pretrial dismissal or insufficient settlements. In particular, the restraints imposed by three Supreme Court decisions — *Amchem Products, Inc. v. Windsor*⁷⁷ (burdening adequacy of representation and settlement), *Ortiz v. Fibreboard Corp.*⁷⁸ (radically narrowing the possibility of Rule 23(b)(1) certification), and *Wal-Mart Stores, Inc. v. Dukes*⁷⁹ (increasing the demand for class cohesiveness in all class actions) — and the constant generation of new defenses to certification⁸⁰ have

74 See, e.g., *Jamie S. v. Milwaukee Pub. Sch.*, 688 F.3d 481 (7th Cir. 2012); *Leysoto v. Mama Mia I., Inc.*, 255 F.R.D. 693 (S.D.Fla. 2009).

75 *Rowden v. Parking Sys., Inc.*, 282 F.R.D. 581, 587 (C.D. Cal. 2012), *aff'd in part*, 583 Fed. App'x 803 (9th Cir. 2014).

76 In Theane Evangelis & Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 EMORY L.J. 383 (2014), the authors, class action attorneys at a major defense firm, suggest enlarging the class certification process by requiring the plaintiffs to demonstrate that the standing of the absent class members can be proven at trial, rather than leaving the question whether an individual class member has been injured to the damage or claims processing phase should that inquiry ever prove necessary.

77 *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997).

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

79 *Wal-Mart Store, Inc. v. Dukes*, 564 U.S. 338 (2011).

80 There have been other negative results in the Supreme Court as well. E.g., *Spokeo, Inc. v. Robins*, 135 S. Ct. 540 (2016) (court of appeals failed to apply a proper injury-in-fact or concreteness standard in a Fair Credit Reporting Act

amounted to forms of economic attrition and risk creation by the defense. Yet, the class action often is criticized for being too much of a plaintiff's weapon for coercing a settlement.⁸¹ Fortunately, there have been a few Supreme Court decisions favorable to class actions.⁸²

The ability to select a forum for a class action was significantly limited by Congress's enactment of the Class Action Fairness Act (CAFA) in 2005,⁸³ which was the product of defense interest lobbying. The statute has effectively federalized class actions of any significant dimension.⁸⁴ Thus, class practice is now largely limited to the federal courts, which, as I have noted, have become far more resistant to certification than were several state judiciaries. Ironically, in some respects, the Act has increased the availability of the federal courts for some class actions, particularly those involving small claims. This is because the Act virtually abandons the historic limitations on the federal courts' diversity of citizenship jurisdiction, which demands that all of the opposing parties be from different states and requires that an ever-increasing

case); Am. Express Co. v. Italian Colors Restaurant, 333 S. Ct. 2304 (2013) (discussed *infra* note 90); Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013) (plaintiffs' expert regression model not acceptable to show damages on a class-wide basis for purposes of establishing predominance); AT&T Mobility LLC v. Concepcion, 536 U.S. 333 (2011) (discussed *infra* note 89).

- 81 See sources cited *supra* note 40. The risks of non-certification and the burdens and delays of seeking it have led some to pursue their claims on an individual basis, particularly when an injunction is sought that would provide effective relief to everyone affected by the defendant's conduct. See Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2083 (2017). That procedure has its own difficulties, however.
- 82 See, e.g., Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016) (sample evidence as to employee practices in a Fair Labor Standards Act case allowed to establish predominance); Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016) (consumer's class complaint in a Telephone Consumer Protection Act action challenging the advertising use of a third-party's involvement in unsolicited text messages was not rendered moot by unaccepted offer of judgment).
- 83 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in 28 U.S.C. §§ 1332(d), 1453, 1711-1715 (2005)).
- 84 The Act has been critiqued by a number of commentators. See, e.g., Stephen B. Burbank, *The Class Action Fairness Act in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008); Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517 (2008); 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 (2009).

individualized dollar amount be in controversy. Since these no longer apply because of CAFA, the federal courts are now more available for initiating class actions in the consumer, employment, and small claims fields than they were before CAFA's enactment. But, the statute does nothing to reduce the stringency with which the class certification prerequisites have been applied by federal courts in recent decades, especially in multi-jurisdictional class actions, or to ameliorate the difficult choice-of-law issues caused by differences in state law that those cases typically raise.⁸⁵ But in certain contexts the federal class action door has been opened to cases that previously were excluded.⁸⁶

To be fair, I have to acknowledge that there have been some marginal, some might say silly, class suits that are given considerable publicity and contribute to the negative imagery. For example, a recent unfair trade practices action, under a state statute that provides for an attorney fee award, was brought against the fast food company Subway, which advertises "foot long" sandwiches. The complaint alleged that some of the sandwiches turn out to be only 11 or 11.5 inches "long." The company insisted that their sandwiches have the same food and nutritional content as the sandwiches in the advertisements. Whatever the merits of the claim and the case's potential may or not be for promoting compliance with consumer protection laws, the optics are very, very bad.⁸⁷ Less "newsworthy" class cases that undoubtedly do perform a policy-enforcing function rarely are given comparable media attention.

The "foot long" lawsuit and others like it raise basic questions. What is a "real case" and what are courts really for? To me, a case that helps effectuate a statutory or judicially established policy prohibiting unfair trade practices or advertising misrepresentations is a "real" case, whether or not the lawyer's motivation is an attorney's fee or a societal good, as long as the class members receive an appropriate remedy.⁸⁸

85 See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); see also Miller & Crump, *supra* note 42. Additional discussion of this important case can be found in WRIGHT, MILLER & KANE, *supra* note 16, § 1780.1; Issacharoff, *supra* note 41; and Richard A. Nagareda, *Bootstrapping in Choice of Law After Class Action Fairness Act*, 74 UMKC L. REV. 661 (2006).

86 See Cabraser & Issacharoff, *supra* note 56.

87 The district court's approval of a settlement that benefited the lawyers but provided nothing for the class was reversed and characterized as "worthless" by the court of appeals. See *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551 (7th Cir. 2017).

88 To me, giving a new substantive right to people is analogous to giving someone a Ferrari. It may be a wondrous gift, but it has no value if the recipient cannot afford gasoline. Analogously, it is the availability of an attorney and provision

IV. THE THREAT OF NO-CLASS-ARBITRATION CLAUSES

Unfortunately, however, the ability to take advantage of the relaxed jurisdiction rules of CAFA has been compromised, I fear potentially quite seriously, by what probably is the most dramatic development undermining the availability of the class action (and citizen access to the courts generally) in recent years, especially in the context of a wide range of consumer transactions, employment disputes, and small business matters. I am referring to the Supreme Court's arbitration decisions in *AT&T Mobility LLC v. Concepcion*⁸⁹ and *American Express Co. v. Italian Colors Restaurant*.⁹⁰ In the first, the Court enforced a no-class-action arbitration clause, and in the second, a no-aggregate arbitration clause despite the fact that in the consumer products and financing fields, as well as in certain employment and small business contexts, these clauses are completely adhesive.⁹¹ They are not products of arm's length bargaining or any bargaining for that matter. "Freedom of contract" is an empty cliché in this context. Indeed, in many instances these contractual provisions are inconsistent with and override aspects of relevant state contract law, such as unconscionability doctrines, or trump a federal statute that creates a private right enforceable in court.

These clauses have been upheld despite the fact that it is totally unrealistic to believe that it is possible economically or by training or background for average people to pursue arbitration on an individual basis.⁹² It seems clear that

for his or her fee if successful, that will fuel the substantive right and make it meaningful. Without that, the right will go largely unused.

89 AT&T Mobility LLC v. Concepcion, 536 U.S. 333 (2011); *see also* DirectTV v. Imburgia, 136 S. Ct. 463 (2015).

90 Am. Express Co. v. Italian Colors Restaurant, 333 S. Ct. 2304 (2013).

91 Various aspects of the utilization of these clauses are discussed in Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REF. 871 (2008); Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371; Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, The Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); Peter B. Rutledge & Christopher R. Drahoszal, *Contract and Choice*, 2013 BYU L. REV. 1; and Jean Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309 (2015).

92 The assertions in the Supreme Court's majority opinions in these cases, that arbitration is more effective, cheaper, faster, and less burdensome than litigation, are subject to doubt given the absence of empiric proof to that effect and the

most Americans are not even aware of the arbitration limitation on asserting a claim against their contracting partner and assume they have a right to go to court, as the Concepcions did when they sued AT&T.⁹³ The available evidence shows that arbitration is rarely invoked on an individual basis⁹⁴ and simply is not a meaningful substitute for the possibility of going to the public court system on an individual basis or taking part in an aggregate proceeding.⁹⁵ Sometimes the arbitration process itself seems stacked against the claimant.⁹⁶

As a result, it is likely that important public policies will be under-enforced since the Supreme Court has now construed the Federal Arbitration Act⁹⁷ to preempt state law deemed inconsistent with the “liberal” federal policy favoring

lack of the metrics needed to make those comparisons. *See* Resnik, *supra* note 91, at 2812-14, 2893-910 (“[T]he number of documented consumer arbitrations is startlingly small.”).

- 93 *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTIONS ACT 11 § 1.4.2, http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (finding that consumers are generally unaware of whether their credit card contracts include arbitration clauses).
- 94 *Id.* at 8 § 7.3. In the few instances in which arbitration is pursued it is likely that the consumer will be opposed by a company and its counsel who are experienced from having participated in similar proceedings and are likely to out-resource the plaintiff.
- 95 This was the conclusion of the Consumer Financial Protection Bureau in its arbitration report. *See id.* at 11 § 1.4.3.
- 96 The *New York Times* published a devastating three-part series entitled *Beware of the Fine Print* on consumer arbitration. *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015, <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?action=click&contentCollection=DealBook&module=RelatedCoverage®ion=Marginalia&pgtype=article>; Jessica Silver-Greenberg & Michael Corkery, *Beware of the Fine Print Part II, in Arbitration, a ‘Privatization of the Justice System,’* N.Y. TIMES, Nov. 1, 2015, https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?_r=0; Jessica Silver-Greenberg & Michael Corkery, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES, Nov. 2, 2015, https://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html?action=click&contentCollection=DealBook&module=RelatedCoverage®ion=Marginalia&pgtype=article&_r=0.
- 97 9 U.S.C. §§ 1-16.

arbitration⁹⁸ and to bypass various important federal substantive statutes.⁹⁹ All of this is justified by the Supreme Court's construction (some would say "misconstruction") of the Federal Arbitration Act, a statute enacted almost a century ago that was designed to promote arbitration between sophisticated commercial entities.¹⁰⁰ People with my orientation view the Court's decisions as an abandonment of the historic commitment to citizen access to the courts, due process, and the right to jury trial, as well as reflecting a judicial distrust (at least on the part of certain Supreme Court Justices) of the litigation process and particularly of juries.¹⁰¹ Fortunately, most consumer over-the-counter purchases do not involve bilateral contracting and are not affected by this arbitration psychosis. That might change, of course, if the movement to insert one-by-one mandatory arbitration provisions in consumer contracts increases substantially.

Two things should be mentioned that somewhat ameliorate the impact of *Concepcion* and *Italian Colors*. First, in certain contexts a very significant

98 See, e.g., Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012) (state claim against nursing home); AT&T Mobility LLC v. Concepcion, 536 U.S. 333 (2011) (consumer claim); Circuit Cities Stores, Inc. v. Adams, 532 U.S. 106 (2001) (state sex discrimination claim); Southland Corp. v. Keating, 465 U.S. 1 (1984) (California's Franchise Investment Law).

99 See, e.g., Am. Express Co. v. Italian Colors Restaurant, 333 S. Ct. 2304 (2013) (antitrust claims); Rodriguez de Quijas v. Shearson Am. Express, Inc., 490 U.S. 477 (1989) (securities claim); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987) (Racketeer Influenced and Corrupt Organizations Act claims).

100 The Supreme Court's extraordinary expansion of the application of the Federal Arbitration Act and the statute's legislative history are discussed in Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1426-32 (2008); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265 (2015); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006); Resnik, *supra* note 91, at 2860-71; Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1635-42 (2005). The arbitration cases undoubtedly are a byproduct of the anti-litigation war that has been waged in the courts and the public arena. See also Gilles, *supra* note 91.

101 The many critical commentaries on the two Supreme Court decisions include Paul D. Carrington, *Protecting the Rights of Citizens to Aggregate Small Claims Against Businesses*, 46 U. MICH. J.L. REFORM 537 (2013); Gilles, *supra* note 91; and Burt Neuborne, *Ending Lochner Lite*, 50 HARV. C.R.-C.L. L. REV. 183 (2015) (mandatory arbitration violates freedom of association). See also Resnik, *supra* note 91 (the Supreme Court's arbitration decisions have created an unconstitutional system).

percentage of mandatory no-aggregate arbitration clauses have a carve-out that allows the consumer to go to small claims courts,¹⁰² which generally are thought to be consumer-friendly. But those courts typically do not have class action or aggregate procedures. Second, both the American Arbitration Association and JAMS, the two most significant providers of arbitrator services, have protocols ensuring a modicum of procedural regularity.¹⁰³

Although there initially was some movement in Congress to overturn the two Supreme Court decisions by legislation,¹⁰⁴ that is now extremely unlikely given the outcome of the 2016 United States' presidential and congressional

102 See CONSUMER FIN. PROT. BUREAU, *supra* note 93, at 10.

103 See, e.g., Am. Arbitration Ass'n, Consumer Due Process Protocol (Apr. 17, 1998), [https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20\(1\).pdf](https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf); JAMS Foundation, JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness (July 15, 2009), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Stds-2009.pdf.

104 E.g., Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 2929 (2011); Consumer Mobile Fairness Act of 2011, S. 1652, 112th Cong. § 22 (2011). Neither bill got out of committee. There are some statutes that void arbitration clauses in certain limited areas. E.g., 10 U.S.C. §§ 987(e)(3), (f)(4) (except for residential mortgages and car loans, arbitration clauses in payday loans and consumer credit contracts with members of the military and their family members are void); 15 U.S.C. § 1226(a)(2) (pre-dispute arbitration clauses in automobile franchise agreements prohibited). Conversely, some federal statutes provide for the arbitration of disputes. Federal Insecticide, Fungicide, and Rodenticide Act of 1947, Pub. L. No. 114-38 (codified as amended at 7 U.S.C. §§ 136 *et seq.* (2012)); Amateur Sports Act of 1978, Pub. L. No. 95-606, § 205(c)(1), 92 Stat. 3045 (codified as amended at 36 U.S.C. § 220529 (2012)) (any party aggrieved by a determination may seek review by any regional office of the American Arbitration Association); Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 4221(a)(1), 94 Stat. 1208 (codified as amended at 29 U.S.C. § 1401 (2012)) (any dispute between an employer and the plan sponsor of a multi-employer plan concerning a plan determination); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 921, 124 Stat. 1376, 1847 (2010) (SEC rule on investor agreements). The Financial Industry Regulatory Authority (FINRA) reaffirmed its bar on enforcing pre-dispute class action waivers after the Supreme Court decisions. FINRA, Dep't of Enforcement v. Charles Schwab & Co., Inc., Complaint No.2011029760201, 2014 WL 1665738, at *1, *18 (Apr. 24, 2014), <https://www.finra.org/sites/default/files/NACDecision/p496824.pdf>.

elections. Similarly, the young Federal Consumer Financial Protection Bureau,¹⁰⁵ which was created as a watchdog agency following the mortgage crisis during the last decade and seemed so promising to consumer advocates a short time ago, has not been able to preserve its recent arbitration rule that would have effectively eliminated the application of *Concepcion* and *Italian Colors* in certain important consumer contexts. Immediately after the rule was promulgated, the business community attacked it in Congress, which has the statutory power to reject administrative agency rulemaking.¹⁰⁶ Both the House of Representatives and the Senate have now done so and the rule will not go into effect.¹⁰⁷ Beyond that, the very existence of that Bureau is now in doubt.¹⁰⁸ Such is the tenor of the times in the United States. Other efforts by certain federal agencies, such as those of the Department of Health and Human Services regarding nursing homes,¹⁰⁹ to limit mandatory no-class arbitration clauses in contracts within their jurisdiction may prove more

105 Consumer Financial Protection Act of 2010, § 1028, 12 U.S.C. § 5518 (2012).

The Bureau issued a report that is extremely critical of various arbitration clause practices. CONSUMER FIN. PROT. BUREAU, *supra* note 93, § 1128(a).

106 Congressional Review Act, 5 U.S.C. §§ 801-808.

107 The Senators basically voted along partisan lines and divided fifty to fifty. That enabled Vice President Pence to cast the deciding vote to reject the CFPB's rule. In addition to the challenge in Congress, major business groups brought lawsuits in federal court attacking the constitutionality of the rule. *See PHH Corporation v. Consumer Financial Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016); *Chamber of Commerce of the United States of Am. v. Consumer Fin. Protection Bureau*, Case No. 3:17-cv-02670 (N.D. Tex. Sept. 29, 2017). The congressional rejection of the CFPB's work product presumably moots these actions. Although the arbitration rule defeat is a major blow to the CFPB, it is unlikely that the battle over arbitration clauses is over. But it is impossible to know what avenues consumer interests (and the Democratic Party) may pursue regarding these clauses in the future.

108 Plans apparently are already underway to undermine the CFPB's scope of operation. Alan Rappaport, *Consumer Watchdog Faces Attack by House Republicans*, N.Y. TIMES, Feb. 10, 2017, at A14, C1. Richard Cordray, the consumer-oriented director of the Bureau, was appointed by President Obama. He resigned before the end of his five-year term, and President Trump has appointed a more business-friendly successor.

109 42 C.F.R. § 483.70(n)(1)(2) (2016), <https://www.gpo.gov/fdsys/pkg/CFR-2005-title42-vol3/pdf/CFR-2005-title42-vol3-sec483-70.pdf> (entry into pre-dispute arbitration agreements or request that a resident sign one as a condition of admission to a facility barred). The regulation has been successfully challenged in court, *Am. Health Care Ass'n v. Burwell*, 217 F. Supp. 3d 921 (N.D. Miss. 2017), and at this time its enforcement has been enjoined.

successful but they have been subject to congressional and judicial attacks. Even if such rules and regulations survive, at best this is a rather piecemeal and limited amelioration of the effect of these decisions.

The situation regarding arbitration clauses may change somewhat. The United States Supreme Court has heard arguments in a consolidated appeal that may determine whether *Concepcion* and *Italian Colors* apply to class action waivers in employment contract arbitration provisions¹¹⁰ or are unenforceable because they are inconsistent with the National Labor Relations Act.¹¹¹ There also is some possibility that state attorneys general, using their *parens patriae* power, or private individuals acting for the state might bring suit on behalf of itself and its citizens to protect the community's health, welfare, and safety against various behaviors, since neither is bound by contractual arbitration clauses.¹¹² But the utility of this possibility depends on whether a particular state gives its attorney general or private individuals standing to bring such an action, whether the attorney general has sufficient resources to prosecute the action, and whether the political climate in a state would promote or inhibit

110 *Ernst & Young v. Morris*, 137 S. Ct. 809 (2017). The courts of appeal are divided on this subject. *Compare Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016), and *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017) (agreement barring collective arbitration violates the NLRA), *with D.R. Horton, Inc. v. Nat'l Lab. Relations Bd.*, 737 F.3d 344 (5th Cir. 2013), and *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) (class action waiver enforced). A decision by the Court should be rendered by June 2018.

111 National Labor Relations Act §§ 151-169. Courts have declined to enforce arbitration clauses when the process suffered from structural or procedural infirmities. *See, e.g.*, *Hooters of Am. v. Phillips*, 173 F.3d 933, 939 (4th Cir. 1999) (failure to provide "an impartial decision maker"). Judicial scrutiny of such matters may not be as intense as it once was given today's pro-arbitration climate.

112 *Parens Patriae* actions have been used in a variety of contexts including consumer and mass torts actions. *E.g.*, *Alfred L. Snapp & Sons v. Puerto Rico*, 458 U.S. 592 (1982); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972). *See Myriam Gilles & Gary Friedman, After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 658-75 (2012) (state attorneys general should take leadership positions using private lawyers when needed); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012) (discussing provisions empowering actions to recover money on behalf of citizens); Margaret S. Thomas, *Parens Patriae and the States' Historic Police Power*, 69 SMU L. REV. 759 (2016) (arguing that *parens patriae* litigation has its roots in the states' police power).

bringing a *parens patriae* action.¹¹³ Defense interests most certainly would lobby against the institution of the action.

V. PROCEDURAL MATTERS RELATED TO THE CLASS ACTION

The current situation regarding the United States class action cannot be fully appreciated without devoting some attention to other procedural phenomena that are integrally related — indeed, overlap — with what is happening to class actions and may provide useful options for aggregating related claims not subject to arbitration clauses containing class action waivers. The most important of these is what has happened since Congress's enactment in 1968 of the Multidistrict Litigation Statute (MDL),¹¹⁴ which empowers a specially constituted federal court appointed by the Chief Justice of the United States — the Judicial Panel on Multidistrict Litigation — to transfer all federal cases “involving one or more common questions of fact” to a single district judge “for coordinated or consolidated pretrial proceedings.” Although the transferee judge has enormous control over the consolidated cases, the statute as interpreted by the Supreme Court requires the individual litigation units to be returned to the Panel and then to their courts of origin when pretrial proceedings have been concluded.¹¹⁵ As a practical matter, however, the great majority of transferred cases — probably in excess of ninety percent — are resolved by settlement or pretrial dispositive motions before then.¹¹⁶

The growth of multidistrict litigation under the statute has had exceedingly dramatic — some would say dominating — effects on federal court aggregate

113 As a *parens patriae* action is not a class action, it has the additional advantages of not being subject to the prerequisites of FED. R. CIV. P. 23 and the federalization and requirements of the Class Action Fairness Act. *See* Miss. ex rel. Hood v. AU Optronics Corp., 134 S. Ct. 736 (2014). Also, it probably would not be affected by the possible enactment of the Fairness in Class Action Litigation Act 2017. *See* supra note 53.

114 28 U.S.C. § 1407. *See* 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS §§ 3861-3868 (4th ed. 2013). A number of states have counterpart provisions. *E.g.*, CAL. CIV. PROC. CODE §§ 404-04.9.

115 The Supreme Court so held in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). Attempts to overrule the decision by statute have failed.

116 One prominent commentator on MDL litigation estimates “that just 2.9% of cases return to their original districts.” Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017).

litigation. At present, between thirty-five and forty percent of all non pro se cases in those courts are part of an MDL proceeding.¹¹⁷ That is a stunning statistic. As a practical matter, when a substantial number of cases are transferred under the statute they effectively proceed as a single aggregated action for pretrial purposes; in many respects, the consolidated units look and are processed as if they were elements of a class action. Indeed, it is not uncommon for one or more class actions to be part of an MDL proceeding. I don't think it is an overstatement to say that multidistrict litigation has displaced resort to the class action in certain substantive areas — such as mass torts — because class certification has become difficult or nearly impossible to secure or in order to bypass the costly, risky, and time-consuming certification prerequisites set forth in Rule 23 or established by the judicial insistence on a "rigorous analysis" of those prerequisites.¹¹⁸ Nor do I think it is an overstatement to stay the MDL statute has created a new mode of aggregate litigation practice in the United States.

State court actions are not covered by the statute, although a global settlement of a large MDL proceeding often embraces the parallel state cases, even those that could not have been initiated in a federal court.¹¹⁹ Indeed, because defendants typically want to achieve maximum preclusion and closure from a settlement, they often are willing to provide a "peace premium"¹²⁰ if the settlement truly is global.

117 See DUKE LAW CTR. FOR JUDICIAL STUDIES, MDL STANDARDS AND BEST PRACTICES, at x n.2 (2014), https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf ("In 2014, these MDL cases make up 36% of the civil case load."); Burch, *supra* 116, at 72 (noting that from 2002 to 2015 MDL proceedings "leapt from sixteen to thirty-nine percent" of the civil caseload).

118 See, e.g., Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015); Coleman, *supra* note 70; Klonoff, *supra* note 31; Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 NEV. L.J. 1455 (2015); Martin H. Redish & Julie McKarabay, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109 (2015).

119 See Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 793-98 (2010).

120 See generally Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397 (2014); D. Theodore Rave, *Governing the Anti-Commons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1192-98 (2013).

In the hands of a dedicated and effective transferee judge, these consolidated litigations often can be handled and disposed of efficiently. Good examples are the Volkswagen emission fraud cases, two of which have now been settled,¹²¹ the concussion litigation brought on behalf of retired National Football League players,¹²² and the actions brought by those injured by the Deepwater Horizon Gulf of Mexico disaster.¹²³ Much pharmaceutical and medical device litigation is now handled in this fashion.¹²⁴ MDL practice has been criticized, however, for various reasons ranging from the settlement focus of the participants, its lack of transparency, the subordination of individual claims, as being unorthodox, to the domination of MDL proceedings by a group of elite lawyers whose interests may not always coincide with the best interests of some of the individual litigants whose claims have been co-opted by the transfer and consolidation mandated by the statute.¹²⁵

If federal subject matter jurisdiction is based on a question of federal law, the MDL process will be an available alternative to a class action for

121 *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, and Prods. Liab. Litig.*, 2017 WL 316165 (N.D. Cal. 2017).

122 *In re Nat’l Football League Players Concussion Injury Litig.*, 921 F. 3d 410 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 591 (2016).

123 *In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 401 (2014). To date, there have been fourteen appeals in this case. *See also* John S. Baker, Jr., *The BP Gulf Oil Spill Class Settlement: Redistributive “Justice”?*, 19 TEX. REV. L. & POL. 287 (2015) (questioning the settlement); Issacharoff & Rave, *supra* note 120; Catherine M. Sharkey, *The BP Oil Spill Settlement Classwide Punitive Damages, and Societal Deterrence*, 64 DEPAUL L. REV. 681 (2015) (discussing criticisms of the settlement).

124 See, e.g., *In re Depuy Orthopaedics Inc.*, 787 F. Supp. 2d 1358 (J.P.M.L. 2011); *In re Zyprexa Products Liab. Litig.*, 467 F. Supp. 2d 256 (E.D.N.Y. 2006). “Bellwether” trials have been going on in the Pinnacle Hip Implant Liability Litigation under the guidance of an MDL judge. The first led to a defense verdict. The second and third ended in very substantial jury verdicts that are now on appeal to the Court of Appeals for the Fifth Circuit. A fourth trial is now underway.

125 See Burch, *supra* note 118; *see also* Abbie R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669 (2017) (analyzing the unique aspects of MDL proceedings based on interviews with twenty judges); Linda S. Mullinex, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 515, 539 (2014); Coleman, *supra* note 70; Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004). But cf. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

aggregating small claims. But it is questionable whether most small claim consumer matters can be gathered and brought into an MDL when claims under numerous state laws are involved. The amount in controversy limitations on diversity of citizenship subject matter jurisdiction will be hard to satisfy, although some consumer claims do involve more than \$75,000 for each claimant. As an alternative, if one hundred or more claimants are grouped together to form a mass or class action and can show more than \$5,000,000 in damages in the aggregate, jurisdiction under CAFA will be available.¹²⁶ Obviously, the smaller the size of the individual claim, the more difficult it will be to satisfy CAFA's amount in controversy requirement unless there is a large number of class members that can be gathered and joined effectively.

In a few instances, a transferee judge has treated the consolidated cases as if they constituted what now is called a "quasi-class action," and has exercised power to approve or reject the terms of a proposed settlement as well as the amount of attorneys' fees, matters not expressly authorized by the MDL statute, raising questions about the judicial legitimacy of this activity.¹²⁷ Thus far this approach has been employed by high-management judges who believe they have a responsibility to protect the absent individual litigants in the aggregated unit from self-interested behavior by those in control of the MDL. It has both adherents and opponents. The former argue that the exercise of these powers is necessary because the multidistrict litigation process deprives the parties and counsel in the individual consolidated cases of their forum selection, time of commencement, choice of counsel, and individual control rights, and they therefore deserve the protection of judicial oversight. That also is thought necessary because none of the procedural protections set out in the class action rule — adequacy of representation, notice, predominance, superiority, opt-out, and settlement approval by the court — are provided by the Multidistrict Litigation Act. Others say there is no authority for what these judges have done and it interferes with the right of private parties to determine the terms of their settlement and various other things.¹²⁸

126 Indeed, if a class or mass action having those dimensions is started in a state court, it probably will be removed to federal court by the defendant under the Class Action Fairness Act. See 28 U.S.C. § 1453.

127 See, e.g., *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 611-12 (E.D. La. 2008); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *19 (D. Minn. Mar. 7, 2008); *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 262-66 (E.D.N.Y. 2006).

128 See Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000) (arguing that ethical safeguards are not sufficient to ensure adequate representation); Linda S. Mullenix, *Dubious Doctrines: The Quasi-*

In truth, significant judicial involvement may be a good thing. Given the high settlement rate in class actions and MDL proceedings, there always have been concerns about whether the plaintiffs' lead counsel have negotiated the best terms for their clients — the predominately absent claimants — or have become distracted by their own self-interest. That distraction might take the form of not pressing for all the monies that might be available for the claimants in exchange for the defendants' cooperation regarding the plaintiffs' attorneys' fee that will be sought from the court.¹²⁹ Thus it is common — and extremely important — for the court in both class action and MDL proceedings to scrutinize the terms of a proposed settlement with great care, particularly with regard to appraising the true value of what the claimants will receive. In some cases, certain elements of the settlement have been challenged as having little or no value.¹³⁰

A related phenomenon that has class action-like characteristics and illustrates the widespread recognition of the need for procedural mechanisms for the efficient resolution of claims stemming from mass events is the development of ad hoc custom-tailored, legislative programs or privately arranged schemes to handle multiple claims based on a single event. The former is illustrated by Congress's creation of a process for compensating victims of the 9/11 terrorist attacks on the Twin Towers in New York City.¹³¹ An example of

Class Action, 80 U. CIN. L. REV. 389 (2011) (arguing that quasi-class actions do not sufficiently consider the interests of individual injured parties); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigation: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

129 See Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1014-23 (2005); Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 82 NOTRE DAME L. REV. 859 (2016) (discussing the signs of a settlement that harms claimants and benefits their counsel and defendants); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337.

130 See, e.g., *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551 (7th Cir. 2017) (concluding that the settlement did not benefit the class and only enriched the lawyers); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (a short-term labelling change said to be of no value to the class); *Dennis v. Kellogg Corp.*, 697 F.3d 858 (9th Cir. 2012) (expressing concern that "self-interest" influenced the negotiation's outcome).

131 Air Transportation Safety and Stabilization Act, Pub. L. No. 107-42 (2001), 115 Stat. 230 (2001) (codified at 49 U.S.C. § 40101 (West 2003)); see Lloyd Dixon & Rachel Kaganoff Stern, *Compensation for Losses from the 9/11 Attacks* (RAND Inst. for Civil Just., 2004), <http://www.rand.org/publications/MG/MG264/>; Peter Schuck, *Special Dispensation*, AM. LAW. (June 1, 2004), <http://>

the latter is the compensation mechanism established by British Petroleum following the Deepwater Horizon disaster in the Gulf of Mexico. Both were administered by Kenneth R. Feinberg who is the acknowledged American expert on these techniques. Obviously, these specially designed arrangements are appropriate only in highly unique circumstances. In some respects, resort to them reflects a lack of faith in the judicial process. But they are motivated by an understandable desire for consistency of result, the expeditious handling of claims, and process informality, things dispersed individual lawsuits cannot guarantee.

Nor can the current aggregate litigation practice in the United States be understood without examining other changes in American civil procedure. The past forty years or so has seen a procedural retrenchment that has narrowed the judicial (personal) jurisdiction of United States' courts.¹³² This has created the possibility that domestic and foreign economic entities will be able to establish jurisdictional havens beyond the reach of the courts in my country.¹³³ The Supreme Court has increased the factual detail that is required to be pled in the plaintiff's complaint in order to survive a motion to dismiss for

www.americanlawyer.com/id=900005408608/Special-Dispensation?slretur=20170629175746; Anthony J. Sebok, *What's Law Got to Do with It? Designing Compensation Schemes in the Shadow of the Tort System*, 53 DEPAUL L. REV. 501, 517 (2003).

- 132 The key decisions are *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (2017); *Walden v. Fiore*, 134 S. Ct. 1115, 1125-26 (2014); *Daimler AG v. Bauman*, 134 S. Ct. 746, 759-63 (2014); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011); and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 926-30 (2011). These cases are analyzed in John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court's Decisions in Goodyear Dunlop Tires and Nicastro*, 90 WASH. U. L. REV. 1707, 1729-34 (2013); Arthur R. Miller, *McIntyre in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465 (2012); Linda S. Mullenix, *Personal Jurisdiction Stops Here: Cabining the Extraterritorial Reach of American Courts*, 45 U. TOL. L. REV. 705 (2014); Robert M. Pollack, Note, "Not of Any Particular State": *J. McIntyre Machinery, Ltd. v. Nicastro and Nonspecific Purposeful Availment*, 89 N.Y.U. L. REV. 1088 (2014); and Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Mach., Ltd. v. Nicastro*, 63 S.C. L. REV. 481 (2012).
- 133 If you couple the shortening of the jurisdictional reach of American courts with the Supreme Court's presumption that federal substantive statutes do not apply extraterritorially, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (Alien Tort Statute); *Morrison v. Nat'l Austl. Bank, Ltd.*, 561 U.S. 247, 255 (2010) (Securities Exchange Act § 10(b)), the result often will be to deprive people — both citizens and noncitizens — of a forum in the United States.

failing to state a claim for relief.¹³⁴ This turn of events has occurred despite sixty years of the federal pleading regime being characterized by the Court as one of “notice pleading.”¹³⁵ In addition, Supreme Court decisions and Rule amendments have established significant judicial gatekeeping barriers regarding an expert’s qualifications for testimonial purposes on economic, scientific, and technical matters,¹³⁶ narrowed the availability and scope of pretrial discovery,¹³⁷ most recently by imposing a “proportionality” requirement

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- 134 *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545-63 (2007). There is a substantial and not very flattering literature on *Twombly-Iqbal*. See, e.g., Miller, *supra* note 68; Alex Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015); Alex Reinert, *Pleading as Information-Forcing*, 75 LAW & CONTEMP. PROBS. 1, 1-2 (2012) (noting the change in pleading standards among lower courts); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008).
- 135 See 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1215 (3d ed. 2004). Starting with *Conley v. Gibson*, 355 U.S. 41 (1957), the Supreme Court repeatedly endorsed the notion of simplified notice pleading. E.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). The Court has been criticized sharply for effectively amending the Federal Rules’ pleading and motion provisions without following the statutorily prescribed rulemaking process. E.g., Steve Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L. REV. 571, 575 (2012) (“The Supreme Court has acted lawlessly.”). *Twombly* and *Iqbal* have been characterized by some scholars in political terms, employing words such as “judicial activism,” or as part of the “right/left” dichotomy, or furthering “conservative” and “corporate” interests. See, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 850 (2010) (“Many observers . . . see the same old right/left story: the conservatives seek to protect rich or powerful defendants, while the liberals stand with the little plaintiffs.”); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1325 (2010) (explaining that *Twombly* and *Iqbal* can be read as favoring “corporate and business interests”).
- 136 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-94 (1993). Two other Supreme Court decisions fill out the “Daubert trilogy.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146-47 (1997).
- 137 Basically, all of the Federal Rule amendments relating to discovery since 1983 have encouraged federal judges to contain the process. See Miller, *supra* note 12, at 353-56. Although individually these changes might not represent a dramatic undermining of federal discovery, they clearly look in a philosophically different direction than did the original discovery rules. It seems fairly obvious that discovery restrictions can impact other procedural and substantive policies

on discovery,¹³⁸ created significant constitutionally based limitations on the availability of punitive damages,¹³⁹ and enhanced the ability to terminate cases without trial on summary judgment motions for lack of “plausibility,” sometimes in cases in which trial-worthy factual issues appear to be present.

I share the widely held perception that these procedural shifts have operated to the disadvantage of plaintiffs and reflect an anti-litigation (and perhaps an anti-plaintiff) orientation on the part of some members of the federal judiciary. When these changes are viewed collectively along with the restraints on class actions discussed earlier and the decisions upholding the enforceability of no-aggregate-class-action-or-arbitration clauses, it seems to me that the prior American commitment to wide-angle citizen access to the courts, procedural simplicity, and a desire to resolve disputes on their merits reflected in the 1938 Federal Rules have been severely compromised.¹⁴⁰

such as access to the courts and merit adjudication negatively. Broad discovery is often a necessity in lawsuits because in many substantive contexts we are quite dependent on private litigation to augment governmental enforcement of federal normative standards. Recent events in both the financial and real estate markets, for example, have laid bare the consequences of under-enforcement of federal regulatory policies.

138 It is too early to know what effect this 2016 “proportionality” amendment will have in practice. It was opposed by plaintiffs’ lawyers and a number of academics, including myself. *See, e.g.*, Statement of Arthur R. Miller to the Advisory Committee on Civil Rules (Phoenix, Arizona, Jan. 9, 2015); Patricia Hatamyer Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083 (2016); Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 28-33 (2016).

139 *E.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 503-15 (2008) (limiting punitive damages in admiralty); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423, 425-26 (2003) (limiting punitive damages under the Due Process Clause); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996) (same).

140 I have written extensively on these matters. Miller, *supra* note 12; Miller, *supra* note 132; Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What’s Happened to the Federal Rules of Civil Procedure*, 43 TEX. TECH. L. REV. 587 (2011); Miller, *supra* note 68; Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 286 (2003). Others have written on them as well. *See* Carrington, *supra* note 101 (discussing the “subversion” of FED. R. CIV. P. 23(b)(3)); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494

VI. THE FUTURE OF AGGREGATE LITIGATION

When one looks to the future, it is apparent that the state of the American class action, and the adjacent MDL practice, will continue to be in flux. As a result, the instability that has existed since 1966 will continue to manifest itself, especially given the current political environment in the United States. That is unfortunate because the importance of aggregating related cases is obvious. In today's world, a procedural system cannot survive with the one-by-one processing of overlapping claims. Abandonment of the class action and other types of multiparty consolidation is not an option. Not only is effective aggregate litigation a matter of common sense, it is a matter of the rational utilization of litigant and judicial system resources. That is in everyone's interest.

A lack of effective collective dispute resolution formats will disadvantage all those who participate in the judicial or arbitration process. It seems self-evident that achieving global litigation peace is preferable to debilitating individualized litigation war. And, I hope, we do not want a procedural system that fails to enforce or to deter violations of important public policies, or that denies citizens the ability to secure compensation or other remedies for their injuries, or that does not do its best to treat claimants consistently in terms of access and outcome — even when each person's stake is small or thought to be inconsequential. Processing claimants on an individual basis will not

(1986). The effect of these procedural developments in two important public policy arenas is canvassed in Suzette Marie Malveaux, *A Diamond in the Rough: How the Trans-Substantivity of the Federal Rules Is Undermining Employment Discrimination and Civil Rights Cases*, 92 WASH. U. L. REV. 455 (2014). See also Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 307 (2010). Other commentators opine that the Supreme Court's opinions "interpreting" (some would say "amending") the Federal Rules and on other procedural matters have been designed to curtail the private enforcement of important statutory rights and other public policies. E.g., Burbank & Farhang, *supra* note 67; Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 928-30 (2000); 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, 1108 (2006); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353-54 (2010); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014).

achieve any of those objectives. As one renowned court of appeals judge has famously remarked: “only a lunatic or fanatic sues for \$30.”¹⁴¹

In addition to the rationality of recognizing the need for aggregate procedures to face the reality of adverse mass phenomena, Rule 23 and the MDL statute remain on the books. And, unless they are relegated to the status of the Dead Sea Scrolls, the class action and the MDL process will continue to be legitimate and authorized procedural vehicles that are entitled to be given some meaning and application. The aggregate litigation genie is out of the bottle. It is here to stay. Clearly there are situations in many substantive contexts in which even the most aggressive class action naysayers will not be able to conclude with a straight face that certification should be denied. One can think of numerous such contexts — for example, claims based on a single event having a single cause, or a common document, or a uniform business or discriminatory practice. The recent court of appeals decisions I referred to earlier involving settlement and the certification of classes have distinguished or limited the applicability of earlier restrictive precedents and other objections and upheld class certification.¹⁴²

But questions abound. What will be the procedural form or forms for aggregating parties and claims and what will be their availability? What matters will be included within the scope of those procedures? How closely related will the claims have to be? How can we make processing complex cases simpler and more expeditious? These questions cannot be answered yet. Nor can anyone be certain how various economic, social, and political forces in the United States may affect the answers. For example, the current administration in Washington quite clearly has been and will continue to appoint federal judges whose backgrounds indicate a conservative and pro-business orientation. Also, I am extremely concerned that the abovementioned proposed (and misnamed) Fairness in Class Action Litigation Act¹⁴³ that

141 Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.).

142 E.g., *In re Urethane Antitrust Litig.*, 768 F.3d 1245 (10th Cir. 2014); *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 401 (2014); *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229 (2d Cir. 2012); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 338 (2012); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d Cir. 2011). Some of the cases are discussed in Georgene Vairo, *Is the Class Action Really Dead? Is That Good or Bad for Class Members?*, 64 EMORY L.J. 477 (2014). As one scholar has correctly observed: although some have “reported the class action’s death . . . [c]lass action litigation, it turns out, is hard to kill off.” Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 Nw. U. L. REV. 511, 516 (2013).

143 See *supra* note 53.

has passed the House of Representatives will strangle both class and mass litigation if enacted.

Moreover, there are worlds within the world of complex litigation that have yet to be fully explored in the United States. That should be done to enlighten the formulation of future policy. Perhaps we should unify the various procedural techniques for aggregating claims and parties and produce a single system for handling large, protracted cases. Perhaps the federal courts should abandon procedural trans-substantivity¹⁴⁴ and design procedures for the tracking of cases according to their dimension or substance.¹⁴⁵ To be even more adventuresome, perhaps we should enable the intersystem transfer of cases between federal and state courts to provide complete aggregation — state to federal or even federal to state.¹⁴⁶ Also perhaps we should focus more intensely on the implementation and distribution of the benefits recovered for classes and in MDL proceedings. Today this subject is hidden in a black box, leaving us at a loss to know to what degree claimants actually benefit from these actions and whether they are being treated equally and equitably.¹⁴⁷

144 Trans-substantivity is a questionable proposition. It may have made some sense in the idyllic litigation world of the 1930s when the Federal Rules were drafted and promulgated, but it seems dubious today. See Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 536; Miller, *supra* note 68, at 90-94. For a discussion of the Advisory Committee’s commitment to the trans-substantive character of the original Federal Rules, see Burbank, *supra*, at 541-42. See generally Robert G. Bone, *Making Effective Rules: The Need for Procedural Theory*, 61 OKLA. L. REV. 319, 324, 333-34 (2008) (discussing trans-substantivity as one of the Federal Rules’ “distinctive features”); Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Body of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2067-69 (1989); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Procedure*, 59 DEPAUL L. REV. 371, 375 (2010) (arguing that only legislatures should engage in substance-specific rulemaking).

145 Debate about the wisdom of developing a tracking system has been going on for some time. See, e.g., Miller, *supra* note 68, at 118-25.

146 This was proposed in COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS WITH REPORTER’S STUDY ch. 5 (AM. LAW INST. 1994), which I served as Reporter. Most of the changes mentioned in text cannot be made by amending the Federal Rules under the existing Rules Enabling Act. Statutory revision is necessary. Several thoughtful proposals are suggested in STEVEN P. CROWLEY, CIVIL JUSTICE RECONSIDERED 135-240 (2017).

147 A greater amount of attention is being paid to subjects such as these in recent years and a modest amount of empiric evidence has been accumulated and more is anticipated. See, e.g., Lynn A. Baker, Michael A. Perino & Charles Silver, *Is*

I suspect that at least for the next few years — the status quo or possibly further restraint will characterize the judicial scene in the United States. My country may have been among the first movers in the class action and aggregate litigation universe, but the many limiting influences I have mentioned suggest that other legal systems may refine and rationalize their group adjudication procedures and, in some ways, be more inventive than we will be in the foreseeable future. Maybe we are to become followers for a while as we were when we simply adopted the English bill of peace. But then maybe the creativity and innovation of American lawyers and judges will resurface and the quest for an efficient merit-oriented procedural system will be resumed.

CONCLUSION

I am depressed about certain aspects of the present civil litigation scene in the United States but remain optimistic about the future. The legal profession in my country has proven it can be very experimental and adventuresome. Recognition of the realities of modern life may enable us to start the procedural innovation clock moving again, perhaps to resurrect the type of intelligence that saw the need to generate new federal class action and joinder rules in 1966 and an MDL process in 1968. I certainly hope that when I end my professional life the American aggregate litigation world will be far more responsive to what society needs from the courts than it was when I was a junior and will have advanced beyond what it is today now that I am a senior.

the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions, 115 COLUM. L. REV. 1371, 1375-81 (2015); Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & Bus. 767 (2015) (finding that between one percent and seventy percent of class members actually received compensation in settlements in fifteen related small-stakes consumer class actions, and that the settlements with the highest compensation rates automatically disbursed payments without requiring class members to file forms); Brian T. Fitzpatrick, *An Empirical Study of the Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010) (finding that of the thirty-three billion dollars in class action settlements in 2006 and 2007 (missing sum) was awarded to class members, five billion dollars of that went to class action lawyers); *see also* Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES L. 47 (2018) (discussing the “information deficit” regarding how class members actually fare).