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KEYNOTE ADDRESS

THE PRESERVATION AND REJUVENATION OF AGGREGATE LITIGATION: A SYSTEMIC IMPERATIVE

*Arthur R. Miller**

Forgive me if I begin on an autobiographical note. Approximately fifty-five years ago I was a young lawyer transitioning into academe when I became indentured—enthusiastically, I admit—to my professional father, procedure teacher, and summer employer following my second law school year, Professor Benjamin Kaplan, of the Harvard Law School.¹ He was then the Reporter for the Advisory Committee on Civil Rules of the Judicial Conference of the United States. Through a series of byzantine circumstances, I became an informal assistant reporter. I was then the Associate Director of the Columbia Law School Project on International Procedure, and one of my assignments was to convince Ben to present to the Advisory Committee a group of rule revisions I had developed relating to transnational litigation, an obscure and arcane matter at the time. That proved a relatively easy sell, and the proposals navigated the statutory rulemaking process successfully.² But the quid pro quo was my commitment to help Ben with what was then at the top of the Advisory Committee's agenda—the revision of the Federal Rules relating to claim and party joinder.

The Rules, originally promulgated in 1938, had taken adventuresome, expansive steps in those precincts. But by the early 1960s it seemed necessary to update, clarify, and improve the effectiveness of the relevant Rules. The Committee had an overarching theme—that the liberal joinder of parties and claims was desirable in order to maximize their utility and further systemic efficiency. The clichés of the time were as follows: promote the resolution of like things in a single action (a.k.a. try like things together), improve judicial

* University Professor, New York University School of Law. This essay is an embellishment and updating of the Keynote Address I delivered at the Randolph W. Thrower Symposium on aggregate litigation hosted by this law review and the Emory University School of Law on February 6, 2014. It was an honor to be a participant. I have tried to maintain the conversational tone of the oral presentation.

¹ Arthur R. Miller, *In Memoriam: Benjamin Kaplan*, 124 HARV. L. REV. 1345, 1354 (2011).

² See generally 28 U.S.C. § 2072 (1958) (codified as amended at 28 U.S.C. § 2072 (2012)) (setting forth the requirements for amending the Federal Rules at the time). The work yielded amendments to Rule 4(f) (service of process abroad), Rule 28(b) (taking testimony in a foreign country), Rule 44(a)(2) (proof of foreign official records), and Rule 44.1 (proof of foreign law).

productivity, and, as I often put it colloquially in class, get more judicial bang for the judicial buck. And so I became a percipient witness and participant in the process that led to the 1966 amendments of the Federal Rules.

The complete revision of Rule 23 governing class actions was the theme's centerpiece. Despite the rich historical roots of the procedure, it had been invoked infrequently during the quarter century following the original promulgation of the Federal Rules. There had been few substantive contexts in which to do so, adventuresome lawyering seemed to be absent at that time, and the Rule's opaque and metaphysical text retarded its functionality.³ The Committee decided the Rule's language had to be translated into plain English to make it user-friendly and elaborated to capture the better procedural features of the limited experience base that then existed.⁴

The Committee's motivation, in significant part, was to create a receptive procedural vehicle for the explosion of civil rights cases that followed the Supreme Court's seminal 1954 decision in *Brown v. Board of Education*,⁵ which was a class action except in formal designation. But another motivation, albeit possibly a secondary one, was to provide a mechanism for allowing the joinder of related modest-sized claims held by a significant number of people that were economically unviable if obliged to be advanced one by one—what today we call negative-value cases.⁶

The economic realities underlying negative-value claims are well understood: unless a joinder device is available to aggregate a large number of small individual claims, there is no feasible way to hold certain defendants accountable or provide any compensation to people who actually might be worthy claimants.⁷ If aggregation is not an available option, the result will not be a multitude of individual suits. Most likely, no suits will be brought, since,

³ 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1752 (3d ed. 2005).

⁴ See generally *id.* §§ 1751–1753 (discussing the historical role and impact of the class action device under Rule 23, as well as the 1966 amendments to Rule 23).

⁵ 347 U.S. 483 (1954).

⁶ Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (providing an introduction to a symposium entitled *The Class Action—A Symposium*, expressing the views of the Advisory Committee's Reporter); see also Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pt. 1), 81 HARV. L. REV. 356, 397–98 (1967) (arguing that an opt-in class action rule 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 revision of Rule 23 and the utility of class actions).

⁷ See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 822–23 (2013).

as a distinguished federal judge has remarked, only a “fanatic” or a “lunatic” sues on a \$30 claim.⁸

The Rules Advisory Committee also understood that making the class form more functional would make it more useful for enforcing the public policies embedded in the antitrust, securities, civil rights, and other substantive federal and state laws extant at the time. There was considerable debate within the Committee as to how far the revised Rule should go, particularly with regard to the necessity for and the scope of what is now Rule 23(b)(3), which the members recognized might well be employed beyond the historic circumference of the class action. They knew they were in uncharted waters because prior to the proposed amendment class members generally had some preexisting affiliation or connection one with the other. So the Committee hedged the new provision in with procedural safeguards to protect absentees—giving class members notice and opt-out rights—and limited its availability by requiring common questions to predominate and insisting the class form be superior to other methods of adjudication.⁹ As with the contemporaneous revision of the other joinder rules, the motif of Rule 23 was rather straight forward: claim and party inclusion, which the Committee believed could be achieved without significant transaction costs or degrading the protection of absentees.¹⁰

Those were relatively simple days in the world of litigation. The Committee obviously could not predict the great growth in complicated federal and state substantive law that would take place in such fields as race, gender, disability, and age discrimination; consumer protection; fraud; products liability; environmental safety; and pension litigation, let alone the exponential increase in class action and multiparty/multi-claim practice that would flow from the expansion of those legal subjects. Indeed, the descriptor “aggregate litigation” had not really appeared when the Rule was amended in 1966. The linguistics of the day only spoke of the emergence of “complex” or “big cases,” as reflected in the fledgling Manual of Complex and Multidistrict Litigation.¹¹

⁸ *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.).

⁹ *See* FED. R. CIV. P. 23(b)(3), (c)(2)(B); *see also* FED. R. CIV. P. 23(e) (requiring judicial approval of settlements).

¹⁰ The revised Rule was progressing up the rulemaking ladder when the civil rights acts of 1963 and 1964 were going through Congress.

¹¹ The original Manual was adopted in 1968. Its title was simplified in 1973. *See generally* 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3868 (4th ed. 2013) (describing the birth and

For approximately two decades after the 1966 revision, class action practice flourished in a rather unencumbered way—with peaks and valleys—and its application extended into almost all of the substantive areas created by the burgeoning state and federal legislation and common law developments that occurred during those years—a period of substantive law growth unique in American history.¹² But, of course, as we know, a sharp reaction set in by the 1990s, although there were premonitions of a resistance to an expansive use of the class action much earlier from the Supreme Court and other parts of the federal judiciary.¹³ Perhaps it was inevitable since those who found themselves the object of large-scale class actions aggregating claims that previously were economically unviable and facing cases having monetary dimensions that hitherto were unthinkable mobilized, gained strength, and counterattacked.¹⁴ And, of course, the composition of the federal judiciary, particularly that of the Supreme Court, changed rather dramatically.

As a result, the Supreme Court and several courts of appeals have rendered decisions that oblige district courts to require “rigorous” adherence to each of the Rule 23 prerequisites—and, some would say, courts in certain cases have gone out of their way to intensify them and create new ones.¹⁵ As a

importance of the Manual). As late as 1994, the American Law Institute published the results of a project for which I served as the reporter. Its title: AM. LAW. INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER’S STUDY (1994). It never would have occurred to me to title it “aggregate litigation.” That nomenclature was first used by the Institute fifteen years later in a successor study. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010) [hereinafter ALI PRINCIPLES].

¹² See Miller, *supra* note 6, at 670–72, 674.

¹³ See *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982) (stating that a Title VII class action may be certified only if, after a rigorous analysis, the court determines that the prerequisites of Rule 23(a) have been satisfied); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176–77 (1974) (holding that the plaintiff must bear the cost of notice to class members; a portion of the cost may not be imposed on defendants on the ground that the plaintiff was likely to prevail on his claims).

¹⁴ See Miller, *supra* note 6, at 679.

¹⁵ The judicial scrutiny of class certification requests has intensified dramatically; see, e.g., *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1086 (7th Cir. 2014) (stating that the court must go beyond the class’s intent to “rely on common evidence and a single methodology to prove both injury and damages” and test the “realism of the [class] injury and the damage model in light of the defendants’ counterarguments”); *Marcus v. BMW 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 Invs. 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.”), *abrogation recognized by Erica P. John Fund, Inc. v. Halliburton Co.*, 718 F.3d 423 (5th Cir. 2013); *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 their overlap with merit issues). The commentators have voiced divergent opinions on this development. Compare Richard Marcus, *Reviving*

consequence, the availability of the class action has been constrained dramatically, thereby reducing its effectiveness as a means of private enforcement of various public policies that serve as a supplement to government enforcement, impairing its utility as a deterrent to large-scale wrongdoing, and compromising it as a procedure for the recovery and distribution of monies in an equitable fashion when that might well be indicated.¹⁶

Exemplifying this change in direction, and encouraging it in significant respects, are *Amchem Products, Inc. v. Windsor*¹⁷ and *Ortiz v. Fibreboard Corp.*,¹⁸ in which the Supreme Court rejected precertification settlements in asbestos cases in the late 1990s. Over the years these two decisions from on high have been read as a signal to contain the class action mechanism.¹⁹ When

Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification, 79 GEO. WASH. L. REV. 324, 349 (2011) (arguing that merits scrutiny during class certification simply is part of the ordinary process of judging), and Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51, 84–87 (2004) (arguing that the proper level of merit inquiry in class certification is when “doing so is convenient and useful to analyzing the certification requirements of Rule 23”), with Steig D. Olson, “Chipping Away”: *The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935, 939 (2009) (stating that these developments make “class certification a more onerous and less efficient process for litigants and the court”). See generally John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1384–1421 (1995) (describing class certification attempts in various contexts). Three virtually contemporaneous court of appeals decisions established the restrictive judicial tone. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 737, 740 (5th Cir. 1996) (decertifying a nationwide class of addicted smokers); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1074, 1081–83, 1085–86 (6th Cir. 1996) (decertifying a product liability class regarding defective penile implants); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297, 1299–1300, 1302 (7th Cir. 1995) (decertifying a class of hemophiliacs seeking damages for contaminated blood). I was the appellate advocate for the classes rejected in two of these cases.

¹⁶ See generally Paul D. Carrington, *Protecting the Rights of Citizens to Aggregate Small Claims Against Businesses*, 46 U. MICH. J.L. REFORM 537 (2013) (discussing the “subversion” of Rule 23(b)(3)); Klonoff, *supra* note 7 (describing the growth and significance of the obstacles to class certification in recent decades). There is a lively scholarly debate as to the relative importance of the compensation and deterrence objectives of small-claim class actions. See, e.g., Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043 (2010) (arguing that the deterrence of wrongdoing is the true value of small-claim class actions); David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871 (2002) (arguing that courts should calibrate class action awards to secure optimal deterrence).

¹⁷ 521 U.S. 591, 620 (1997) (requiring compliance with all Rule 23 prerequisites other than manageability when certification of a settlement class is requested).

¹⁸ 527 U.S. 815, 838–39 (1999) (restricting the availability of the Rule 23(b)(1)(B) limited fund class action).

¹⁹ E.g., *In re Cmty. Bank of N. Va.*, 418 F.3d 277 (3d Cir. 2005); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001); *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 154–57 (S.D.N.Y. 2008).

they are coupled with *Phillip Morris USA v. Williams*,²⁰ in which the Court concluded that a defendant only can be punished for the harm suffered by a specific plaintiff and not for injuries its conduct caused others or the public, the availability of punitive damages in class actions has been sharply limited.²¹ In addition, a number of decisions have impregnated the certification determination with an examination of aspects of the merits and established proof burdens that have led to a substantial procedural frontloading of Rule 23 cases, many of which expire early (or simply are not brought) because courts are unwilling to certify.²² The certification process has become so arduous that its cost and delay—coupled with the risk of eventual failure—either deter the institution of potentially meritorious class actions or lower their settlement value. Obviously, these developments represent significant inhibitions for even the strong willed.

Illustrative of the current state of affairs is *Wal-Mart Stores, Inc. v. Dukes*,²³ in which a divided Supreme Court interpreted Rule 23(a)(2) to require a showing of a high level of issue commonality at the certification point in an employment discrimination case brought on behalf of an enormous nationwide class of female employees against Wal-Mart.²⁴ The decision demands more than the drafters of Rule 23(a)(2) ever intended be necessary.²⁵ Furthermore,

²⁰ 549 U.S. 346, 352–57 (2007).

²¹ See, e.g., Catherine M. Sharkey, *The Future of Classwide Punitive Damages*, 46 U. MICH. J.L. REFORM 1127 (2013).

²² E.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1429–31, 1433 (2013) (a regression model was not accepted as evidence that damages were susceptible of measurement across the entire class); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (3d Cir. 2008) (Rule 23 requires a rigorous consideration of all the evidence and arguments regarding the certification prerequisites); see also *Zavala v. Wal-Mart Stores, Inc.*, 691 F.3d 527, 534 (3d Cir. 2012) (deciding that to certify a Fair Labor Standards Act case, the district court, after considering all the evidence, must find as a fact that all the class members are “similarly situated”). At an earlier time, the Supreme Court had expressed the view that a federal court lacked the “authority to conduct a preliminary inquiry into the merits of a suit” to determine whether it could proceed as a class action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

In Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 GEO. WASH. L. REV. 606 (2014), the author proposes doing what the title of her article suggests. But to impose evidentiary standards on Rule 23 matters, something not done on other procedural issues, such as jurisdiction, venue, and process, that are left for the judge’s determination, is mischievous at best. It inevitably will increase the friction and transaction costs that accompany certification hearings.

²³ 131 S. Ct. 2541 (2011).

²⁴ *Id.* at 2550–51.

²⁵ “Commonality” was conceived by the rulemakers as only requiring that a low threshold of overlap among the class’s claims be satisfied. See 7A WRIGHT, MILLER & KANE, *supra* note 3, § 1763. Fortunately, the Supreme Court has cautioned that on the certification motion plaintiffs need not prove that the common questions will be answered “in favor of the class.” *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013). Recently, in *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750 (7th Cir. 2014), the court

Wal-Mart precluded certification of the class’s claim for individualized monetary relief—back-pay—in conjunction with the certification of classwide equitable relief under Rule 23(b)(2) and did not take the step of suggesting the conversion of the case into a hybrid Rule 23(b)(2)–(b)(3) case, although that possibility probably was not before the Justices.²⁶ To date, the Advisory Committee on Civil Rules has done nothing to abate this trend. To the contrary, its Rule 23 rulemaking activity in recent years has further complexified class action practice.²⁷

In a related vein, by enacting the Class Action Fairness Act of 2005 (CAFA),²⁸ Congress acquiesced to corporate and defense bar lobbying and federalized virtually all sizeable class actions. The statute eliminates state courts as alternative fora for most class actions as well as for actions on behalf of 100 or more monetary claimants—what are now called “mass” actions.²⁹ Unfortunately, CAFA does nothing to resolve difficult choice-of-law questions that have resulted in many multijurisdictional diversity-based class actions not being certified because of a lack of predominance or manageability. In particular, Congress failed to do anything to ameliorate the problem of obliging district courts to apply multiple state laws that has plagued Rule 23(b)(3) diversity class actions for years,³⁰ it clearly could have taken a

declined to apply *Wal-Mart* when it found the question of whether a reasonable consumer was likely to be confused by the packaging of the defendant’s coffee pods to be common to the claims of every class member.

²⁶ *Wal-Mart*, 131 S. Ct. at 2557–61. On hybrid classes, see 7AA WRIGHT, MILLER & KANE, *supra* note 3, § 1784.1. Although this restrictiveness is perhaps best exemplified by the *Wal-Mart* holding, the pattern, as mentioned earlier, has been endorsed by the Supreme Court, at least since its decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). However, the courts of appeals had been moving toward requiring strict adherence to Rule 23(b)(3) even before *Amchem*. See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995); see also *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1359–60 (11th Cir. 2009).

²⁷ Amendments have added provisions for discretionary interlocutory review of class certification decisions, Rule 23(f), for selecting class representatives, Rule 23(g), and for court awarded attorney’s fees, Rule 23(h). The first of these is very resource and time consumptive. The other additions to the Rule simply capsule accepted practice. A subcommittee was appointed recently by the Advisory Committee to consider whether further revision of the Rule is needed.

²⁸ Pub. L. 109-2, 119 Stat. 4 (codified as 28 U.S.C. §§ 1332(d), 1453, 1711–15, 2074 (2012)). The law notes that it will not affect the Supreme Court’s rulemaking authority. § 8, 119 Stat. at 14. See generally Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553 (2008) (chronicling the history and deficiencies of CAFA).

²⁹ § 4, 119 Stat. at 9–12 (codified as 28 U.S.C. § 1332(d)).

³⁰ See, e.g., *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1177–78, 1180–84 (11th Cir. 2010) (citing both predominance and manageability concerns); *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 724–25, 730 (5th Cir. 2007) (citing predominance concerns); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 743–44 (5th Cir. 1996) (citing manageability concerns); see also Linda Silberman,

major step in that direction had the politics of the situation permitted.³¹ Now that state class actions, mass actions, and analogues to federal MDL litigation are being captured by CAFA, these alternatives to traditional Rule 23 classes that formerly offered possible innovative workarounds to certain procedural hurdles have been rendered largely unavailable.

Even more troubling in my judgment are the Supreme Court's extraordinary extensions of the Federal Arbitration Act,³² particularly its decisions in *AT&T Mobility LLC v. Concepcion*³³ and *American Express Co. v. Italian Colors Restaurant*.³⁴ These cases take away access to the judicial system and the opportunity for class or aggregate arbitration from countless consumers, employees, investors, and small businesses that lack any real bargaining ability and are left subject to adhesive no-class arbitration clauses relating to a wide range of basic transactions and societal amenities. As a result of these and several other Supreme Court decisions, such as *CompuCredit Corp. v. Greenwood*³⁵ and *Marmet Health Care Center, Inc. v. Brown*,³⁶ judicial determinations involving significant federal and state policies are being eschewed in favor of a hypothesized national policy favoring arbitration, supposedly emanating from a 1925 statute designed for intercorporate disputes that never was intended to apply to the types of transactions involved in *Concepcion* and *Italian Colors*.³⁷

The Role of Choice of Law in National Class Actions, 156 U. PA. L. REV. 2001, 2009–10 (2008) (explaining that choice of law is a “monumental barrier to class certification”).

³¹ My NYU colleague Samuel Issacharoff and I drafted proposed amendments to the CAFA legislation that would have ameliorated the choice of law problem. Unfortunately, they failed to carry the day in the Senate. See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1417 n.257 (2006); Linda J. Silberman, *Choice of Law in National Class Actions: Should CAFA Make a Difference?*, 14 ROGER WILLIAMS U. L. REV. 54, 67 (2009).

³² 9 U.S.C. §§ 1–16 (2012).

³³ 131 S. Ct. 1740, 1753 (2011) (enforcing mandatory no-class arbitration clause despite its unconscionability under California law); see also *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686–87 (2010) (establishing a default rule that when an arbitration clause is silent on the matter, a party cannot be compelled to submit to class arbitration).

³⁴ 133 S. Ct. 2304, 2310–12 (2013).

³⁵ 132 S. Ct. 665, 668–70, 672–73 (2012).

³⁶ 132 S. Ct. 1201, 1203–04 (2012).

³⁷ The extraordinary expansion in the application of the Federal Arbitration Act by the Supreme Court is 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); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1635–42 (2005). The Court had taken a major step in the direction of enforcing adhesive consumer contracts in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596–97 (1991) (enforcing a choice of forum provision in a passenger's cruise contract). The Court's assertion in *Italian Colors* that aggregate arbitration of a dispute is incompatible with the arbitration process simply does not comport with reality. Both the American Arbitration Association and JAMS have rules for aggregate

As a result of this development, the enforcement of various important policies such as antitrust, consumer protection, and employment rights are threatened, and the transparent public dispute resolution process is being displaced in many contexts by powerful business entities employing take-it-or-leave-it contracts containing mandatory arbitration clauses in contexts in which concepts of bargain, consent, and volition are wholly illusory.³⁸ The invisible character of arbitration results in far less deterrent effect than does the public nature of class litigation, which often is accompanied by media attention (particularly the complaint’s allegations of wrongdoing and the fruits of discovery) that can negatively impact public perception of the defendant.³⁹ The widespread dissemination of information and commentary on social media about court-based litigation dramatizes this difference between the two systems.

In particular, *Italian Colors*, in which the Court enforced a mandatory no-class arbitration clause despite the fact that individual arbitration was economically unfeasible for a small merchant asserting an antitrust claim, certainly has exacerbated the situation. Although, the Court’s opinion recognized an “effective vindication” of federal law exception to the enforcement of such provisions as a potential safety valve,⁴⁰ I don’t think I am being too cynical in suggesting that the majority of the Justices rendered it a bit of a mirage—judicial “sound and fury signifying nothing”⁴¹ one might say, or very little at most.

arbitration, *see Rules and Procedures*, AM. ARB. ASS’N, <https://www.adr.org/aaa/faces/rules> (last visited Dec. 13, 2014); JAMS, JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES (2014), http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf, and several experienced arbitrators have told me they have conducted such proceedings without untoward consequences.

³⁸ Online purchasers often are faced with “terms of use” that include arbitration clauses that the purchaser must “accept” by keystroke or simply by making a purchase. *See, e.g.*, *Nguyen v. Barnes & Noble, Inc.*, No. 8:12-cv-0812-JST (RNBx), 2012 WL 3711081, at *3–4 (C.D. Cal. Aug. 28, 2012) (motion to compel arbitration denied because plaintiff was not shown to have notice of the terms of use or that he affirmatively assented to them), *aff’d*, 763 F.3d 1171 (9th Cir. 2014); *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009), *aff’d*, 380 F. App’x 22 (2d Cir. 2010); *cf. Hubbert v. Dell Corp.*, 835 N.E.2d 113, 124 (Ill. App. Ct. 2005) (online forms gave plaintiff notice that there were terms and conditions, including arbitration, applicable to the sale). For additional discussion concerning the sufficiency of notice provided by these online forms, *see Mendoza v. Microsoft Inc.*, No. 2:14-CV-00316-MJP, 2014 WL 4540225 (W.D. Wash. Sept. 11, 2014); *Tompkins v. 23andMe, Inc.*, No. 5:13-CV-05682-LHK, 2014 WL 2903752 (N.D. Cal. June 25, 2014); *Starke v. Gilt Groupe, Inc.*, No. 13 Civ. 5497(LLS), 2014 WL 1652225 (S.D.N.Y. Apr. 24, 2014).

³⁹ *See* Russell M. Gold, *Compensation’s Role in Class Action Deterrence* 17–25 (2014) (unpublished manuscript on file with the author).

⁴⁰ *Italian Colors*, 133 S. Ct. at 2310–11.

⁴¹ My apologies to Shakespeare and Faulkner. WILLIAM SHAKESPEARE, *MACBETH*, act 5, sc. 5, lines 27–28 (George Lyman Kittredge ed., 1939); WILLIAM FAULKNER, *THE SOUND AND THE FURY* (1929).

Justice Scalia's opinion for the Court articulated the exception quite narrowly, limiting the concept of "effective vindication" to the mere possibility of initiating only one type of legal proceeding—one-on-one arbitration—to enforce the federal statute.⁴² According to the Court, "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."⁴³ Really? Doesn't making the pursuit of everything beyond the mere filing of a request for arbitration economically impossible render "access" meaningless? How can this be considered consistent with that valued element of American due process—the right to a day in court? The Court's majority obviously took the "effective" out of "effective vindication," all with no concern for the principles of unconscionability or the fairness of the arbitration terms or the collateral effect widespread use of the clauses would have on antitrust under enforcement.

Inasmuch as most consumer and many employment claims have a negative value, the result of requiring one-by-one mandatory arbitration is obvious—there will be little or no compensation and no meaningful deterrence. Realistically viewed, these clauses are designed not to be employed to any meaningful degree. Moreover, those few hardy souls who decide to undertake arbitration typically face well-resourced, experienced adversaries who have all the advantages of being repeat players.

As the dissenters observed: "Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."⁴⁴ I had hoped that the Justices would have required state and federal judges to delve further to be sure that remitting the dispute to arbitration does not require the class members to forego "the substantive rights afforded by the statute,"⁴⁵ as suggested by Justice Kagan in her dissent—a pointed reference to the Court's earlier decision in *Green Tree Financial Corp.-Alabama v. Randolph*.⁴⁶ What is next, one might ask—enforcing

⁴² *Italian Colors*, 133 S. Ct. at 2311.

⁴³ *Id.* This attitude echoes the Supreme Court's reluctance to extend the right to counsel in civil cases. *E.g.*, *Turner v. Rogers*, 131 S. Ct. 2507, 2517–20 (2012). By contrast, the European Court on Human Rights has held that clause 6(1) of the European Convention on Human Rights and Fundamental Freedoms guarantees a "fair hearing" and "equality of arms" with the opposing side, which embraces the right to counsel for indigent litigants. *See Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) at 12–14 (1979); *see also Steel & Morris v. United Kingdom*, 2005-II Eur. Ct. H.R. 1, 38.

⁴⁴ *Italian Colors*, 133 S. Ct. at 2313 (Kagan, J., dissenting).

⁴⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

⁴⁶ 531 U.S. 79, 89–90 (2000).

arbitration clauses disallowing any form of consolidation of claims or parties, preventing informal arrangements with other parties to produce common expert evidence, precluding any shifting of costs regardless of which party prevails?⁴⁷ Justice Kagan’s restrictive construction of the earlier *Concepcion* decision might be a cause for optimism, except, alas, it is a dissent.⁴⁸

Sadly, there is far more that is challenging the availability and utility of aggregate litigation, far more. As I have written,⁴⁹ and some would say I have done so at nauseating length, there have been a myriad of restrictive procedural developments in the past quarter century on subjects ranging from a judicial preoccupation with many threshold defenses,⁵⁰ replacing notice pleading with fact pleading,⁵¹ expanding the availability of summary judgment,⁵² limiting discovery,⁵³ imposing gatekeeping on expert testimony,⁵⁴ eviscerating punitive

⁴⁷ According to the *Italian Colors* dissent, the AmEx agreement barred these forms of ameliorating arbitration costs. 133 S. Ct. at 2316, 2318–19 (Kagan, J., dissenting).

⁴⁸ Although *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013) seems to some to offer a small glimmer of hope for the future of class arbitration, it is potentially disastrous in its reasoning. The Court failed even to pay lip service to the public policy justifications for judicial determinations and the public benefits provided by resolving disputes in the court system.

⁴⁹ E.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013); Arthur R. Miller, McIntyre in Context: *A Very Personal Perspective*, 63 S.C. L. REV. 465 (2012); Arthur R. Miller, From Conley to Twombly to Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); 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. 982 (2003). I have not been alone in these observations. See, e.g., Carrington, *supra* note 16; Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); and the authorities cited in notes 57–58, *infra*.

⁵⁰ Standing, preemption, exhaustion of administrative remedies, mootness, and statutes of limitations are but a few. See, e.g., *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1395 (2014) (standing); *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013) (mootness).

⁵¹ *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545–63 (2007).

⁵² *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597–98 (1986); see also Brooke D. Coleman, *Summary Judgment: What We Think We Know Versus What We Ought to Know*, 43 LOY. U. CHI. L.J. 705, 709–10 (2012) (discussing the high rate of summary judgment grants in favor of defendants); cf. *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (reaffirming that evidence is not to be “weighed” on a summary judgment motion and must be viewed in the light most favorable to the non-moving party).

⁵³ Limiting amendments to the discovery rules were promulgated in 1983, 2000, and 2003. Additional amendments that will further narrow the scope of discovery have been approved by the Advisory and Standing Committees and the Judicial Conference; they will soon complete their journey through the rulemaking process. See *Judicial Conference Receives Budget Update, Forwards Rules Package to Supreme Court*, U.S. CTS. (Sept. 16, 2014), <http://news.uscourts.gov/judicial-conference-receives-budget-update-forwards-rules-package-supreme-court>.

⁵⁴ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–94 (1993).

damages,⁵⁵ and narrowing both specific and general personal jurisdiction.⁵⁶ These developments have worked against the ability to maintain civil cases in general and have negatively affected aggregate litigation even more significantly.⁵⁷ Some observers believe that the Federal Rules era has ended and that we are now in a “fourth” procedural age characterized by judicial control of litigation, early dismissals based on little or no factual revelation or development, judges preoccupied with case management and facilitation rather than adjudication of the merits, and outright judicial hostility to litigation as a mode of dispute resolution.⁵⁸ Federal litigation, particularly the pretrial phase, has become littered with procedural stop signs that cause delays, consume resources, and impose grave risks to a litigant’s ability to complete what is now a marathon-length process, assuming he or she can avoid the pitfalls that now result in the earlier and earlier termination of cases, almost always without trial, let alone jury trial.⁵⁹

⁵⁵ *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).

⁵⁶ *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*, 131 S. Ct. 2780, 2791 (2011); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2855–58 (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); Miller, *McIntyre in Context*, *supra* note 49; 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 Meaning of McIntyre*, 18 SW. J. INT’L L. 417 (2012).

⁵⁷ 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. (forthcoming 2014); *see also* Carrington, *supra* note 16; 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 statutory rights and other public policies. *E.g.*, Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014).

⁵⁸ *See, e.g.*, 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); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014); Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353–54 (2010); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 314–32 (2012).

⁵⁹ In addition to the philosophical and political shifts in the judiciary and society, today’s early termination, procedural clutter, and merit avoidance culture also reflect the movement to judicial management, the significant enlargement of the judiciary and the bar, increased caseloads on both the criminal and civil sides of the docket, and the greater complexity of substantive law as well as the increased judicial restrictions

The Supreme Court's 2013–2014 Term included cases that could have further debilitated the effectiveness of class and mass actions in the federal courts. Fortunately, it did not do so in any appreciable way. In the securities context, for example, the Court did not accept an invitation to extend the preemptive force of the Securities Litigation Uniform Standards Act (SLUSA) in a manner that would have limited plaintiffs' ability to bring a wide range of securities-related class or mass actions in state courts.⁶⁰ And *Halliburton Co. v. Erica P. John Fund, Inc.*⁶¹ posed the risk that the Court would overturn the long-standing seminal decision in *Basic Inc. v. Levinson*,⁶² which established the principle that when securities trade on an efficient market, purchasers and sellers can be presumed to be relying on the propriety of the market price, thereby largely eliminating a significant individual issue impediment—reliance on this misstatement—to class certification. That did not come to pass—stare decisis prevailed.⁶³ The Court, however, did afford defendants the opportunity of rebutting the presumption at the class certification stage with evidence of a lack of price impact, which is also a merits issue, further complexifying the Rule 23(c)(1) process in securities cases.⁶⁴ Fortunately, some months earlier, the Court decided that the critical issue of the alleged fraud's materiality did not have to be proven at the class certification stage.⁶⁵ On the other hand, the Court did issue a defendant-friendly opinion on awarding costs under Rule 54(d)(1) in a Fair Debt Collection Practices Act case⁶⁶ and enhanced the ability to remove class actions under CAFA.⁶⁷ All in all, however, it could have been a lot worse.

So now I must respond to the question that has brought us to this conference in these pleasant surroundings. Where do the events I have described leave us? Have we witnessed “The Death of Group Vindication of the Law?” Are we at a funeral, each of us to deliver our own eulogy for the

on it. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 66–67 (1985); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 *STAN. L. REV.* 1255, 1262–66 (2005); Miller, *Pretrial Rush to Judgment*, *supra* note 49, at 984–1006; Diarmuid F. O'Scannlain, *Access to Justice Within the Federal Courts—A Ninth Circuit Perspective*, 90 *OR. L. REV.* 1033, 1049–51 (2012); Judith Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374, 376–78 (1982); Subrin & Main, *supra* note 58.

⁶⁰ *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014), *aff'g* *Roland v. Green*, 675 F.3d 503, 506–07 (5th Cir. 2012).

⁶¹ 134 S. Ct. 2398 (2014), *vacating* 718 F.3d 423 (5th Cir. 2013).

⁶² 485 U.S. 224, 249–50 (1988).

⁶³ *Halliburton*, 134 S. Ct. at 2411–13.

⁶⁴ *Id.* at 2414.

⁶⁵ *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013).

⁶⁶ *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1169–71 (2013).

⁶⁷ *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1347 (2013).

recently departed? What I have recounted does seem like it is the death of aggregate litigation by a thousand paper cuts, or as my sainted television mentor Fred Friendly would put it, death by one-degree-itis. Uncharacteristically for those who know my negative personality, I will be optimistic for a change and answer “no.” As Mark Twain might say, “The reports of aggregate litigation’s death are greatly exaggerated.”⁶⁸ But, of course, inevitably the landscape will continue to change, reformulate, and transmogrify.

Aggregate litigation is not becoming a creature of purely historical import; there are some rays of light that indicate it will survive. I will offer several reasons for this conclusion—in no particular order—that I believe (or at least hope) go beyond wishful thinking. First, and admittedly somewhat impressionistically, my experience with lawyers who typically represent clients on the left side of the “v,” of both the public interest and entrepreneurial stripe, is that many of them are incredibly inventive, talented, and tenacious—some might call them stubborn. After all, it was these risk-assumptive personalities who, in a sense, “created” the modern class (and mass) action; gave it wide-angle application; and nurtured its growth into a major, constantly evolving, and sophisticated procedural vehicle, sometimes embracing the concept of the private attorney general along the way. I doubt they will flee this field of litigation. And so I hope it will be talented, committed lawyers—both social action and entrepreneurial—who will find ways to preserve and resuscitate aggregate litigation even if new modalities for doing so must be created and the present ones reformulated and modified. As a gifted plaintiffs’ lawyer friend of mine is fond of saying: “We know how to find the back doors.”

Of course, these lawyers and those who follow them in the future must have the fortitude to swim upstream against the overwhelming human and economic resources of defense interests who thus far have been fairly successful in painting the plaintiffs’ bar as greedy ambulance chasers and have projected unsubstantiated images of runaway litigation expenses; abusive, out-of-control, and lawyer-driven lawsuits; extortionate settlements; and

⁶⁸ Now I owe an apology to Mark Twain. See *THE WIT AND WISDOM OF MARK TWAIN: A BOOK OF QUOTATIONS* 46 (Dover 1999). I decline to be as morbid as some of my academic colleagues. See, e.g., 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”); Klonoff, *supra* note 6.

threats of damage to American competitiveness.⁶⁹ I strongly suspect, although admittedly cannot prove, that when the average person thinks or speaks disparagingly about “lawyers” or “trial lawyers,” the image is that of the stereotypical plaintiffs’ lawyer so frequently portrayed in the media. It would be useful if elements of the plaintiffs’ bar would organize themselves, which they have never done effectively; engage legal policy issues in the public arena, from which they have been largely absent; exhibit patience by taking a long term view of things; and have perseverance despite the power of corporations, the government, and defense law firms and their frequent scorched-earth practices.

Unfortunately, plaintiffs’ lawyers sometimes have been their own worst enemies because they occasionally behave like pigs at the trough, overreach, act unrealistically, and play territorial games—typically taking the form of “I got here first” or “My class is bigger than yours” or “I should be lead counsel, not you.” These behaviors often seem counterproductive and self-defeating, as I think may have been true in *Wal-Mart*, and at times plaintiffs’ lawyers pursue pathways that are not in the best interests of their clients—the class members, or some of them.

Second, Rule 23 continues in the rulebook. And, unless it is relegated to the status of the Dead Sea Scrolls, it will continue to be a legitimate and authorized procedural vehicle that is entitled to be given some meaning and application. There are situations in numerous substantive contexts in which even the most aggressive class action naysayers will not be able to conclude “certification denied.” One can think of many such contexts—for example claims based on a

⁶⁹ See PHILIP K. HOWARD, *THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA’S LAWSUIT CULTURE UNDERMINES OUR FREEDOM* 14–27 (Ballantine Books 2002) (2001) (arguing that the theory of personal rights has led to excessive litigation); WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 5–11 (1991) (arguing that personal injury lawsuits have crippled the medical industry and unjustly enriched the legal profession). Contrary viewpoints are expressed in: Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 *DENV. U. L. REV.* 77, 77–90 (1993) (describing and debunking various inaccurate statistics that are put forth to attack the American legal system); Miller, *Double Play on the Federal Rules*, *supra* note 49, at 61–71 (challenging claims of high cost as unfounded and research as superficial); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 *STAN. L. REV.* 1393, 1395–96 (1994) (“We believe America is the most litigious society on earth not because this is true but because the media have told us so over and over again.”); Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 *OR. L. REV.* 1085, 1116–33 (2012) (analyzing various factors, including media distortion, contributing to the effectiveness of the cost-and-delay narrative advanced by defense interests). For additional discussion of this contrary perspective, see Robert S. Peck & John Vail, *Blame It on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 *N.Y.L. SCH. L. REV.* 323, 325–26 (2007) (outlining the history of antipathy toward the plaintiffs’ bar).

single event, a common document, or a uniform business or discriminatory practice. A number of recent courts of appeals decisions involving settlement and litigation classes have bypassed *Wal-Mart* and other objections and concluded that certification was proper.⁷⁰ And it should be remembered that Justice Scalia acknowledged in his plurality opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,⁷¹ that a Federal Rule must be given some meaning, even at the expense of clearly contrary state law.⁷² Admittedly the Court was not obliged to give Rule 23 any particular application in that case.

I am concerned, however, that the Rules Advisory Committee, its members having been appointed by the current Chief Justice, may constrict or burden Rule 23, and there are strong voices outside the Committee that continue to sound a negative klaxon and recommend wielding the hatchet against the present rule.⁷³ Most notably, the United States Chamber of Commerce has

⁷⁰ *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); *In re American Int'l Group, Inc. Sec. Litig.*, 689 F.3d 229 (2d Cir. 2012); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d Cir. 2011). Some of the cases are discussed in this Symposium in Georgene Vairo, *Is the Class Action Really Dead? Is that Good or Bad for Class Members?*, 64 EMORY L.J. 477 (2014).

⁷¹ 559 U.S. 393 (2010).

⁷² Only four Justices expressed that view. *Id.* 406–10. Some district courts have concluded that Justice Stevens' concurring opinion is controlling since it provides the narrowest ground of decision and therefore that five Justices in *Shady Grove* concluded that a Federal Rule cannot alter state substantive law that is embedded in a class action provision. *See, e.g.*, *In re Trilegiant Corp.*, 11 F. Supp. 3d 82, 115–18 (D. Conn. 2014); *In re Ford Tailgate Litig.*, No. 11-CV-2953-RS, 2014 WL 1007066, at *9 (N.D. Cal. Mar. 11, 2014). *See generally* Jack E. Pace III & Rachel J. Feldman, *From Shady to Dark: One Year Later, Shady Grove's Meaning Remains Unclear*, 25 ANTITRUST, Spring 2011, at 75, 76 (noting that district courts applying the "narrowest grounds" rule have held Justice Stevens' test governs the *Shady Grove* decision).

⁷³ *See, e.g.*, MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009). Two of the distinguished contributors to this Symposium propose dramatic curtailments of Rule 23 and current class action practice. 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). And 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, would burden the class certification process by requiring that the plaintiffs 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 even prove necessary. The reader will not be surprised by my rejection of these three viewpoints as being retrogressive and completely at odds with the litigation system's contemporary needs.

As to the orientation of the Advisory Committee, two distinguished scholars have written:

A rulemaking committee appointed by a Republican Chief Justice that is dominated by judges appointed by Republican Presidents and lawyers who defend corporations/business may demonstrate . . . that it should be understood, to a material degree, as a political institution

been a powerful campaigner for cabining the application of Rule 23.⁷⁴ Fortunately, in actuality, despite all that I have bemoaned, class action practice retains considerable vibrancy.

In an analogous vein, as long as it remains on the books, as it undoubtedly will, the multidistrict litigation statute, Section 1407 of the Judicial Code,⁷⁵ will continue to have very significant application through the work of the Judicial Panel on Multidistrict Litigation. Once transferred under Section 1407, the consolidated individual cases (also, in some instances, including one or more class actions) along with the almost inevitable tagalong actions, effectively become an aggregate litigation unit, at least for pretrial purposes.⁷⁶ MDL activity has increased substantially over the years, and it has become an enormously significant phenomenon in the work of the federal courts since the statute's enactment in 1968.⁷⁷ Section 1407 transfer is now an accepted and

carrying out a partisan project; that some interest groups, therefore, count more than others; and that those interest groups also count more than empirical evidence, at least if they are persistent.

Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. (forthcoming 2014–2015) (manuscript at 39–40) (footnote omitted), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478698.

⁷⁴ The Chamber of Commerce released a study on February 28, 2014, pertaining to the cost of securities class actions, dubiously asserting that these lawsuits cost investors nearly \$39 billion a year. *U.S. Chamber Study: Investors Incur Significant Losses Due to Securities Class Actions*, U.S. CHAMBER COM. (Feb. 28, 2014, 11:00 am), <https://www.uschamber.com/press-release/us-chamber-study-investors-incur-significant-losses-due-securities-class-actions>. The Chamber also filed an amicus brief in support of the petitioners in *Halliburton Co. v. Erica P. John Fund, Inc.*, discussed *supra* at note 61 and accompanying text, arguing in an assumption-laden passage that the approach courts have taken to the fraud-on-the-market theory has provided securities fraud plaintiffs a “near free pass to class certification, and the easy certification of plaintiff classes has predictably led to excessive securities fraud litigation and the *in terrorem* settlement of insubstantial claims.” Brief for Chamber of Commerce of the United States of America, National Ass’n of Manufacturers, Pharmaceutical Research and Manufacturers of America, and Business Roundtable as Amici Curiae Supporting Petitioners at 4–5, *Halliburton Co. v. Erica P. John Fund, Inc.*, 135 S. Ct. 2389 (2014), No. 13-317, 2014 WL 108360.

⁷⁵ 28 U.S.C. § 1407 (2012).

⁷⁶ See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (transferred actions must be returned to their original courts for trial). In reality, the vast majority of consolidated cases never return to the transferor courts because of settlements, pretrial dispositive motions, or party consents. Although Section 1407 only enables the consolidation of federal cases, in certain contexts, notably in air crash cases, a significant amount of coordination develops between the judges and lawyers in the parallel state cases and the participants in the transferee proceeding, partially aggregating the litigation in both the federal and state courts.

⁷⁷ ANNUAL REPORT PANEL ON MULTIDISTRICT LITIGATION 1 (1980), available at http://www.jpml.uscourts.gov/sites/jpml/files/Legacy_Statistical_Reports-1980-1991-Compressed.pdf (reporting that in cases transferred pursuant to Section 1407, between July 1, 1979, and June 30, 1980, the Panel acted upon 1,386 civil actions). By way of contrast, during the twelve-month period ending September 20, 2013, the Panel acted upon 46,509 civil actions. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2013 (2013), available at http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-2013_1.pdf. People in the know state that if pro

embedded aspect of federal litigation that will not go quietly into the night. It has taken on a life of its own.⁷⁸ Moreover, I doubt that the Panel's judges are ready to abandon the very reason for their own existence.

The use of Section 1407 multidistrict consolidation is a particularly important method for aggregating and organizing dispersed cases, and its application has been kaleidoscopic. It especially is useful when class certification is unlikely because the litigants in the individual cases can be shepherded toward a global settlement by the transferee judge. And in the class context, as just noted, the use of settlement classes can achieve resolution of an MDL. As a result, Section 1407 consolidation often affords individual plaintiffs and class members a forum for claims that otherwise might have near-zero or negative litigation value, or would languish or yield inconsistent results if they each remained in separate federal courts. Furthermore, if facilitating settlement is an implicit aim of transferee judges (and who can deny the reality of today's settlement culture), the likelihood that meritorious claims ultimately are rejected or undervalued is no greater in an MDL, perhaps less so, than claims aggregated through the traditional class action and joinder mechanisms.⁷⁹ Section 1407 consolidation also is a useful context in which to explore the use of bellwether trials and other forms of sampling claims to develop an estimate of their value in order to create an environment for an

se and social security cases are excluded, well over 40% of all federal civil actions are part of MDL proceedings.

⁷⁸ The mechanics, structure, economics, and sociology of practice before the MDL Panel are ably described in this Symposium in Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329 (2014).

⁷⁹ Of course, this technique depends on the initiation of enough individual cases to warrant the attention of the MDL Panel, which may be somewhat less likely when they are small-value claims that have near-zero or negative litigation value. In Jaime Dodge, *Disaggregative Mechanisms: Mass Claims Resolution Without Class Actions*, 63 EMORY L.J. 1253, 1271–72 (2014), the author challenges the belief that litigation consolidation is the only mechanism for efficiently resolving mass claims by arguing that a new branch of non-aggregative case resolution has emerged, aptly named by her “disaggregation,” which employs individualized determinations as the claims resolution vehicle. She argues that disaggregation is capable of awarding greater compensation more quickly and at a lower cost than aggregate litigation. That position is disputed in Margaret Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1341 (2014), which asserts that disaggregative mechanisms typically are not able to resolve mass torts without court intervention and argues that the MDL process is the primary mechanism for global settlements. See also 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, 777–82 (2010) (noting the trend toward nonclass aggregate settlements in multidistrict situations).

aggregate settlement.⁸⁰ Use of the statute will continue to be a bedrock for the group resolution of related claims.

Next, forgive my optimism, but I believe that there are many federal district and courts of appeals judges who understand the systemic efficiencies of aggregate litigation as well as the societal importance of providing a forum for claims that must be collectivized to be viable through procedures such as class and mass actions and are willing to embrace the opportunity to secure those objectives, especially in the public policy arena. Unfortunately, their ranks may well have thinned in recent decades, and many live in the shadow of the hostility to class and mass actions as well as certain areas of substantive law demonstrated in several circuits and by some Supreme Court Justices. Nonetheless, I think these judges will continue to employ aggregative techniques with the expectation that their work product will survive or escape appeal.⁸¹

Another aggregation possibility reflects the fact that, in addition to class actions with all of their risks and procedural baggage, there always is the occasional prospect of the large-scale joinder of parties into what are now referred to as “mass” actions. Rather than attempting to navigate the pitfalls and attendant delays of Rule 23, plaintiffs in some circumstances are

⁸⁰ See, e.g., *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 318–19 (5th Cir. 1998); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019–21 (5th Cir. 1997). See generally Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008) (discussing the history of bellwether trials in MDL actions and advocating their use for actions with significant attorney participation); Zachary B. Savage, Note, *Scaling Up: Implementing Issue Preclusion in Mass Tort Litigation Through Bellwether Trials*, 88 N.Y.U. L. REV. 439 (2013) (arguing preclusion problems with bellwether trials can be overcome when a substantial number of them have been completed). Some courts have declined to use sampling for preclusion purposes. See *In re Chevron*, 109 F.3d 1016; *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990). But cf. *Hilao v. Estate of Marcos*, 103 F.3d 767, 782–83 (9th Cir. 1996) (sample of 131 claimants’ depositions used as evidence to establish 9,541 claims). A critique of settlement class actions can be found in Martin H. Redish & Adrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545 (2006).

⁸¹ See, e.g., *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 761 (7th Cir. 2014) (finding predominance satisfied based on the common question of whether the defendant’s packaging of its coffee pods would deceive a reasonable consumer but concluding that on remand the district court “must decide whether classwide resolution would substantially advance the case”); *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1185, 1227 (N.D. Cal. 2013) (finding that since antitrust violations can be shown through evidence common to the entire class, common issues predominate over individual issues thereby satisfying Rule 23(b)(3)’s requirement); *Brooklyn Ctr. for Independence of the Disabled v. Bloomberg*, 290 F.R.D. 409, 418–19 (S.D.N.Y. 2012) (commonality requirement was satisfied in a class action claiming New York City’s emergency and disaster plan discriminated against people with disabilities; although the class members would not be affected in the same way by the alleged lack of planning, the city-wide policy would affect all disabled residents).

voluntarily or involuntarily joined together (typically under the aegis of an MDL consolidation), as was done, for example, in the Actos and Zyprexa pharmaceutical litigations.⁸² A byproduct of this type of expansive joinder is the recent judicial creation of the so-called “quasi-class action.”⁸³ This procedure, which has manifested itself in various forms, demonstrates that some federal district judges are willing to employ strong control over large multiparty cases. They may choose to encourage party and claim joinder, oversee attorneys’ fees, engage in extensive management, foster settlement and evaluate its adequacy as they would if it were a class action, and promote judicial cooperation with related cases in other courts, often both state and federal.⁸⁴

These admittedly are pragmatic and creative endeavors, but there are substantial questions about whether federal judges have authority to create quasi-classes without meeting the requirements of Rule 23, let alone impose their will on attorneys’ fees and settlement terms, and whether the procedural protections they provide people who realistically are absentees are sufficient.⁸⁵ In other words, judges and lawyers must tread carefully in forming and proceeding with these ad hoc aggregative units. Nonetheless the phenomenon does reflect a strong judicial desire to resolve a large number of related cases by using aggregative techniques. Further experimentation with these techniques can be expected.

And now, at the risk of being fobbed off as a fuzzy-headed academic by my peers, I will speak aspirationally. I believe that sooner or later, thoughtful people will be distressed by the realization that restricting class actions and other forms of group litigation inevitably leads to the under-enforcement of important public policies. For example, consumer protection laws might well be rendered ineffective without the possibility of aggregation since most claims under those statutes are not economically sustainable if they must be

⁸² *In re Actos Prods. Liab. Litig.*, 840 F. Supp. 2d 1356 (J.P.M.L. 2008); *In re Zyprexa Prods. Liab. Litig.*, 314 F. Supp. 2d 1380 (J.P.M.L. 2004).

⁸³ *See In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006).

⁸⁴ *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 Products Liab. Litig.*, 467 F. Supp. 2d 256, 262–66 (E.D.N.Y. 2006).

⁸⁵ *See generally* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000) (arguing ethical safeguards are not sufficient to ensure adequate representation); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389 (2011) (arguing that quasi-class actions do not resolve claims by giving full consideration of the interests of individual injured parties).

litigated on an individual basis. In addition to the effectuation of public policy, it should become clear that in contemporary society there must be a mechanism for the aggregation of claims for both pragmatic and fairness reasons—individual cases will yield only limited binding effect, provide no relief to those not in a position to bring suit or even know that possibility exists, cause systemic inefficiencies, produce potentially inconsistent litigation results, and lose the benefits of global peace, something often critical to defense interests for variant reasons.⁸⁶ Judicial enforcement of mandatory no-class arbitration clauses under *Italian Colors* simply exacerbates these deficiencies.

The contemporary litigation scene no longer is typified by one plaintiff suing one defendant on a single issue. Let's be realistic: the era of disputes over custom-crafted oxcarts and the like is over. Significant products are mass produced and sold on a national or global marketplace basis, and a multitude of transactions take place, often anonymously, on the internet; manufacturers, financial institutions, and service providers benefit from these geographically unbounded marketplaces, distribution systems, and information networks. Because these entities reap the rewards of national or global commerce, plaintiffs similarly should be enabled to seek rectification on a corresponding geographically unlimited and aggregate basis when there is a commonality of claims. Recognition of the essential characteristics of today's commercial world and the value of efficient dispute resolution might motivate courts to allow the aggregate litigation pendulum to retrace its arc.

Some acknowledgment of these considerations and the need to move aggregate litigation forward can be found in a series of decisions by the Seventh Circuit that show a willingness to put limits on the applicability of *Wal-Mart* and *Comcast Corp. v. Behrend*,⁸⁷ two current defense bar favorites, when it seems useful to do so. In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the court demonstrated a capacity to employ Rule 23 creatively

⁸⁶ See Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901 (2000). See generally Rhonda Wasserman, *Future Claimants and the Quest for Global Peace*, 64 EMORY L.J. 531 (2014), which proposes a public-private claims resolution process to obtain global peace when there are unknown future claimants whose protection typically is difficult if not impossible because of problems of identification, notice giving, and adequacy of representation. Professor Wasserman's proposal, as well as earlier ones by Professors Hensler and Mullenix, are certainly worthy of discussion. See Deborah R. Hensler, *Bringing Shutts into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 UMKC L. REV. 585 (2006); Linda S. Mullenix, *Back to the Futures: Privatizing Future Claims Resolution*, 148 U. PA. L. REV. 1919 (2000).

⁸⁷ 133 S. Ct. 1426 (2013).

to achieve an efficiency objective.⁸⁸ Merrill Lynch agreed to a \$160 million settlement with a class of minority brokers in a Title VII case alleging that the brokerage firm was engaging in discriminatory practices and race-based retaliation in failing to hire, promote, and advance African Americans. The settlement may well be the largest sum distributed to date in a racial discrimination suit against an American employer.⁸⁹ It might not have materialized without the Seventh Circuit reversing the district court's denial of class certification, which had relied heavily on *Wal-Mart*.⁹⁰ The Supreme Court then denied certiorari,⁹¹ leaving the litigants facing trial as the next step absent a settlement.⁹²

The facts of *McReynolds* seem quite similar to *Wal-Mart* because both involved a sizable class suing a large company for institutionalized discrimination. Thus, what is encouraging for the future is that a unanimous appellate panel opinion recognized factual limits on *Wal-Mart*'s application.⁹³ The court's opinion, written by Judge Posner, treads carefully through

⁸⁸ 672 F.3d 482, 486 (7th Cir. 2012).

⁸⁹ See Patrick McGeehan, *Merrill Lynch in Big Payout for Bias Case*, N.Y. TIMES DEALBOOK (Aug. 28, 2013, 9:02 PM), <http://dealbook.nytimes.com/2013/08/27/merrill-lynch-in-big-payout-for-bias-case/>. The settlement was preliminarily approved by the district judge, the class members were notified, and a fairness hearing was held December 6, 2013, at which final approval was granted. See *McReynolds v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, No. 05 C 6583, slip op. (N.D. Ill. Dec. 6, 2013), available at https://classaction.kccllc.net/Documents/MLR0002/616_Final_Approval_Order.pdf; see also *George McReynolds v. Merrill Lynch, Pierce, Fenner & Smith Inc. Class Action Settlement Website*, KUTZMAN CARSON CONSULTANTS, <http://classaction.kccllc.net/CaseInfo.aspx?pas=mlr2> (last visited Dec. 13, 2014).

⁹⁰ *McReynolds*, 672 F.3d at 492; see also *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 05 C 6583, 2012 WL 5278555 (N.D. Ill. July 13, 2012) (class certification order).

⁹¹ See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McReynolds*, 133 S. Ct. 338 (2012) (denying certiorari to Merrill Lynch's petition from the order of class certification); see also Settlement Agreement and Release at 17, *McReynolds v. Merrill Lynch Pierce, Fenner, & Smith, Inc.*, No. 05 C 6583 (N.D. Ill. Aug. 23, 2013) (No. 05-C-6583), available at http://www.merrillclassaction.com/pdfs/ML_SettlementAgreement_082813.pdf.

⁹² Settlement Agreement and Release, *supra* note 91, at 12 (noting that a trial date had been set for January 2014 at the time of the settlement).

⁹³ According to Judge Posner:

Wal-Mart holds that if employment discrimination is practiced by the employing company's local managers, exercising discretion granted them by top management . . . rather than implementing a uniform policy established by top management to govern the local managers, a class action by more than a million current and former employees is unmanageable; the incidents of discrimination complained of do not present a common issue that could be resolved efficiently in a single proceeding. Not that the employer would be immune from liability even in such a case . . . [b]ut because there was no company-wide policy to challenge in *Wal-Mart*—the only relevant corporate policies were a policy forbidding sex discrimination and a policy of delegating employment decisions to local managers—there was no common issue to justify class treatment.

McReynolds, 672 F.3d at 488 (citation omitted).

Rule 23's requirements, noting that the class could not be certified under Rule 23(b)(3) because each individual employee's situation at Merrill Lynch arguably was too different.⁹⁴ But he saw the efficiency value of classwide adjudication of the central issue of whether there was actionable employment discrimination, even though damage claims would require individual adjudication.⁹⁵

However, relying on Rule 23(b)(2), which governs injunctive and declaratory relief classes and does not require a predominance of common questions, and Rule 23(c)(4), which provides that a class can be certified "with respect to particular issues," a provision that has been little used by the courts until recently, the Seventh Circuit based its decision in part on the lack of a "downside" to granting limited class action treatment on the issue of disparate impact.⁹⁶ Judge Posner noted that although allowing a single very critical issue to turn on a decision by one judge or jury might weigh against certifying a large class (echoing an influential earlier opinion of his),⁹⁷ he felt the risk that posed was simply one facet of the inquiry into "whether the accuracy of the resolution would be unlikely to be enhanced by repeated proceedings."⁹⁸ Expressing himself very pragmatically and recognizing the need for resolution of the dispute's critical question sooner rather than later, Judge Posner concluded that "[t]here isn't any feasible method . . . for withholding injunctive relief until a series of separate injunctive actions has yielded a consensus for or against the plaintiffs."⁹⁹

⁹⁴ *Id.* at 491.

⁹⁵ *Id.* at 492 ("As far as pecuniary relief is concerned, there may be no common issues[.] . . . and in that event the next stage of the litigation, should be the class-wide issue be resolved in favor of the plaintiffs, will be hundreds of separate suits for backpay The stakes in each of the plaintiffs' claims are great enough to make individual suits feasible. But the lawsuits will be more complex if, until issue or claim preclusion sets in, the question whether Merrill Lynch has violated the antidiscrimination statutes must be determined anew in each case.").

⁹⁶ *Id.*; see also *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006) (certification of a question whether the defendant's strip-search policy was constitutional); *Chen-Oster v. Goldman Sachs & Co.*, No. 10 Civ. 6950(LBS)(JCF), 2012 WL 205875, at *7 (S.D.N.Y. Jan. 19, 2012) ("District courts should take full advantage of [Rule 23(c)(4)] to certify separate issues" (alteration in original) (quoting *Robinson v. Metro-N. Commuter R.R.*, 267 F.3d 147, 167 (2d Cir. 2001) (internal quotation marks omitted)). See generally 7AA WRIGHT, MILLER & KANE, *supra* note 3, § 1790 (discussing partial class actions and the use of Rule 23(c)(4) to craft subclasses).

⁹⁷ See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995).

⁹⁸ *McReynolds*, 672 F.3d at 491 (quoting *Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910, 911 (7th Cir. 2003)) (internal quotation marks omitted) (citing, *inter alia*, *In re Rhone-Poulenc*, 51 F.3d at 1299–1300).

⁹⁹ *Id.*

Although the *McReynolds* class certainly was smaller than some that have been certified, particularly during the heyday of class actions, and although the case's holding does nothing to reverse the denigration of Rule 23(b)(3) damage classes that has occurred in recent years, the melding of a Rule 23(b)(2) injunction class with a Rule 23(c)(4) issue class and the subsequent settlement of the case offer a possible blueprint for the handling of a variety of civil rights, consumer, and other class certification situations. It seems intuitive that settlement is more likely once a class is certified, especially when the possibility of an indeterminate number of subsequent individual damage trials exists, even if that certification is partial and does not fall neatly under Rule 23(b)(2) or Rule 23(b)(3). It remains to be seen whether issue certification under Rule 23(c)(4) has growth potential. That could be something of a game changer.

In the Rule 23(b)(3) context, Judge Posner's opinion one year after *McReynolds* in *Butler v. Sears Roebuck & Co.*,¹⁰⁰ a product defect class action involving mold in washing machines, provides another template that is well worth considering. The Seventh Circuit reversed a denial of certification of one of two separate classes advancing two different breach of warranty theories. The opinion again is pragmatic, focusing on the need for courts to handle cases efficiently and distinguishing the Supreme Court's decision in *Comcast* by limiting it largely to its facts.¹⁰¹ Judge Posner noted that class certification was denied in *Comcast* because the plaintiffs in that case failed to base their classwide damages theory on the particular injury they were complaining about,¹⁰² something not relevant in *Butler*.¹⁰³ The court of appeals concluded

¹⁰⁰ 727 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.*, 722 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).

¹⁰¹ *Butler*, 727 F.3d at 799–801.

¹⁰² *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). *Comcast's* negative effect on certification can be seen in the securities cases arising from the Gulf Oil disaster. *See In re BP P.L.C. Sec. Litig.*, No. 4:10-md-2185, 2013 WL 6388408, at *17 (S.D. Tex. Dec. 6, 2013) (denying class certification for failure to establish that damages could be proven on a class-wide basis). On the other hand, three months before the *Butler* opinion was handed down, the Ninth Circuit in *Leyva v. Medline Industries Inc.*, certified a class seeking to recover unpaid wages. 716 F.3d 510, 513–14 (9th Cir. 2013). The *Leyva* court read *Comcast* narrowly and said that the need for individualized damage calculations does not defeat certification, which always has been the received wisdom on the subject. *Id.*; *see also, e.g., In re Deepwater Horizon*, 739 F.3d 790, 810–11 (5th Cir. 2014).

¹⁰³ *Butler*, 727 F.3d 796 at 801 (“It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages. . . . [T]he fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for

that the central liability question of whether the washing machines were defective could be determined on a classwide basis leaving damage matters to individual proceedings if liability was established.

In 2014, a year after *Butler*, the Seventh Circuit reiterated its receptivity to the aggregation of consumer claims in *In re IKO Roofing Shingle Products Liability Litigation*,¹⁰⁴ when it vacated a denial of class certification in another home products case. After distinguishing *Wal-Mart* and *Comcast*, the court rejected the district court's conclusion that "commonality of damages" among class members was "legally indispensable."¹⁰⁵ Although the class had advanced two theories of damages, both matched its theory of liability. The court acknowledged, but was not concerned, that one of the damage theories would require buyer-specific hearings in the event the common liability questions were established in favor of the class; it simply cited *Butler*.¹⁰⁶ These two opinions, as did *McReynolds*, show a judicial willingness to employ the class action whenever the resolution of classwide issues will advance the litigation in a meaningful way.¹⁰⁷

Another potential avenue for development involves more creative lawyering and judicial management in other aggregate litigation contexts. A class or mass action is not the only method by which multiple plaintiffs can create a single litigation unit. As discussed earlier, MDL proceedings provide an extremely useful consolidation vehicle and often will offer an effective environment for a collective settlement or other form of resolution. Not surprisingly, several experiments and proposals for nonclass aggregate settlements have emerged.¹⁰⁸ For example, in litigation against Merck challenging its drug Vioxx for causing a heightened risk of heart attacks and similar health problems, the transferee district court with jurisdiction over the

tortious harms of enormous aggregate magnitude but so widely distributed as not to be able to be remedial in individual suits.").

¹⁰⁴ 757 F.3d 599 (7th Cir. 2014).

¹⁰⁵ *Id.* at 603.

¹⁰⁶ *Id.*

¹⁰⁷ 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*, 131 S. Ct. 2541, 2551 (2011)) (internal quotation marks omitted)). Something appears to be in the water in the Seventh Circuit. I hope it percolates to the other circuits.

¹⁰⁸ ALI PRINCIPLES, *supra* note 11, § 3.17(b); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011); Wasserman, *supra* note 86, at 531. However, this mode of settlement can be criticized for its lack of transparency.

federal actions by virtue of consolidation under Section 1407 refused to certify a class of plaintiffs because of perceived deficiencies regarding typicality, adequacy, predominance, and superiority.¹⁰⁹ Much of the district court's conclusion on that point can be attributed to its determination that the applicable law for each individual claim was the home jurisdiction of each individual plaintiff¹¹⁰—the perennial multistate-law problem so common in diversity-based class actions. The very experienced MDL Judge, Eldon Fallon of the Eastern District of Louisiana, indicated that the wide range of injuries allegedly suffered by the claimants and the potential for individual alternative health issues likely would prevent satisfaction of the Rule 23(b)(3) predominance requirement by itself, even if the class could be certified on the single issue of Merck's liability for the drug.¹¹¹

Instead, a number of bellwether trials were conducted.¹¹² Only one of the first six resulted in a plaintiffs' verdict.¹¹³ However, perhaps due to Judge Eldon's effectiveness, a unique type of opt-in settlement ultimately was reached, resulting in a \$4.85 billion fund for successfully processed claims.¹¹⁴ The Vioxx case is hardly an isolated example of a major settlement being achieved without prior class certification. Another MDL case—a highly

¹⁰⁹ *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 459 (E.D. La. 2006). This line of reasoning is reminiscent of the *Amchem* decision ten years earlier, which also resulted in a denial of class certification due to predominance and adequacy concerns. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622–28 (1997).

¹¹⁰ *Vioxx*, 239 F.R.D. at 458.

¹¹¹ *Id.* at 461–62 (“While the majority of plaintiffs in this case allegedly suffered either a heart attack or stroke as a result of ingesting Vioxx, the extent of each plaintiff's subsequent injuries varies widely.”). I wonder whether the *Butler* and *IKO* approach will ever be extended from claims of product defect, as in those cases, to personal injury cases.

¹¹² *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 608 n.4 (E.D. La. 2008) (listing six trials). Bellwether trials appear to be becoming more popular. For example, they are being used in the litigation against Merck involving its osteoporosis drug Fosamax, which allegedly causes jaw and femur injuries. See *In re Fosamax (Aledronate Sodium) Prods. Liab. Litig.*, Civil Action Nos. 12-1492, 08-08, 2014 WL 2738224, at *4–7 (D.N.J. June 17, 2014). Bellwether trials also are underway in the centralized litigation involving Pfizer's cholesterol reducing drug Lipitor, which has been consolidated before Judge Gergel in South Carolina. See *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.* (No. II), 997 F. Supp. 2d 1354 (J.P.M.L. 2014).

¹¹³ *In re Vioxx Prods. Liab. Litig.*, 448 F. Supp. 2d 737, 738 (E.D. La. 2006) (describing the verdict in the one successful trial).

¹¹⁴ Settlement Agreement between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto (Nov. 9, 2007), available at <http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%2020new.pdf>. Aspects of the settlement have been criticized. Additional details about this case can be found in Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979 (2010); Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183. For more on the potential influence of the Multidistrict Litigation Panel on the *Vioxx* litigation, see Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 983–86 (2012).

complex one—involving anticompetitive practices within the credit card industry recently led to a \$7.25 billion settlement that has received both the district court’s preliminary¹¹⁵ and final approval,¹¹⁶ even though no class certification was sought and no bellwether trials were conducted. However, aspects of this settlement relating to attorneys’ fees and the claims of certain objectors still are being contested.¹¹⁷ To provide an economic incentive for pursuing and aggregating cases like *Vioxx*, attorneys’ fees can be provided to the lead lawyers through a common benefit assessment, as they were in that litigation, by separate agreement and made subject to the approval of the settlement judge.

Another technique is extra-class collaboration and cost sharing among individual arbitration or litigation claimants that might produce the economics necessary to maintain a viable aggregate unit. That possibility came up during oral argument in *Italian Colors*; Chief Justice Roberts was particularly interested in the costs and benefits of having counsel in individual arbitrations work together, since the main argument challenging the enforceability of the contractual class waiver before the Court was the prohibitive cost of arbitrating claims on an individual basis.¹¹⁸

Various levels of collaboration could be useful when significant arbitration or litigation costs other than attorneys’ fees are likely to be incurred; realistically, however, collaboration is likely to be difficult to achieve when the primary financial barrier does relate to attorney fee matters. Moreover, beyond

¹¹⁵ *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2012 WL 5989763, at *8 (E.D.N.Y. Oct. 24, 2012).

¹¹⁶ *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013). Because of opt-outs, the settlement fund was reduced to \$5.7 billion. Attorneys’ fees of \$554.8 million were approved by the court. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437 (E.D.N.Y. 2014).

¹¹⁷ An even more recent example of the use of a settlement class is the MDL involving the National Football League’s retired players who are seeking compensation for the delayed effects of concussions sustained when they played professionally. An open-ended settlement that undoubtedly will exceed the \$765 million originally proposed to the court has been preliminarily approved. *In re NFL Players’ Concussion Injury Litig.*, 301 F.R.D. 191 (E.D. Pa. 2014); see also *Revised Settlement in Concussion Suit Reached; Funds Uncapped*, NAT’L FOOTBALL LEAGUE (June 25, 2014, 11:57 am), <http://www.nfl.com/news/story/0ap2000000361552/article/revised-settlement-in-concussion-suit-reached-funds-uncapped>. The previous iteration of the settlement agreement still can be found online. See Press Release, Alternative Dispute Resolution Ctr., NFL, Retired Players Resolve Concussion Litigation; Court-Appointed Mediator Hails “Historic” Agreement (Aug. 29, 2013), available at <http://nflabor.files.wordpress.com/2013/08/press-release-2.pdf>. Other cases are cited *supra* note 70.

¹¹⁸ Transcript of Oral Argument at 21, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133), available at http://www.supremecourt.gov/oral_arguments/arguments/transcripts/12-133.pdf.

the confidentiality concerns raised by the respondents' attorney in response to the Chief Justice's inquiry,¹¹⁹ the hypothetical that he offered during the argument—individual merchants using information gathered by a “trade association”—does not lend itself to general application. It would not work in most civil rights, consumer, or products liability cases, for example. It is unlikely that any prospective plaintiff in these contexts (and many other types of cases) would belong to a “consumer's association,” or any voluntarily assembled group, that would have substantial knowledge to exchange or enough synergy to provide a basis for promoting cooperation among plaintiffs' attorneys and their clients either in the arbitration or litigation environment.

Not surprisingly, it has proven difficult to achieve any real-world collaborative counterpart for the Chief Justice's hypothetical. The possibility does exist, however, that if class treatment is unavailable, agreements for sharing costs and other litigation or arbitration burdens might be useful if the plaintiff group is of a manageable size and the universe of related members is identifiable and can be organized by cooperative counsel.¹²⁰ Although informal, ad hoc collaboration may be possible, it will be the exception not the rule—hardly a panacea for the economic burdens of litigation or arbitration.

I have one more entry in my catalog of reasons why aggregate litigation will persevere. It emanates from a positive procedural Supreme Court decision last Term that deserves mention. In *Mississippi ex rel. Hood v. AU Optronics Corp.*¹²¹ the Court held that *parens patriae* actions by state attorneys general to enforce state laws may proceed in state court despite CAFA even though they look very much like class and mass actions.¹²² Attorney general actions on behalf of a state's citizenry provide a comparatively unencumbered means for holding defendants accountable by means of a single representative litigation. Given *Hood*, efforts should be expended to incentivize attorneys general to bring these actions to remediate any significant consumer, employment, or civil rights violation affecting people in their states. Realistically, however, the

¹¹⁹ *Id.* at 42 (statement of Paul D. Clement).

¹²⁰ *Italian Colors* probably is an atypical case because of the uniquely high cost of the experts needed for establishing an antitrust violation, as distinguished from the costs in smaller and simpler consumer or employment cases. I wonder whether the burgeoning litigation financing business might find this context a fruitful extension of their activities in some situations.

¹²¹ 134 S. Ct. 736, 745 (2014). The case is discussed in this Symposium in Vairo, *supra* note 70, in which the author writes: “*Hood* is a potential nightmare for defendants.” *Id.* at 525.

¹²² Alison Frankel, *Big Business, Class Actions and the Supreme Court: It's Complicated*, ON THE CASE BLOG (Sept. 16, 2013), <http://blogs.reuters.com/alison-frankel/2013/09/16/big-business-class-actions-and-the-supreme-court-its-complicated>.

attorneys general will face at least two inhibiting factors. First, powerful political and economic forces in their home states will press them not to act. Second, many state attorney general offices do not have sufficient resources or experience with certain types of large-scale litigation to be effective against defense interests. Will state attorneys general do the obvious—hire talented and experienced private counsel? History on this is mixed.¹²³

Stepping back and viewing this panorama of possibilities for the future, it seems reasonable to conclude that all is not lost. Yes, it is true that many federal courts, especially the Supreme Court, seem to be limiting the class action procedure's utility as a tool for adjudicating the claims of a large number of multijurisdictional claimants. But, *McReynolds*, *Butler*, *IKO*, and *Vioxx* suggest that even if the days of certifying very large classes and those with members advancing diverse claims might lie largely in the past, smaller, more targeted class actions or alternative aggregate procedural vehicles remain feasible, particularly if a “phase” of the suit can be determined on a collective basis, such as the injunctive aspect of *McReynolds* or the product liability elements in *Butler* and *IKO*. Moreover, there are MDL judges who have demonstrated that they can manage the consolidated cases before them in effective ways that can motivate a global settlement either before or after individual adjudications employed as bellwethers, as in *Vioxx*.

A general observation or two or three before I close. It should be remembered that in many of the Supreme Court and other cases in which class certification has been denied on reasoning similar to that in *Amchem*, the class's supposed lack of “cohesion” was a significant aspect of the negative determination regarding the Rule 23(b)(3) predominance factor.¹²⁴ Indeed, that test functionally was used again by the Court to deny certification in *Wal-Mart*, albeit in the context of a Rule 23(b)(2) class.¹²⁵ The elements that generally undermine a finding of class cohesion include the following: diversity in the type of harm suffered,¹²⁶ the severity of that harm,¹²⁷ the extent of insurance

¹²³ In the so-called cigarette war waged by the states against the tobacco industry, many states employed private counsel very effectively. *State Attorney General Class Actions Raise Concerns*, LAW360 (Oct. 08, 2007, 12:00 AM), <http://www.law360.com/articles/36952/state-attorney-general-class-actions-raise-concerns>.

¹²⁴ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616 (1997); *see, e.g., Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 131, 133, 135, 140, 142 (3d Cir. 1998).

¹²⁵ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551–53 (2011).

¹²⁶ *E.g., id.* at 2553; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856–57 (1999); *Amchem*, 521 U.S. at 624; *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 459 (E.D. La. 2006).

¹²⁷ *See, e.g., Amchem*, 521 U.S. at 624; *Vioxx*, 239 F.R.D. at 459.

coverage,¹²⁸ choice-of-law considerations,¹²⁹ and factors that might cast doubt on the commonality of causation.¹³⁰ Many proffered classes have been rejected because too many different categories of claimants or theories of liability were advanced,¹³¹ although the judicial concern about class cohesion also has been relevant in defeating other Rule 23 requirements such as adequacy of representation and superiority.¹³² The lesson this history teaches is that considerable pre-institution attention must be paid by counsel to the composition and definition of the class as well as the substantive claims to be advanced. The natural plaintiff's instinct to be overinclusive in framing classes must be resisted in some situations. Less may be preferable to more.

Class members and liability theories can be categorized for rationale class and subclass purposes, and the claims of each group often can be litigated separately when the overlap is not complete.¹³³ When that is true, a court might be convinced that the situation lies closer to *McReynolds*, *Butler*, and *IKO* than *Wal-Mart* because there is a larger classwide overlap on a narrower set of issues or that they are relevant to a smaller number of class members—in other words, that there is “cohesion.” As Judge Edwards wrote concurring in *DL v. District of Columbia*:¹³⁴ “An illegal policy or practice affecting all class members would provide the ‘glue’ necessary to litigate otherwise individual claims as a class.”¹³⁵ There are many situations in which that standard for cohesion can be met.

To sound a somber note, I must confess that the enforcement of mandatory no-class arbitration clauses by the Supreme Court in *Concepcion* and *Italian*

¹²⁸ *E.g.*, *Ortiz*, 527 U.S. at 857.

¹²⁹ *See, e.g.*, *Ortiz*, 527 U.S. at 845; *Vioxx*, 239 F.R.D. at 459.

¹³⁰ *E.g.*, *Amchem*, 521 U.S. at 624; *Vioxx*, 239 F.R.D. at 459. *Ortiz* had the added wrinkle of doubts as to the propriety of the settlement and whether a limited fund actually existed for purposes of qualifying under Rule 23(b)(1)(B).

¹³¹ *E.g.*, *Wal-Mart*, 131 S. Ct. 2541, discussed *supra* notes 23–26; *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982); *Zavala v. Wal-Mart Stores, Inc.*, 691 F.3d 527, 534 (3d Cir. 2012) (class members must be “similarly situated”).

¹³² *E.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

¹³³ As an alternative to wide-angle aggregation, a firm handling a number of partially overlapping but separate cases arising out of a single matter or related matters should realize that even if the claims of some units fail, the remainder may prove stronger on average and be successful, either through settlement or litigation.

¹³⁴ 713 F.3d 120 (D.C. Cir. 2013).

¹³⁵ *Id.* at 131 (Edwards, J., concurring); *see also* *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 504 (7th Cir. 2012) (Rovner, J., concurring in part and dissenting in part) (“[N]otwithstanding the inherently child specific nature of child-find inquiries, a class action based on a truly systemic child-find failure may be viable.”).

Colors probably is the most difficult obstacle to effective utilization of aggregate litigation. It would be foolishly optimistic to expect a legislative correction at this time given the composition of Congress and the business community's resources and lobbying power. Yet, that probably is the only realistic global answer to the stop sign many consumers, employees, and small businesses now face in trying to gain access to a judicial or arbitration forum on a collective basis. Despite Chief Justice Roberts's remarks during argument in *Italian Colors* about sharing resources,¹³⁶ it is doubtful that this technique is workable in the arbitration setting let alone plausibly effective on a meaningful scale. It might be feasible when there is a well-defined group of claimants because resource pooling is more likely in the arbitration context if the universe of directly affected parties is known. Attorneys general, of course, are not bound by the no-class arbitration clauses signed by their constituents and could attempt to attack or bypass their application in federal or state court given the *Hood* decision.¹³⁷

A limited possibility for relief from these clauses may emerge from the Consumer Financial Protective Bureau's authority to issue regulations relating to arbitration in consumer finance disputes,¹³⁸ these would apply to banks, credit unions, brokerage houses, financial institutions, and the operation of federal laws relating to consumer finance. The Bureau has issued a report quite critical of arbitration abuses,¹³⁹ but regulatory proposals have not appeared from the agency. Any attempt to issue regulations restricting no-class arbitration clauses in certain transactions, of course, will have to run a formidable political and lobbying gauntlet by the affected industries suggesting that aid from this quarter will be a long time in coming and may be of uncertain effectiveness.

Another obstacle that I believe acts as an impediment to forward progress in aggregate litigation, most pronouncedly in large, fact-dependent cases, is the widespread fear of the burdens of discovery of electronically stored information. One hopes that the current, almost "crisis" environment concerning e-discovery and its cost and related issues will abate. It is hard to

¹³⁶ Transcript of Oral Argument, *supra* note 118, at 20–21.

¹³⁷ *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 745 (2013).

¹³⁸ Consumer Financial Protection Act of 2010 § 1028, 12 U.S.C. § 5518 (2012).

¹³⁹ CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY, PRELIMINARY REPORT (2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf. My ever inventive colleague Burt Neuborne argues that when a contractual waiver such as a no-class-arbitration provision is unconscionable under local law, state enforcement of it violates a First Amendment right of association for litigation purposes. Burt Neuborne, *Ending Lochner Lite*, 50 HARV. C.R.-C.L. L. REV. (forthcoming 2014).

know whether the commonly voiced apprehensions have been advanced honestly or are part of the constant complaints by defense interests about the allegedly high costs and intrusiveness of discovery that currently is driving the latest proposed restrictions on discovery—particularly the so-called “proportionality” provision to be inserted in Rule 26(b)(1)—that have now been approved by the Judicial Conference’s Civil Rules Advisory and Standing Committees, as well as the Judicial Conference itself, and seem certain to be promulgated.¹⁴⁰ Anecdotes about high cost and massive data discovery are trotted out repetitively at meetings of these Committees and in numerous other settings.

Concerns about e-discovery actually may prove to be a relatively manageable matter that calls for a bit of patience and some retooling of discovery methodology by the profession. There is every reason to believe that information retrieval science and the technology itself will be able to reduce costs, accelerate the e-discovery process, and enhance the accuracy of retrieval. Experience in a number of cases has shown that a combination of statistics, linguistics, and computer science can produce those results through the development of sophisticated, custom-tailored discovery protocols employing predictive sampling and iterative search strategies in conjunction with the constant improvement in information technology and a significant reduction in retrieval costs.¹⁴¹

¹⁴⁰ *Judicial Conference Receives Budget Update, Forwards Rules Package to Supreme Court*, *supra* note 53; Memorandum from David G. Campbell, Advisory Committee on Civil Rules, to Jeffrey S. Sutton, Chair, Committee on Rules of Practice and Procedure 4–10 (May 2, 2014), in *STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE: MEETING MATERIALS OF MAY 29–30, 2014*, at 61, 64–70 (2014), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf>. At this juncture, I feel I must invoke my Fifth Amendment protection (some would say I should recite a “*mea culpa*”). As the reporter to the Advisory Committee on Civil Rules in the late 1970s and first half of the 1980s I am somewhat responsible for the injection of the “disproportionality” concept into Rule 26 in 1983 as a potential judicial tool for preventing any exploration of duplicative, redundant, or easily available material that otherwise would be within the proper scope of discovery. See ARTHUR R. MILLER, *FED. JUDICIAL CTR., THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* 16–34 (1984). The current proposal relocates the disproportionality provision so that it will be a limitation on the scope of discovery itself. To me, this is a significant difference from what the limited 1983 amendment intended. One hopes we are not watching another pretrial stop sign in the making. Absent action by the Supreme Court or Congress, the amendments will take effect on December 1, 2015.

¹⁴¹ See, e.g., *Fed. Hous. Fin. Agency v. HSBC N. Am. Holdings Inc.*, No. 11 Civ. 6189(DLC), 2014 WL 584300, at *3 (S.D.N.Y. Feb. 14, 2014) (predictive coding has a better track record than human review); *Moore v. Publicis Groupe*, 287 F.R.D. 182, 183–84, 186–93 (S.D.N.Y. 2012) (holding that computer-assisted document review can be appropriate in large-data-volume cases), *adopted sub nom.* *Moore v. Publicis Groupe SA*, No. 11 Civ. 1279(ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012). See generally Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and*

To be sure, e-discovery management will require considerable cooperation and education of the Bench and Bar. But that process, aided by the burgeoning investment by various companies in the application of information retrieval science to litigation (or arbitration) already is underway and will continue. It would be desirable for that process and experience to accelerate, lest progress in adjusting to the new realities of information technology be inhibited by continual assertions regarding litigation costs, the drumbeat of criticism of discovery, and pressure on the rulemaking process for further restrictions.

In sum, although the present situation regarding aggregate litigation appears to many to be dire, there are reasons to be hopeful that it will live to see another day, albeit, in forms somewhat different than those we have been familiar with. In truth, our legal system has long been committed to various forms of aggregate litigation through traditional party and claim joinder techniques. In addition to those embedded in the Federal Rules, there is the world of bankruptcy,¹⁴² the limitation of liability process long used in admiralty,¹⁴³ and “collective” actions under the Fair Labor Standards Act.¹⁴⁴ All are aggregate litigation procedures. And, of course, there are occasional congressional interventions and private arrangements that, in effect, create aggregate claim resolution processes following events such as the 9/11 World Trade Center terror attack,¹⁴⁵ the Gulf of Mexico Deep Water Horizon

More Efficient than Exhaustive Manual Review, 17 RICH. J.L. & TECH., no. 3, 2011, art. no. 11, at 1, 15–18, 35–36, available at <http://jolt.richmond.edu/v17i3/article11.pdf> (analyzing and comparing automated and manual document review techniques); Charles Yablon & Nick Landsman-Roos, *Discovery About Discovery: Sampling Practice and the Resolution of Discovery Disputes in an Age of Ever-Increasing Information*, 34 CARDOZO L. REV. 719, 739–42 (2012).

¹⁴² The worlds of bankruptcy and mass tort litigation overlap on occasion. See generally McKenzie, *supra* note 114 (bankruptcy actions balance collective resolution, individual consent, and institutional litigation structures). Perhaps the best illustration of the attempt to resolve multiple claims through a prepackaged bankruptcy reorganization plan under Section 524 and a channeling injunction under Section 105(d) of the Bankruptcy Code (codified in title 11 of the U.S. Code) appeared in an asbestos context. See *In re Combustion Eng'g Inc.*, 391 F.3d 190, 204–06 (3d Cir. 2004). A modified plan was approved in this case in 2006.

¹⁴³ 46 U.S.C. §§ 30501–30512 (2012). See generally 14A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3671.1 (4th ed. 2013) (providing an overview of the sources and scope of admiralty jurisdiction).

¹⁴⁴ 29 U.S.C. §§ 201–262 (2012); see, e.g., *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013); *Fratcelli v. MSG Holdings, L.P.*, No. 13 Civ. 6518(JMF), 2014 WL 1807105 (S.D.N.Y. May 7, 2014). The Multiparty, Multiforum, Trial Jurisdiction Act of 2002, 28 U.S.C. § 1369 (2012), or the “mass disaster statute,” and the Class Action Fairness Act of 2005 § 4, 28 U.S.C. § 1332(d) (2012), are aggregate litigation procedures, and the Federal Courts Study Committee Implementation Act of 1990 § 310, 28 U.S.C. § 1367 (2012), usually referred to as the “supplemental jurisdiction statute,” also is a vehicle for multiparty, multiclaim litigation.

¹⁴⁵ *In re World Trade Ctr. Disaster*, 769 F. Supp. 2d 650 (S.D.N.Y. 2011).

calamity,¹⁴⁶ and, more recently, the General Motors ignition switch–air bag debacle.¹⁴⁷

These procedural phenomena all reflect a truism—we live in a complex and interconnected environment in which the national and global distribution of products, innumerable internet transactions, as well as a stunning array of other mass activities often require the justice system to operate in a collective rather than an individual mode. In a sense, the need for continued—indeed enhanced—aggregate litigation is an idea that is “too big to fail.” Whatever form or forms it might take, our procedural system must continue to deal with this truism as it has for many years now. The egg cannot be unscrambled.

I simply cannot envision a litigation world devoid of procedural mechanisms for the group adjudication of claims. It cannot be that we will regress to the code regime let alone to common law procedure, eras in which the joinder of claims or parties was virtually nonexistent and everything had to be reduced to a single or limited number of litigable issues between two parties. You might as well try to convince me that the world is flat and that the sun circles planet earth. Our society is filled with so many different types of mass and complex phenomena that at some juncture thoughtful individuals or groups—maybe federal or state judges or rulemakers or possibly legislators—will accept the unremarkable proposition that motivated the 1966 amendments to the Federal Rules—like things should be adjudicated together. In today’s world, a rational procedural system should strive to operate with the greatest efficiency that it can muster, even when the process is not always quite up to the A+ standard law professors like to preach about. Conceivably, even defense interests may see the wisdom of that.

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. Global litigation peace is preferable to debilitating individualized litigation war. And, I hope, we certainly do not want a procedural system that fails to enforce or to deter violations of our public policies or denies citizens the ability to seek compensation for their injuries. A lack of effective collective dispute resolution formats will disadvantage all

¹⁴⁶ *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014).

¹⁴⁷ See Editorial, *Fair Compensation for G.M.’s Victims*, N.Y. TIMES, July 1, 2014, at A24, available at <http://www.nytimes.com/2014/07/02/opinion/fair-compensation-for-gms-victims.html>; see also Jeff Bennett, *GM Victims’ Fund to Begin Taking Car-Injury Claims*, WALL ST. J., July 30, 2014, at B3, available at <http://online.wsj.com/articles/gm-begins-taking-crash-claims-1406754459>.

those who participate in the judicial (or arbitration) process. These realities may enable us to start the procedural innovation clock forward again, perhaps to resurrect the wisdom that gave us new class action and joinder rules in 1966. Of course, I acknowledge my bias in thinking that 1966 was a good year for federal civil procedure—a vintage year as it was for some wines. So, forgive my self-absorption in hoping that when I end my professional life the world of aggregate litigation will be far more responsive to society’s needs than it was when I was a junior or as it appears to be now that I am a senior.