

What Are Courts For? Have We Forsaken the Procedural GoldStandard?

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What Are Courts For? Have We Forsaken the Procedural Gold Standard?

Arthur R. Miller*

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PROLOGUE: REFLECTIONS

I had the great pleasure and honor of knowing Judge Alvin Rubin. On occasion, he was my house guest in Cambridge, Massachusetts when I was on the Harvard Law School faculty. He always arrived with a quart of shrimp *étouffée*, which we collaboratively consumed with gusto. I also had

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* University Professor, New York University. This Article expands and updates my Alvin and Janice Rubin Lecture delivered at the Paul M. Hebert Law Center, Louisiana State University on March 8, 2017. I have tried to preserve its conversational style. At several points, however, that style did not translate to paper, but the substance of my remarks has not been changed. The citations are designed to be illustrative rather than exhaustive.

the privilege of arguing cases before him in the Fifth Circuit.¹ As a judge, Alvin had “a profound respect for the law and the limitations it imposes on judges.”² His commitment was total. Fellow Fifth Circuit Judge John Minor Wisdom once described him as someone born to be on the bench.³

My remarks in his memory are personal, at times impressionistic, reflecting the belief that the aspirational ideas underlying the American civil justice system are to promote the resolution of disputes on their merits after an adversarial contest on a level litigation playing field with minimal technicality. These ideals certainly were the hopes of those distinguished lawyers and professors who wrote the Federal Rules of Civil Procedure in the 1930s. The drafters wanted to give people access to a meaningful day in court and believed that the procedural process should effectuate those aspirations. The system the rulemakers created was designed with that in mind, and many believed that the Federal Rules represented a Gold Standard that envisioned a trial and, when appropriate, one before a jury.

For example, the rulemakers concluded that simplified pleading opened the courthouse door and promoted adjudicating a dispute on its merits with a minimum of motion practice. Wide-angle discovery was intended to give litigants equal access to all information relevant to the case’s subject matter, which always has seemed very American to me. How can you be against enabling litigants to be informed? Especially close to my heart is the class action, perhaps because I participated in drafting the 1966 revision of Federal Rule 23. It was designed in part to provide a receptive procedural vehicle for the world of civil rights litigation that emerged after the 1954 decision in *Brown v. Board of Education of Topeka*,⁴ in part to promote efficiency—litigants get more judicial bang for their judicial buck when like things are aggregated and adjudicated together—in part to achieve consistency of result for all people affected by the same conduct, and in part to be a mechanism for the joinder of modest claims that are not economically viable for litigation on an individual basis—what, today, are called negative value claims.⁵ Finally,

1. I once argued an *en banc* appeal before Alvin and 13 of his colleagues. None of them asked me a single question during the 30 minutes allotted to me—the Bench’s silence made it a harrowing experience. When I asked him why years later, he simply said with a twinkle, “I don’t like diversity cases and my colleagues just wanted to listen to you.”

2. See John Minor Wisdom, *Dedication: Judge Alvin Rubin*, 52 LA. L. REV. 1371, 1371 (1992).

3. See David W. Robertson, *Alvin Rubin’s Last Dissent*, 70 TEX. L. REV. 7, 9 (1991).

4. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

5. I have always believed that whatever small claim class actions may lack in terms of significant individual compensation they often make up for in terms

the Rules were written to be useful for enforcing the public policies embedded in national and state statutes as well as common-law doctrines, such as antitrust, securities, civil rights, products liability, and other more recently developed substantive fields, such as environment, pension protection, privacy, and consumer rights.

I was blessed by having a wonderful procedure professor, mentor, and role model—Benjamin Kaplan of the Harvard Law School—who imbued me with the thoughts I just expressed when I was his student and research assistant.⁶ My legal education was followed by an apprenticeship in a law firm at a time when litigation practice was relatively civilized and it seemed to me that the Federal Rules were working as they were intended to work. A few years later, life's fortuities again brought me together with Ben, who had been appointed by Chief Justice Earl Warren as the Reporter of the Federal Rules Advisory Committee of the Judicial Conference of the United States.⁷ As a result of a delightful constellation of circumstances he enticed me to work with him on what a few years later became the 1966 amendments to those Rules.⁸

In remembering Judge Rubin and thinking about how best to honor him, I asked myself whether we are moving toward or away from the aspirations of my youth, which I know he shared,⁹ by looking through a

of deterring wrongdoing. *See generally* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011).

6. My indebtedness to Ben is recorded in *In Memoriam: Benjamin Kaplan*, 124 HARV. L. REV. 1345, 1354–57 (2011). My involvement in what became the 1966 Federal Rule amendments is described in Arthur R. Miller, *Some Very Personal Reflections on the Rules, Rulemaking, and Reporters*, 46 U. MICH. J.L. REFORM 651 (2013).

7. The congressional delegation of rulemaking authority to the Supreme Court is set out in 28 U.S.C. §§ 2071–2073 (2012). The multi-tiered federal rulemaking process, its scope, and its difficulties are discussed in Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 GEO. L.J. 887 (1999); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13 (1996); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969 (1989).

8. For what sometimes feels like forever, I have been teaching and writing about procedure ever since. On days when I am feeling low, I count the number of times I have taught *Pennoyer v. Neff*, 95 U.S. 714 (1877) and *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The final count does not lift my spirits.

9. He was an optimist about the federal courts and their future. *See* Alvin B. Rubin, *The Role of the Federal Courts in the Next 25 Years*, 39 LA. B.J. 44 (1991).

telescope trained on what is going on in our courts today. What do I see after almost 60 years of professional devotion to civil procedure—admittedly mainly federal? Are the Rules still working as they were intended to work? In a nutshell, my judgment is that many of the principles I once took for granted have been compromised in the last 30 to 40 years. Would Alvin agree with me? I think he would. If I am right, were the rulemakers of the 1930s engaged in wishful thinking? Have I been naïve all these years? It makes me wonder, as I have over the years: what are courts for? Indeed, each year I ask my first-year procedure students that question toward the end of the course. They seem baffled by it. I do not fault them for being uncertain because, although it seems to be a simple question, I always have been uncertain about the answer. What are courts really for? I wish I could ask Alvin.

Is the answer dependent on the movements of time, changes in societal conditions, and the self-interest of the participants? In part, most certainly. There obviously have been seismic changes in the law and the legal profession in my lifetime in terms of demographics, economics, and culture. Entire new fields of law have emerged; others have been transformed; and some have been eclipsed. We now have massive law firms, some are global.¹⁰ There even are some large and financially strong plaintiffs' firms. Gender, race, and other professional barriers have been lowered but not eliminated so that the bench, bar, and law schools are far more diverse than in my youth; the same is true of those who appear in court. The scale of cases and the legal fees they generate have escalated beyond anything I could have contemplated when I entered practice, as is true, for example, in the mass tort and securities fraud fields. New professional fields and sub-bars have emerged, including public interest, civil rights, entrepreneurial litigators, aggregators, national practitioners, sophisticated repeat plaintiffs' lawyers, children's attorneys, and senior citizens' specialists. Law school curricula today are interdisciplinary, transnational, and sometimes smack as much of graduate programs as they do of professional education. And specialization is the order of the day.

But the cliché is apt: law has become a business—a big one. Inevitably, this shift has produced pluses and minuses. Unfortunately, there often is so much money on the table that professional judgment and client loyalty sometimes are compromised. Resource consumption in mega-cases is so extreme that they appear governed by a Sorcerer's Apprentice promoting endless activity. Also, attorney civility seems to be

10. When I was a young associate, the likelihood of a law firm having as many as 100 lawyers was thought to be as remote as putting a man on the moon or someone breaking Babe Ruth's mark of 60 home runs in a baseball season.

in decline, all too often being replaced by scorched-earth Rambo litigation tactics or Godzilla-like behavior. On the plus side, practicing law today can be exciting, intellectually stimulating, ideologically rewarding, and, of course, for some, lucrative. Moreover, for about 40 years now, law has provided a career for those attracted to social activism or who seek involvement in public policy formulation. People now join the profession to champion various philosophical objectives, protect the rights of an ever-expanding range of sub-populations, or press significant causes and issues.¹¹

In evaluating today's civil justice system, one of its important characteristics reflects a piece of Americana that should be kept in mind. Unlike the judiciaries in many other countries, we historically have employed our courts to press issues of public significance—even absent Legislative or Executive Branch authorization or direction—as well as to challenge governmental conduct. On the national scene, the Judicial Branch, our least democratic branch—in the sense that federal judges are not elected and serve for life—generates legal doctrines that produce social change in various highly sensitive and contentious contexts. These doctrinal shifts by the judiciary often result because the elected branches are politically paralyzed, as has been true regarding issues like desegregation, political reapportionment, abortion, same-sex marriage, affirmative action, immigration, and capital punishment, or because one of the branches or a state is acting beyond its constitutional or statutory domain and needs to be

11. Members of the private bar frequently function as a second regulatory system and often are dubbed “private attorneys general.” *See, e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 377–84 (1983). *See generally* SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES* (2010); Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private Antitrust Litigation*, 26 *YALE J. INT'L L.* 219 (2001); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 *VA. L. REV.* 1131 (2009). The legitimacy and effectiveness of the concept has been the subject of a noisy debate and partisan politics over the years, *see* STEPHEN BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (2017) [hereinafter BURBANK & FARHANG, *RIGHTS AND RETRENCHMENT*], and is inextricably entwined in the pluses and minuses of the entrepreneurial aspects of much of contemporary litigation. *See generally* JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* (2015); Myriam Gilles, *Can John Coffee Rescue the Private Attorney General? Lesson from the Credit Card Wars*, 83 *U. CHI. L. REV.* 1001 (2015) (an extended essay based on Professor Coffee's book). Individual lawyers, of course, have different motivations. Some attorneys pursue the public interest, some are entrepreneurial, and others have both motivations and try to do well by doing good.

contained.¹² It is an aspect of American exceptionalism. What we do in our courts often is very important, indeed critical, for many people and institutions, which means that the quality and integrity of the governing court procedures also are very important and warrant close attention.

But are those procedures functioning consistently with the supposed objectives of our civil justice system? I will try to respond to that question by looking first at economic access to the courts. Ask yourself: how many Americans can afford to pay a lawyer by the hour to remedy a grievance? And how many lawyers are willing to pursue a claim on a contingent fee basis—no matter how clear the merits or how important the matter may be to a potential client and others—for \$100, \$1,000, \$10,000, or even more—especially if some pretrial discovery and a medical, scientific, or economic expert will be needed? Reality requires acknowledging that access to the courts has been priced beyond the reach of the vast majority of Americans. Honesty also requires us to recognize that meaningful access depends on a level of equality of economic resources and legal talent between the contestants that does not exist. We simply have not come close to achieving that objective; indeed, inequalities in both categories may well have increased over time.

In certain contexts, of course, access is achievable because a contingent fee arrangement, or a statutory fee provision,¹³ or the judicially created common-fund doctrine provides compensation for a successful attorney.¹⁴

12. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Reynolds v. Sims*, 377 U.S. 533 (1964) (political malapportionment); *Lawrence v. Texas*, 539 U.S. 558 (2003) (consensual, private sodomy); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (campaign financing); *Brown v. Plata*, 563 U.S. 493 (2011) (prison overcrowding); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (same-sex marriage).

13. E.g., Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2012); see also 15 U.S.C. § 77(k) (creating civil liability on account of a false statement in a security registration); 29 U.S.C. § 216(b) (providing damages for violation of a minimum wage and overtime compensation statute); 42 U.S.C. § 2000a-3(b) (applying to civil rights actions for injunctive relief for violations of a public accommodations statute).

14. See, e.g., *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Trustees v. Greenough*, 105 U.S. 527 (1881). The common law principle is of limited utility when purely injunctive or declaratory relief is sought. See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Federal statutory fee provisions have not been liberally interpreted. See, e.g., *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010) (discussing that a lodestar fee computation generally takes account of superior contingent fee attorney performance); *Evans v. Jeff D.*, 475 U.S. 717 (1986) (approving a waiver of fees under the Civil Rights Attorney's Fee Awards Act) (three Justices dissented).

These economic mechanisms can incentivize lawyers, but the obvious caveat is that not every type or dimension of claim is an attractive candidate for contingent or court-awarded fee representation. And then there is the ever-present risk of losing, leaving the lawyer without any fee and substantial sunk costs for discovery, experts, protracted motion practice, and appeals that cannot be recovered. That unattractive possibility means that without the availability of funding and a realistic prospect of surviving the process and ultimately succeeding, most contingent fee lawyers would pass on investing in a case, effectively foreclosing access. As they say, the winners must pay for the losers—the former must be maximized and the latter minimized. Of necessity that means some cases will be accepted and others rejected, a reality that leaves many unrepresented. Fortunately, pro bono entities do offer aid to some individuals, but that hardly is universally available, in part because of various eligibility requirements.

In recent years, a litigation funding industry has emerged in the United States, as it has elsewhere, that could enhance the prospect of access if it becomes more widely available. At present, it is a work in progress.¹⁵ Most litigation situations on the plaintiffs' side, however, do not have the economic dimension to be attractive to funders. But there may be a viable business model for providing funding for small or medium sized claims, particularly when they can be aggregated.¹⁶ In any event, for the

15. Various aspects of litigation funding are comprehensively discussed and analyzed in *Proceedings of the 2015 Fall Conference with the Center on Civil Justice: Litigation Funding: The Basics and Beyond*, 12 N.Y.U. J.L. & BUS. 511–942 (Special Issue 2016); see also Elizabeth Chamblee Burch, *Financers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1316 (2012) (“[A]ssigning a financier a percentage of the plaintiffs’ winnings converts that financier into a sizeable stakeholder and incentivizes it to monitor the attorneys and the litigation’s costs.”); David R. Glickman, Note, *Embracing Third-Party Litigation Finance*, 43 FLA. ST. U. L. REV. 1043 (2016) (describing how third-party litigation finance would allow lawyers to focus on providing high quality legal services); Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions*, 63 DEPAUL L. REV. 561 (2014) (discussing the potential of litigation funding in the United States); Victoria Shannon Sahani, *Judging Third Party Funding*, 63 UCLA L. REV. 388 (2016) (suggesting changes in the Federal Rules to allow judges to consider and manage third-party funding); Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861 (2015) (proposing a regulatory safety net in third party litigation funding arrangements to ensure integrity).

16. See generally Anthony J. Sebok, *Private Dollars for Public Litigation: An Introduction*, 12 N.Y.U. J.L. & BUS. 813 (Special Issue 2016). Forms of crowdfunding are beginning to appear.

economically disadvantaged, getting to the justice trough is an obstacle not easily navigated.

Even if a lack of money and difficulties securing a lawyer were not barriers for claimants, mounting dockets, cases the size of woolly mammoths, and the complexity of modern litigation have produced pressures for efficiencies, judicial gatekeeping, and procedural changes that often seem at odds with the getting-to-the-merits-with-a-minimum-of-technicality orientation of the original rulemakers and the assumptions of my youth. The last 30 years has seen the erection of a series of judicially or legislatively generated procedural restraints—I call them stop signs—largely motivated, not surprisingly, by and supportive of defense interests. These procedural restraints produce earlier and earlier termination of cases, avoid merit determinations, and generate substantial litigation costs, delays, and risks. This inhibits people from seeking relief in court, leads to settlements below market value, or produces premature dismissals. Because the impact of these restraints often is related to an individual's access to funding and professional assistance, I think they exacerbate the disparities that exist between the haves and the have-nots in our society.

Perhaps today's procedural obstacle course is the result of pressures created by systemic resource and capacity limitations, or reflects a philosophical belief that litigation should be contained and discouraged, or is the product of a predictable lobbying response by those interests that increasingly have become the object of large-scale damage actions or the aggregation of small claims that previously were unviable as individual cases and never would have been brought. It is true that some of today's lawsuits have previously unimagined monetary dimensions and other consequences that conceivably could devastate an economic entity or governmental program. But whatever substance these explanations may have, the time has come to recognize that the procedural stop signs that have been erected to counter these concerns often work at cross purposes with the Gold Standard I mentioned earlier. More attention should be paid to the tension between the two and the consequences of the procedural paradigm shift that clearly has taken place.

I. EARLY TERMINATION OF CASES: THE PROCEDURAL STOP SIGNS

The retrenchment of American civil procedure is best understood by examining the recent developments in the federal courts regarding a number of important litigation elements. Among the effects of what has happened in recent decades is the increased difficulty of enforcing state and national public policies, both of statutory and common law origin,

through private lawsuits. At present, all three branches of our national government display considerable hostility to litigation.

A. Personal Jurisdiction

I start at the genesis of litigation. The permissible constitutional reach of the personal jurisdiction of both state and federal courts has been reduced in what to me are significant ways. The Supreme Court's decision in *Daimler AG v. Bauman*¹⁷ has virtually eliminated general jurisdiction, which previously could be based on the defendant's continuous and systematic contacts with the forum even if the events in litigation occurred elsewhere. It now is limited to those fora in which the defendant is "at home."¹⁸ The decision appears to eliminate longstanding notions of corporate presence and doing business and restricts jurisdiction over disputes unrelated to the forum to the defendant's state of incorporation and the state of its principal place of business in the United States, except in an as yet to be defined "exceptional case."¹⁹ The Court offered no real explanation for its deviation from what had long been settled doctrine or articulate why the cabining of general jurisdiction was desirable.²⁰ But it

17. *Daimler AG v. Bauman*, 571 U.S. ___, 134 S. Ct. 746 (2014). See generally Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101 (2015) (discussing new issues *Daimler* raised that will likely be the focus of future litigation); Stephanie Denker, *The Future of General Jurisdiction: The Effects of Daimler AG v. Bauman*, 20 FORDHAM J. CORP. & FIN. L. 145 (2014) (analyzing the Supreme Court's holding and discussing *Daimler*'s potential impacts on general jurisdiction, the economy, and international affairs); Linda J. Silberman, *The End of Another Era: Reflections on Daimler and its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675 (2015) (discussing the decision's potential ramifications).

18. *Daimler*, 134 S. Ct. at 760. The result in *Daimler* was foreshadowed in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011). More recently the Court applied *Daimler* to a Federal Employers' Liability Act action in *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017), after concluding that the statute did not speak to personal jurisdiction. Only Justice Sotomayor dissented, as she had in *Daimler*.

19. *Daimler*, 134 S. Ct. at 760.

20. The Court's silence on these matters has been viewed as somewhat curious. See Stanley E. Cox, *The Missing "Why" of General Jurisdiction*, 76 U. PITT. L. REV. 153, 155–56 (2014) (approving the court's decision to limit general jurisdiction to where the defendant is "at home" based on its overall activities); Richard D. Freer, *Some Specific Concerns with the New General Jurisdiction*, 15 NEV. L.J. 1161, 1162 (2015) ("[T]he Court's efforts are puzzling."). Justice

is clear who benefits from the constriction: domestic and foreign economic entities.

And in the specific or long-arm jurisdiction context, Justice Kennedy's opinion for four Supreme Court Justices in *J. McIntyre Machinery, Ltd. v. Nicastro*²¹ reintroduced limiting notions of state sovereignty.²² The language is somewhat reminiscent of the Court's opinion 134 years earlier in *Pennoyer v. Neff*.²³ Passages in the plurality opinion seem to subscribe to the notion that a defendant must "manifest an intention to submit to the power of a sovereign" before a court can exercise jurisdiction.²⁴ How many defendants would ever knowingly "manifest"—let alone acknowledge—such an intention?²⁵

Ginsberg, who I have known since law school, led the Court on this doctrinal shift. I am not sure why since I would not have thought it was part of her DNA to limit the jurisdictional reach of American courts.

21. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

22. *Id.* at 884–87. New appointments to the Court may increase that number to five or more.

23. *Pennoyer v. Neff*, 95 U.S. 714 (1877). That, at least arguably, makes my continued teaching of that case rational!

24. *McIntyre*, 564 U.S. at 882. The meaning—and significance—of *McIntyre* is obscured by the concurrence of Justices Breyer and Alito who joined in the result but declined to join in the plurality's reasoning. *Id.* at 887. These cases are analyzed in John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court's Decisions in Goodyear Dunlop Tires and Nicastro*, 90 WASH. U. L. REV. 1707, 1729–34 (2013); Arthur R. Miller, *McIntyre in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465 (2012) [hereinafter Miller, *McIntyre in Context*]; 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); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Mach., Ltd. v. Nicastro*, 63 S.C. L. REV. 481 (2012); Adam N. Steinman, *The Meaning of McIntyre*, 18 SW. J. INT'L L. 417 (2012).

25. In a post-*McIntyre* Supreme Court specific jurisdiction decision, *Walden v. Fiore*, 134 S. Ct. 1115, 1125–26 (2014), the mere fact that the defendant was travelling from Atlanta—where the challenged conduct occurred—to Nevada did not allow jurisdiction to be asserted in Nevada; the decision adds little to the understanding of the Court's direction and probably should be limited to its unusual facts. *See also* Waldman v. Palestine Liberation Org., 835 F.3d 317 (2d Cir. 2016) ("[T]he defendant's suit-related conduct must create a substantial connection with the forum State." (quoting from *Walden*, 134 S. Ct. at 1121)). *See generally* Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather than Liberty After Walden v. Fiore*, 19 LEWIS & CLARK L. REV. 769 (2015) (suggesting the Court should "overhaul" personal

Then last Term, in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*,²⁶ the Court held that California could not constitutionally assert jurisdiction over non-residents whose claims were not related to the defendant's conduct within the forum state despite the company's extensive unconnected in-state activities and the presence of California resident plaintiffs asserting identical claims. According to the Court, "a defendant's general connections with the forum are not enough . . . [W]hat is needed . . . is a connection between the forum and the specific claims at issue."²⁷ Only Justice Sotomayor dissented, pointing out:

What interests are served by preventing the consolidation of claims and limiting the forums in which they can be consolidated? The effect of the Court's opinion today is to eliminate nationwide mass actions in any state other than those in which a defendant is "essentially at home." . . . Such a rule hands one more tool to corporate defendants determined to prevent the aggregation of individual claims, and forces injured plaintiffs to bear the burden of bringing suit in what will often be far flung jurisdictions.²⁸

Bristol-Myers prevents potential plaintiffs who are from different states from joining an action in a single state that has been brought by claimants who reside in that forum. As a result, the ability of multiple dispersed plaintiffs to aggregate their claims, or join multiple defendants from different states, has been impaired, and may oblige them to bring separate related actions in different fora regarding what sometimes even may be identical claims. That obviously is inefficient and wasteful for both courts and litigants, and is likely to produce inconsistent processing and outcomes. Moreover, *Bristol-Myers* may make it especially difficult for

jurisdiction doctrine). In John T. Parry, *Rethinking Personal Jurisdiction after Bauman and Walden*, 19 LEWIS & CLARK L. REV. 607 (2015), the author argues that *Bauman* and *Walden* dispose of the *Nicastro* plurality.

26. *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773 (2017).

27. *Id.* at 1781. Of note, the Court's opinion does not echo the sovereignty thinking expressed in the *McIntyre* plurality opinion, and it left "open" the question of whether the Fifth Amendment imposes the same restrictions on a federal court's exercise of personal jurisdiction as apply to a state court under the Fourteenth Amendment. *Id.* at 1784.

28. *Id.* at 1789. She also wondered what effect the Court's decision had on multistate class and mass actions. *See infra* note 154. That issue has now arisen in a number of cases. *See, e.g., In re Chinese-Manufactured Drywall Products Liab. Litig., Civ. Ac. MDL No. 09-2047* (E.D. La. 2017) (*Bristol-Myers* does not apply to class actions).

claimants with small and overlapping claims who reside in less populous states. Economic reality may mean that effectively there is no forum in any state in which there are enough potential claimants to constitute a critical mass of plaintiffs that can be aggregated.

I have no idea how often this contraction of the jurisdictional reach of American courts over matters having a nexus to this country or to a particular state will enable economic entities—domestic as well as foreign—to create jurisdictional safe havens to the disadvantage of plaintiffs without sufficient resources to chase possible wrongdoers. At a minimum, the Court’s decisions have put the question of personal jurisdiction “in play” more often than in the past, encouraging motions to dismiss at a case’s threshold with attendant cost and delay. Long-arm jurisdiction clearly is getting shorter.²⁹

B. Pleading

Moving along the litigation timeline, the sudden appearance of “plausibility” pleading is next on my list of procedural stop signs. The Supreme Court’s 2007 decision in *Bell Atlantic Corp. v. Twombly*³⁰ and its elaboration two years later in *Ashcroft v. Iqbal*³¹—two particular objects of my concern about what is happening to the Gold Standard—have reintroduced fact pleading by calling for a showing of “plausibility” in a federal complaint and in those states that choose to follow the two federal decisions. That development effectively authorizes fact evaluation and possibly merit determinations on what for centuries has been purely a law motion that simply asked whether the complaint “stated” a legally cognizable claim. Whether that claim is “provable” or “trial-worthy” or “for the jury” are questions that supposedly are to be left for later stages

29. If the shortening of the jurisdictional reach of American courts is coupled with the Supreme Court’s presumption that federal substantive statutes do not apply extraterritorially, the result may be to deprive many citizens and non-citizens of a domestic forum for challenging foreign conduct having an effect in this country. *E.g.*, *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016) (Racketeer Influenced Corrupt Organizations Act); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (Alien Tort Statute); *Morrison v. Nat’l Austl. Bank, Ltd.*, 561 U.S. 247, 255 (2010) (Securities Exchange Act § 10(b)).

30. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

31. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In *Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam), decided days after *Twombly*, the Court reversed a dismissal of a prisoner’s complaint for failing to satisfy the Federal Rules’ pleading standard. The subsequent *Iqbal* decision, however, made clear that *Erickson* was not a retreat from “plausibility pleading.” The complaint’s striking facts made its sufficiency fairly obvious.

of the litigation. These two decisions came out of the blue. One night I went to sleep believing that I lived in the access-oriented world of notice pleading, something repeatedly reaffirmed by the Supreme Court for 50 years.³² I woke up in a world of fact pleading. I felt as if I had been transported back to New York's 1848 Code of Procedure.³³

The two decisions ignore the reality that at the outset of many cases there is a significant information asymmetry between plaintiffs and defendants, typically favoring defendants. Plaintiffs rarely know why a complex machine malfunctioned or why a pharmaceutical appears to have deleterious side effects. To make the demand for facts in the complaint even more consequential, the Court said there can be no discovery—not even “spotlight” or “pinpoint” discovery to help establish a claim’s plausibility—until the plaintiff has pled a “plausible” case, which often means not until the complaint survives a motion to dismiss under Rule 12(b)(6).³⁴ It is tantamount to telling a plaintiff: “You must plead what you don’t know and the system won’t help you find anything out before it dismisses you.”³⁵ To me, *Twiqbal*—a quaint, but irreverent, shorthand for

32. See 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1215 (3d ed. 2004). Starting with *Conley v. Gibson*, 355 U.S. 41 (1957), the Supreme Court repeatedly endorsed the notion of simplified notice pleading. *E.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

33. The Court’s reasoning and various critiques of it are discussed at length in the materials cited *infra* notes 34–40.

34. *Iqbal*, 556 U.S. at 665. The Court has been criticized sharply for effectively amending Federal Rule 8(a) without following the rulemaking process prescribed by statute. *E.g.*, Steve Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571, 575 (2012) (“The Supreme Court has acted lawlessly.”). Other commentators also have been critical. See generally Edward D. Cavanaugh, Twombly, *the Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN’S L. REV. 877, 892 (2012) (“*Twombly* has shifted the balance of power in federal court decidedly in favor of defendants.”); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules*, 60 DUKE L.J. 1 (2010) [hereinafter Miller, *Double Play on the Federal Rules*]; Alex Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008).

35. I think a more reasonable approach is that taken by the Ninth Circuit in cases involving the analogous context of pleading fraud under Federal Rule 9(b) in which that court has excused the failure to allege facts the plaintiff cannot “reasonably be expected to have access,” *Concha v. London*, 62 F.3d 1493, 1503 (9th Cir. 1995), or relaxed Rule 9(b) “as to matters within the opposing party’s knowledge,” *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir.

the two cases—is inconsistent with a systemic commitment to getting to and resolving a case on its merits.³⁶ It appears to have resulted in lengthier, over-inclusive, protracted pleadings as well as increased motions to dismiss and appeals from dismissals that have to be decided on the basis of a single document—the complaint—with no discovery, no summary judgment, no trial, and no jury. There also is reason to believe that the increased risks and burdens of “plausibility” pleading inhibit the institution of cases that might have proven meritorious. Of course, it is quite difficult, if not impossible, to ascertain whether that inhibition is real, or how frequently it occurs, let alone figure out how many of those unasserted claims might have proven meritorious.³⁷

According to the majority opinion in *Iqbal*, “plausibility” is to be judged by subjective and ambiguous factors such as “judicial experience” and “common sense.”³⁸ It defies reality to think that judges with radically different educations, philosophical orientations, and social backgrounds

1989); *see also* Rubenstein v. Neiman Marcus Grp., L.L.C., 687 F. App’x 564 (9th Cir. 2017) (dismissal reversed because “without an opportunity to conduct any discovery” the plaintiff “cannot reasonably be expected to have detailed personal knowledge” of the defendant’s “internal pricing policies or procedures” and thus “need not specifically plead facts to which she cannot ‘reasonably be expected to have access’”).

36. *See generally* Miller, *Double Play on the Federal Rules*, *supra* note 34; Reinert, *Measuring the Impact of Plausibility Pleading*, *supra* note 34; Alex Reinert, *Pleading as Information-Forcing*, 75 LAW & CONTEMP. PROBLEMS 1, 1–2 (2012) (noting the change in pleading standards among lower courts). Before the two Supreme Court decisions, I would quip in class that the last time a motion to dismiss under Federal Rule 12(b)(6) was granted was in the McKinley administration. The fact that McKinley’s presidency ended 37 years before the Rules were promulgated apparently never was noticed by the students.

37. *See generally* Jonah B. Gelbach, Note, *Locking the Doors to Discovery, Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012) (an attempt to measure the effects of *Twombly* on party behavior); William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693 (2016) (a thought experiment by the author based on a hypothetical pleading regime he creates).

38. *Twombly* and *Iqbal* have been characterized by some scholars in political terms, employing words such as “judicial activism,” or as part of the “right/left” dichotomy, or furthering “conservative” and “corporate” interests. *See, e.g.*, Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 850 (2010) (“Many observers . . . see the same old right/left story: the conservatives seek to protect rich or powerful defendants, while the liberals stand with the little plaintiffs.”); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1325 (2010) (explaining that *Twombly* and *Iqbal* can be read as favoring “corporate and business interests”).

will have comparable “judicial experience” or “common sense.”³⁹ Thus, what has always been a motion addressed to a question of law now is dependent on what lies in the eyes of the judicial beholder regarding the pleaded facts, which lowers predictability, reduces the likelihood of consistency of result, and engenders protraction.⁴⁰ The desire to separate litigation chaff from litigation wheat is understandable, but there are other, more merit-preserving techniques than through a heightened pleading requirement that can lead to premature termination.

C. Class Actions

Next, there has been a debilitation of the class action. To state the obvious, the growth in class action practice following the 1966 amendment of Federal Rule 23, which was designed to make the procedure more user friendly, was revolutionary. Most of the Rules Advisory Committee members wanted to create a mechanism for cases they believed would profit from aggregate handling and intended to give the procedure enough functionality and clarity to enable it to operate efficiently and fairly. As a hedge against unknown future developments in the law and society, to be cautious, and to protect absent class members, they wisely contained the somewhat adventuresome Rule 23(b)(3) “damage” class action with special procedural safeguards—requiring the common questions to predominate over individual questions, insisting that the class action be superior to other adjudicatory techniques, providing individual notice of the action to identifiable absent class members, and giving the class members a right to opt out. These procedures were imposed in addition to the court’s obligation in all class actions to assure the adequacy of the class representative, select class counsel, award counsel fees if the class is

39. This point was made forcefully by a former federal judge in Nancy Gertner, *A Judge Hangs Up Her Robes*, 38 LITIG. 60, 61 (2012); see also Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 115 (2009) (“The discretionary power of the judge to follow his or her personal preferences in deciding the plausibility of a complaint is enlarged to the extent that direct allegations of liability-creating conduct can be thus disregarded.”).

40. In Adam N. Steinman, *The Rise and Fall of Plausibility Pleading*, 69 VAND. L. REV. 333 (2016), the author, a frequent commentator on pleading (as well as my co-author), suggests that there are indications in post-*Twigbal* Supreme Court decisions that offer a way of preserving the pre-plausibility structure of notice pleading regarding the limited judicial function on a motion to dismiss.

successful, and approve the fairness, reasonableness, and adequacy of a settlement.⁴¹

Surely the Committee members could not have foreseen what was to come in the following decades: the explosive recognition of new substantive rights by federal and state statutes and judicial activity; the wide-angle invocation of the class action for civil rights and other public interest purposes; the enlarged dimension, scope, and economic stakes of many class actions; and the frequency—let alone the character—of product and commercial failures and other adverse events that would give rise to aggregate litigation.⁴² That combination of forces created a perfect storm for generating unprecedented class action activity. Depending on one's perspective and attitude regarding the class action as well as the character of the cases invoking the procedure, the result of the Committee's labors can be viewed positively or negatively. All would agree, however, that the world of class actions was completely transformed following the 1966 revision.

Class action practice expanded dramatically in the years following 1966. It became the procedural vehicle of choice across a wide range of substantive fields⁴³ and was recognized as the best—often the only—way

41. Much of the history of the process that produced the 1966 revision of Rule 23 is recounted in John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 333–45 (2005). See generally 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 1777-84.1, 1804–05 (3d ed. 2005); *An Oral History of Rule 23: An Interview of Professor Arthur R. Miller by Professor Samuel Issacharoff*, Ctr. on Civil Justice Papers 1 (2017), http://www.law.nyu.edu/sites/default/files/ICCVJUS17.1-CCJ%20Rule%2023%4050%20Booklet%20Project_RELEASE.pdf [<https://perma.cc/P39R-VF4W>].

42. My co-author on the Federal Practice and Procedure treatise, who was part of the rulemaking process at the time of the revision, expressed the opinion that not many Federal Rule 23(b)(3) cases would materialize. Charles Alan Wright, *Recent Changes in the Federal Rules of Procedure*, 42 F.R.D. 552, 567 (1966). Three years later Charlie confessed error. Charles Alan Wright, *Class Actions*, 47 F.R.D. 169, 179 (1969). The caution in the Advisory Committee Note accompanying the revised rule that a “mass accident . . . is ordinarily not appropriate for a class action” seems quaint in retrospect given what has happened since 1966. As a percipient witness to events both in the Advisory Committee meetings and as a result of numerous contacts with Committee members and the Reporter outside of meetings, I can say—with a touch of nostalgia—you had to be there to appreciate how that passage in the Note came into being.

43. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) (antitrust); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (discrimination); *Dunn v.*

to pursue a remedy for small claims that were not economically viable on an individual basis.⁴⁴ The procedure was employed by both public interest and entrepreneurial lawyers to challenge various forms of discrimination, enforce public policies, pursue compensation for various economic injuries, and remedy a wide range of other types of misconduct that impacted large groups of people. Some commentators have referred to this period as a “Golden Age” of class actions.⁴⁵ But every action breeds a reaction, and eventually resistance to class actions intensified, especially in the mass tort and physical injury contexts.⁴⁶ A polarized and contentious debate set in, which continues to this day,⁴⁷ often accompanied by proposals for further revision of Rule 23 and other facets of complex litigation.⁴⁸

Blumstein, 405 U.S. 330 (1972) (voting rights); *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968) (securities).

44. See, e.g., *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980); *Eisen v. Carlisle & Jaquelin*, 417 U.S. 156 (1974). The amount-in-controversy requirement in 28 U.S.C. § 1332(a) (2012) limited the class action's utility in diversity of citizenship cases. See, e.g., *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973) (requiring that each class member in a Rule 23(b)(3) action satisfy the diversity of citizenship statute's amount-in-controversy requirement). In *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005), the Court concluded that the enactment of the Supplemental Jurisdiction Act, 28 U.S.C. § 1367, effectively overruled *Zahn*. The enactment of the Class Action Fairness Act has largely eliminated the amount in controversy issue in diversity-based class actions. See *infra* notes 58–61.

45. See Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 499–504 (2016) [hereinafter Marcus, *Bending in the Breeze*] (supporting the belief that aggregate litigation will continue); Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 404 (2014) (proposing a more limited role for class litigation) [hereinafter Mullenix, *Ending Class Actions as We Know Them*].

46. A group of virtually simultaneous court of appeals decisions rejecting the certification of personal injury classes were instrumental in turning the tide. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996) (epilepsy drug); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (tobacco addiction); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996) (defective penile implants); *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851 (7th Cir. 1994), *cert. denied*, 516 U.S. 867 (1995) (contaminated blood supply).

47. I naively tried to calm the waters. Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem”*, 92 HARV. L. REV. 664 (1979).

48. The Rule has been amended several times since 1966. Additional amendments are now working their way through the rulemaking process. See COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE 25–

That Golden Age is long over. The Supreme Court's decisions in *Wal-Mart Stores Inc. v. Dukes*,⁴⁹ *Amchem Products, Inc. v. Windsor*,⁵⁰ *Ortiz v. Fibreboard Corp.*,⁵¹ and other cases⁵² have made class certification and

27 (2017), http://www.uscourts.gov/sites/default/files/2017-09-jcus-report_0.pdf [<https://perma.cc/4JE7-R86L>]. They are not major. One of the most inventive academic proposals is to reconceptualize the class as an entity and focus on the adequacy of its representation. See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998). Some issues never seem to be definitively resolved. For example, more than 50 years after it was decided that Rule 23(b)(3) class actions should be opt-out in character, some scholars continue to advocate they be opt-in or that such a possibility be available in particular cases. See, e.g., Scott Dodson, *An Opt-In Option for Class Actions*, 115 MICH. L. REV. 171 (2016); Mullenix, *Ending Class Actions*, *supra* note 45, at 441; see also John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903 (2005) (advocating limiting class settlements to those who consent to them by opting in).

49. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). *But cf. id.* at 375 (Ginsburg, J., dissenting) (“The Court blends Rule 23(a)(2)’s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer ‘easily satisfied.’”). Although Rule 23 establishes different categories of class actions, some evidence exists that cases like *Wal-Mart* seem to obscure the differences between and among them, sometimes making certification even more difficult to achieve. See Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843 (2016) (arguing that courts should engage in a broader analysis that takes into account all of the subtypes described in the class-action rule).

50. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

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

52. There have been other negative class action decisions by the Court. *E.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016) (determining the court of appeals failed to apply a proper injury-in-fact or concreteness standard in a Fair Credit Reporting Act case), *on remand*, 867 F.3d 1108, 1118 (9th Cir. 2017) (holding that an inaccurate website report alleged a sufficiently concrete injury), *cert denied*, 138 S.Ct. 931 (2018), 2018 WL 491554; *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (upholding a no-class-action-or-class-arbitration clause despite the obvious economic unviability of individual litigation or arbitration); *Comcast Corp. v. Behrend*, 569 U.S. 27, 35–38 (2013) (determining plaintiffs’ expert regression model was not acceptable to show damages on a class-wide basis for purposes of establishing predominance); *AT&T Mobility, L.L.C. v. Concepcion*, 536 U.S. 333, 340, 351–52 (2011) (enforcing a no-class-action arbitration clause despite California law on contract unconscionability). Most recently, in *California Pub. Emps.’ Retirement Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042 (2017), the Court applied the three-year repose provision, 15 U.S.C. § 77m (2012), applicable to actions under § 11 of the Securities Act of 1933, 15 U.S.C. §§ 77a–77aa, to bar the claim of a class member who opted out after three years to bring its own action. Four Justices dissented.

settlement approval more difficult to secure and generated procedures that have become very labor and resource intensive. Courts not only demand “rigorous” adherence to the Rule 23 requirements, particularly predominance,⁵³ but also explore merit issues when they are intertwined with any of the certification requirements.⁵⁴ It is somewhat ironic that

The effect of the decision is to compromise the “constitutionally shielded,” *ANZ Secs., Inc.*, 137 S. Ct. at 2057 (Ginsberg, J., dissenting), opt-out right when it is exercised after the repose period expires either because the court denies class certification or the class member learns of a settlement proposal he deems inadequate after the time limitation has run. The *ANZ Secs.* decision may encourage class members to file protective actions to preserve their individual litigation option, further complicating global resolution of disputes. Some decisions by the Court have been more hospitable. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046–47 (2016) (allowing sample evidence as to employee practices in a Fair Labor Standards Act case to establish predominance); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) (determining that a consumer class complaint under the Telephone Consumer Protection Act challenging advertising use of a third party’s involvement in unsolicited text messages was not rendered moot by an unaccepted offer of judgment).

53. The Supreme Court demanded a “rigorous analysis” initially in *Gen. Tel. Co. Sw. v. Falcon*, 457 U.S. 147 (1982). It has been repeated as catechism many times since. *E.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014) (noting plaintiffs must “prove each requirement of Rule 23, including . . . predominance”); *Marcus v. BMW of N. Am., L.L.C.*, 687 F.3d 583, 592, 594, 596–97, 605 (3d Cir. 2012) (reversing class certification and demanding higher factual proof of the 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 seemingly 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.”), *abrogated on other grounds by* *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011); *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 724 (5th Cir. 2007) (“rigorous” analysis showed that differences in various aspects of states’ laws meant that common questions did not predominate); *In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006) (class certification requires a ruling on each Rule 23 requirement regardless of any overlap with merit issues); *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545 (5th Cir. 2003) (individual issues of reliance precluded certification on various theories).

54. *See, e.g.*, *Comcast Corp.*, 569 U.S. at 35–36 (damage measurement); *Phillips v. Asset Acceptance, L.L.C.*, 736 F.3d 1076, 1077 (7th Cir. 2013) (determining statute of limitations issue relevant to class certification); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013) (finding scrutiny of damage model relevant to class certification); *Szabo v. Bridgeport Machs, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (stating that when there is an overlap

many of the protections for absentees the rulemakers crafted in the 1966 revision have become burdensome points of contention on the certification motion.

Moreover, defense lawyers and litigants who generally find themselves on the right side of the “v.” in class actions, as well as some courts, have exerted pressure to impose new procedural requirements that are not prescribed in the Rule, such as demanding the ascertainability of every class member when certification is sought,⁵⁵ even though that does not seem necessary and is not particularly useful until the case is resolved,

between the merits and Rule 23(b)(3) issues, “[T]he judge must make a preliminary inquiry into the merits.”).

55. The courts of appeals are divided on whether there is a heightened ascertainability requirement, although the trend seems to be going against recognizing it. *Compare In re Petrobras Secs.*, 862 F.3d 250, 265 (2d Cir. 2017) (“[W]e decline to adopt a heightened ascertainability theory that requires a showing of administrative feasibility at the class certification stage” because it is not consistent with Rule 23.); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1123 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 313 (2017) (not requiring class proponents to demonstrate that it is administratively feasible to identify class members); *Sandusky Wellness Ctr., L.L.C. v. Medfox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016) (deeming objective criteria such as online sales, receipts, and identification by physicians sufficient); *Mullins v. Direct Digital, Inc.*, 795 F.3d 654 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016) (rejecting heightened ascertainability), *with Byrd v. Aarons, Inc.*, 784 F.3d 154, 162–63 (3d Cir. 2015) (requiring the class to provide a “reliable and administratively feasible” method for determining membership); *Carrera v. Bayer Corp.*, 727 F.3d 300, 310, 312 (3d Cir. 2013) (rejecting class of purchasers of an inexpensive over-the-counter product for lack of ascertainability); *Karhu v. Vital Pharmacies, Inc.*, 621 F. App’x 945, 949–51 (11th Cir. 2015) (requiring objective criteria for identification). *See also City Select Auto Sales, Inc. v. BMW Bank of N. Am., Inc.*, 867 F.3d 434, 441 (3d Cir. 2017) (“Affidavits, in combination with records or other reliable and administratively feasible means, can meet the ascertainability standard.”). *See generally* Robert G. Bone, *Justifying Class Action Limits: Parsing Debates Over Ascertainability and Cy Press*, 65 U. KAN. L. REV. 913, 913–39 (2017); Sarah R. Cansler, *An “Insurmountable Hurdle” to Class Action Certification? The Heightened Ascertainability Requirement’s Effect on Small Consumer Claims*, 94 N.C. L. REV. 1382 (2016); Geoffrey C. Shaw, *Class Ascertainability*, 124 YALE L.J. 2354 (2015). The Advisory Committee considered the ascertainability question for almost three years but abandoned further consideration of the subject. *See* Scott Dodson, *A Negative Retrospective of Rule 23*, 92 N.Y.U. L. REV. 101 (2017). If enacted, the Fairness in Class Action Litigation Act of 2017, H. Rep. 985, 115th Cong. (2017), discussed *infra* note 66, would demand heightened ascertainability.

or requiring a showing that each class member has been injured⁵⁶ and is seeking the same remedy. There also has been pressure to eliminate the so-called “it ain’t worth it” actions or those actions that might result in over-deterrence or overcompensation—matters that seem highly speculative at the certification stage.⁵⁷

56. See *Spokeo*, 136 S. Ct. at 1547–50 (holding plaintiff must show an injury in fact that is concrete and particularized), *on remand*, 867 F.3d 1108 (9th Cir. 2017) (concluding that website inaccuracies concerning age, marital status, educational background, and employment concrete for Fair Credit Reporting Act standing); *Attias v. CareFirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017) (concluding that there was a substantial risk of injury from a data breach); *In re: SuperValu, Inc.*, 870 F.3d 763 (8th Cir. 2017) (data breach was not shown to create a “substantial risk” of injury); *Eike v. Allergen, Inc.*, 850 F.3d 315, 318 (7th Cir. 2017) (finding regret or disappointment about a product is not injury for standing purposes). Thus far the courts only have required that the named representatives show a cognizable injury to satisfy the standing-to-sue requirement. See *In re: SuperValu, Inc.*, 870 F.3d 763; *In re Deepwater Horizon*, 739 F.3d 790, 802 (5th Cir. 2014); see also *Phillips*, 736 F.3d 1076. See generally Joshua P. Davis, Eric L. Cramer & Caitlin V. May, *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858 (2014). However, these decisions preceded the Supreme Court’s decision in *Spokeo*, 136 S. Ct. at 1549, in which the Court said that “Article III standing requires a concrete injury even in the context of a statutory violation.” Since then a number of courts have dismissed actions under the Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681c(g)(1), which limits the number of credit card digits that can be included on receipts, because the only injury alleged was an increased risk of identity theft. The courts concluded that a bare allegation to that effect lacked a “degree of risk sufficient to meet the concreteness requirement.” *Spokeo*, 136 S. Ct. at 1550. See, e.g., *Meyers v. Nicolet Rest. of De Perre, L.L.C.*, 843 F.3d 724 (7th Cir. 2016); *Hendrick v. Aramark Corp.*, 2017 WL 1397241 (E.D. Pa. Apr. 18, 2017). There are similar decisions under other statutes. See, e.g., *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511 (D.C. Cir. 2016) (District of Columbia Consumer Protection Procedures Act). Compare *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1337 (11th Cir. 2017) (finding disclosure of a consumer’s personal information was a sufficiently concrete injury to provide standing under the Video Privacy Protection Act, but the action was dismissed because downloading the defendant’s app for free did not make the plaintiff a statutory “subscriber”), with *Cole v. Gene by Gene, Ltd.*, 2017 WL 2838256, at *4–5 (D. Alaska June 30, 2017) (finding disclosure of plaintiff’s DNA satisfied the injury-in-fact requirement). The proposed Fairness in Class Action Litigation Act, described in note 66, *infra*, has a demanding injury requirement.

57. See, e.g., *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 235 (9th Cir. 1974) (applying the standard used in *Ratner*, cited below, to Sherman and Clayton Act actions); *Rowden v. Pac. Parking Sys., Inc.*, 282 F.R.D. 581, 587 (C.D. Cal. 2012), *aff’d in part*, 583 F. App’x 803 (9th Cir. 2014) (determining certification

In addition, when Congress became more conservative and responsive to business interests, corporate and other defense groups secured the 2005 enactment of the Class Action Fairness Act (“CAFA”)⁵⁸—a misnomer if

would limit Laguna Beach’s “ability to protect the health, safety and welfare of the city”); *Leysoto v. Mama Mia I., Inc.*, 255 F.R.D. 693, 697 (S.D. Fla 2009) (holding that a class action was not “superior” for purposes of satisfying Rule 23(b)(3) “in light of the potentially annihilating” damages it might inflict); *Shields v. First Nat’l Bank of Ariz.*, 56 F.R.D. 442, 446 (D. Ariz. 1972) (determining potential \$100 million class recovery was grossly disproportionate given that the class members had suffered no damage and the defendant had gained little benefit; such a recovery is a “possibly annihilating punishment”); *Ratner v. Chem. Bank N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972) (expressing concern that a class action might inflict “horrendous, possibly annihilating punishment, unrelated to any damage”). *But see* *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010) (holding that Rule 23(b) does not permit consideration of the proportionality of liability to actual harm and reversing a denial of class certification); *Murray v. GMAC Mort. Corp.*, 434 F.3d 948 (7th Cir. 2006) (concluding that defendant’s potential enormous liability is an impermissible factor in a Rule 23(b) superiority analysis). A proposal to add a Rule 23(b)(3)(F) to the effect that the court consider “whether the probable relief to individual class members justifies the costs and burdens of class litigation” on a motion to certify under Rule 23(b)(3) was offered to the bench and bar by the Civil Rules Advisory Committee in the 1990s. It was almost universally opposed and dropped by the Committee. For a glimpse into some reactions to that proposal, see COMM. ON RULES OF PRACTICE & PROCEDURE, FED. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 36–38 (1997), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1997.pdf> [<https://perma.cc/6VLK-LQTQ>]; *see also* Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 937–46 (1998) (discussing the arguments for and against the proposal); Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 621–22 (1997) (suggesting the proposal might violate the Rules Enabling Act).

58. Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453, 1711–1715. With certain very limited exceptions, the Act embraces all class and “mass” actions with 100 or more members with claims having an aggregate value exceeding \$5,000,000 and only requires minimal diversity of citizenship. Unfortunately, the statute does nothing to reduce the stringency with which the class certification prerequisites have been applied by the federal courts in recent decades in multi-jurisdictional diversity-based class actions or ameliorate the difficult choice-of-law issues caused by differences in state law those cases often raise. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2012) (decertifying a nationwide class because the law of all states would have to be applied); *Cole v. Gen. Motors Corp.*, 484 F.3d 717 (5th Cir. 2007) (finding differences in state laws meant predominance not satisfied); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085

ever there was one. The Act virtually federalizes class actions of any substantial dimension, thereby marginalizing involvement by state courts.⁵⁹ In my view, it is a blatant affront to federalism.⁶⁰ But there is an irony. By alleviating certain historic subject matter jurisdiction limitations to capture these cases in the federal courts, such as the complete diversity of citizenship and amount in controversy requirements applicable in non-class diversity cases, the Act has enabled the aggregation of modest monetary state law claims so that an array of matters that previously could not have been brought as class actions in federal court now can be, which is particularly significant in the consumer protection field.⁶¹

In my judgment, the class action now has reduced effectiveness in several respects. It has less utility as a means of promoting the private enforcement of important public policies, particularly in the civil rights and employment fields, which supplements government enforcement. Its efficacy as a deterrent to large-scale wrongdoing has decreased. Its usefulness as a remedial mechanism for compensating those injured by public or private wrongs has been compromised. And finally, to some extent, elements of the plaintiffs' bar have been discouraged from acting

(6th Cir. 1996) (decertifying nationwide products liability class action because the negligence law of 50 states would be impossible to be applied as would instructing the jury); *Powers v. Gov't Emps. Ins. Co.*, 892 F.R.D. 313 (S.D. Fla. 1998) (same). See generally WRIGHT, MILLER & KANE, *supra* note 41, § 1780.1; Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839 (2006); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547 (1996); Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1 (1986).

59. State law class actions still may be brought in state court if they fall within one of the limited exceptions in CAFA permitting that, 28 U.S.C. § 1332(d)(3)–(4), the defendant fails to remove, or if a federal court has declined to certify. See *Smith v. Bayer Corp.*, 564 U.S. 299 (2011).

60. For an excellent analysis of the relationship between preemption and federalism, see Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006).

61. See Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765 (2008) (discussing the expansion of federal subject matter jurisdiction over class actions); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdiction Reform*, 156 U. PA. L. REV. 1823 (2008) (analyzing CAFA's centralizing impact on American law and government).

as private attorneys general and some of its members have become extremely risk averse.⁶²

The procedural rigors that now burden class action certification obviously weigh particularly heavily on plaintiffs. The reality is that today's judicial treatment of the class action has made pursuing certification a time-consuming and expensive process, one that often is nearly or completely impossible to navigate successfully, leading some knowledgeable scholars to question the long-term viability of the procedure.⁶³ I, however, disagree with their calamitous forebodings; to paraphrase Mark Twain, reports of the death of class actions are "greatly exaggerated."⁶⁴ In some parts of the country and in certain substantive

62. See generally David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777 (2016) (noting that public interest classes are not being certified today for reasons that would have been nearly unimaginable a decade ago); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 296–300 (2014) [hereinafter Miller, *Preservation and Rejuvenation*] (describing the current difficulties of securing class certification). Questions about the legitimacy and utility of private enforcement have been part of the class-action debate. One negative frequently asserted is that private enforcement occasionally creates a risk of over-deterrence or over-enforcement, particularly when there has been a small or technical violation of a statutory scheme that affects a large number of people in some marginal way. See generally Marcus, *Bending in the Breeze*, *supra* note 45, at 520–30. That has led to a denial of certification in some cases. See the citations *supra* note 57.

63. See, e.g., Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161 (2015); Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) (asserting that class actions will soon be "virtually extinct"); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (providing an excellent description of the then current state of affairs); four years later the author was somewhat more optimistic: Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971 (2017); Georgene Vairo, *Is the Class Action Really Dead? Is That Good or Bad for Class Members?*, 64 EMORY L.J. 477, 528 (2014) ("[C]lass actions . . . have taken a huge hit."); see also MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009) (arguing that class actions undermine foundational constitutional principles); Mullenix, *Ending Class Actions*, *supra* note 45; 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, 462 (2014) (arguing that class attorneys should be viewed as the fiduciary or guardian of the absent class members).

64. Class action litigation, it turns out, is hard to kill off. See Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 516 (2013); see also Elizabeth J. Cabraser & Samuel

contexts, class actions actually appear to flourish, although in others they languish or are stillborn. Despite the gloomy picture painted above, a few years ago I expressed the view that “there are some rays of light that indicate it will survive.”⁶⁵ I stubbornly repeat that belief.

The pessimistic views are either understandable expressions of frustration, possibly tinged with a touch of despair, or wishful thinking depending on the speaker’s or writer’s point of view. Objectively viewed, however, the demise of the class action would be completely at odds with the litigation system’s contemporary needs. In today’s world, a procedural system cannot function with a reasonable degree of efficiency by processing a substantial number of overlapping or related claims one-by-one. Abandonment of the class action and other multi-party consolidation devices is not a reasonable option. Not only is effective aggregate litigation a matter of common sense, it is a matter of the rational utilization of litigant and judicial system resources. That efficiency is in everyone’s interest. Nonetheless, a bill has passed the House of Representatives that would further burden class actions in very significant ways and probably extinguish or dim the “rays of light” to which I referred.⁶⁶

One reason for optimism is the willingness of some federal judges in recent years to employ the passage in Rule 23(c)(4), stating that “when

Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846 (2017) (describing how the class action is getting a second life). Actions under Rule 23(b)(1) to avoid prejudice always were thought to be the exception not the rule and have not figured prominently in the class action debate; actions under Rule 23(b)(2) for injunctions primarily to stop discrimination or public policy violations also have largely avoided the brunt of the controversy.

65. Miller, *Preservation and Rejuvenation*, *supra* note 62, at 306. Professor Richard Marcus, who is my co-author on the Federal Practice and Procedure treatise and an Associate Reporter of the current Advisory Committee on Civil Rules, echoes my thought in his text, Marcus, *Bending in the Breeze*, *supra* note 45. I hope we are not travelling down a primrose path. If the reader has patience, perhaps the “rays of light” I perceive will become apparent.

66. The Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. (2017). The bill cleared the House in days without any hearings or public discussion. Among other things it would require an affirmative demonstration that “each” class member “suffered the same type and scope of injury,” that class members be ascertainable, that attorney’s fees be limited to a reasonable percentage of the monies “directly distributed” to class members and postpone payment of fees until the distribution to class members has been “completed,” eliminate issue classes, and postpone discovery until various motions, including the motion to dismiss, have been decided. *Id.* Simply put, the legislation would cripple class action practice. So, one might ask for whom would the proposed “Fairness Act” provide “fairness.”

appropriate, an action may be brought or maintained as a class action with respect to particular issues.” Admittedly, the provision is ambiguous as to whether it is an independent basis for class certification or presupposes that all other prerequisites, most notably predominance in Rule 23(b)(3), must be satisfied before the court can treat one or more issues on an aggregate basis, leaving the remaining issues for individual treatment.⁶⁷ The former construction, creating what now is called single-issue certification, has been gaining traction.

A good example is *Butler v. Sears Roebuck & Co.*⁶⁸—a product defect consumer class action involving mold in washing machines. The Court of Appeals for the Seventh Circuit reversed a denial of certification of one of two separate classes that advanced two different breach-of-warranty theories. The opinion is very pragmatic, focusing on the need for courts to handle partially overlapping cases efficiently. Judge Richard Posner, writing for the court, concluded that the central liability question of whether the washing machines were defective could be determined on a

67. The ambiguity is exemplified by two 1996 court of appeals decisions that expressed opposite views on the point. *Compare* *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (“Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues.”), *with* *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745–46, 745 n.21 (5th Cir. 1996) (“The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3).”). It is unclear whether *Castano*’s rejection of single-issue certification is still good law in the Fifth Circuit. *See In re Deepwater Horizon*, 739 F.3d 790, 815–16 (5th Cir. 2014). Another unclear decision is *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 441–43 (4th Cir. 2003). The subject has attracted considerable academic interest. *See generally* WRIGHT, MILLER & KANE, *supra* note 41, § 1790; Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855 (2015); Laura J. Hines, *Codifying the Issue Class Action*, 16 NEV. L.J. 625 (2016); Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249 (2002); Joseph A. Seiner, *The Issue Class*, 56 B.C. L. REV. 121 (2015).

68. *Butler v. Sears Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *see also In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 839 (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).

class-wide basis, leaving damage matters to individual proceedings if liability were established.⁶⁹

In 2014, a year after the *Butler* decision, the Seventh Circuit reiterated its receptivity to the aggregate adjudication of portions of identical consumer claims in *In re IKO Roofing Shingle Products Liability Litigation*,⁷⁰ when it again vacated a denial of class certification in another home products case. The court of appeals rejected the district court's conclusion that "commonality of damages" among class members was "legally indispensable."⁷¹ The class's two theories of damages both matched its liability theory. The *IKO* panel acknowledged, but was not concerned, that one of the damage theories would require buyer-specific hearings and could not be handled on a class-wide basis in the event the common liability questions were established in the class's favor; it simply cited *Butler*.⁷²

These two decisions show that some judges are willing to employ the class action whenever the determination of one or more significant class-wide issues will meaningfully advance the litigation's resolution.⁷³ Other

69. *Butler*, 727 F.3d at 801–02. Judge Posner's *Butler* opinion can be traced back to his earlier opinion in *MacReynolds v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (allowing certification of the issue whether the defendant's practices had a discriminatory effect). His earlier opinion in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), *cert. denied*, 516 U.S. 867 (1995), was far less accepting of single-issue certification.

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

71. *Id.* at 603.

72. *Id.* The Seventh Circuit explicitly embraced this view 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* *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014) (cautioning that the common issue must "greatly simplify the litigation" to avoid creating risks).

73. The materially-advance approach also has been approved by the *Manual for Complex Litigation* and the American Law Institute's *Principles of the Law of Aggregate Litigation*. *See* FED. JUDICIAL CTR., *MANUAL FOR COMPLEX LITIGATION* § 21.24 (4th ed. 2004); AM. LAW. INST., *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* § 2.02 (2010). Sometimes, it is difficult to determine whether the court is deciding the certification question on the basis of the existence of a meaningful common single issue or because some other Rule 23 prerequisite, such as predominance, is satisfied. For example, in *Johnson v. Nextel Commc'ns, Inc.*, 780 F.3d 128, 147–48 (2d Cir. 2015), a failure to satisfy the materially-advance standard was characterized as a lack of both predominance and superiority. In *Jacob v. Duane Reade, Inc.*, 602 F. App'x 3 (2d Cir. 2015), the court upheld certification on the basis of "liability" being common but spoke in terms of predominance, which a single issue occasionally can satisfy.

courts have accepted single-issue certification but have used different formulations for deciding when it is appropriate to do so.⁷⁴ This single-issue class action concept, if it is ultimately accepted by the Supreme Court and survives the current threat of being legislatively overruled by Congress,⁷⁵ holds great promise for proceeding on an aggregate basis in the future in various substantive contexts.⁷⁶

74. See *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1253 (10th Cir. 2014) (stating common antitrust questions of conspiracy and impact “drive the resolution of litigation” (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)) (internal quotation marks omitted); *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 272–73 (3d Cir. 2011) (accepting the concept of single-issue certification and offering numerous factors for determining when it is appropriate to use it); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (indicating that a single issue must “materially advance the litigation”); *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006) (allowing certification of a single issue relating to the propriety of strip searches); cf. *In re St. Jude Med., Inc.*, 522 F.3d 836 (8th Cir. 2008). Another case in the same vein, although not phrased in single-issue terms, is *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), which held that a common question in a Racketeer Influenced Corrupt Organization action predominated. Other cases recognize single-issue certification but decline to employ it because of the circumstances of the particular case. E.g., *Gates*, 655 F.3d 255; *McLaughlin*, 522 F.3d 215; *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996). Also, Judge Pryor’s opinion for an *en banc* court in *Graham v. R.J. Reynolds, Tobacco Co.*, 782 F.3d 1261 (11th Cir. 2015), seems quite accepting of issue classes, liability-only class determinations, and bifurcation.

75. If enacted, the Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. § 1.03 (2017), described *supra* note 66, would prohibit certifying any issue under Rule 23(c)(4) unless all class action certification requirements are satisfied with regard to the entirety of the cause of action from which the issue arises, effectively overruling *Butler* and *IKO*. As resistance to class action certification has increased and the burdens associated with that process have magnified in the United States, class-action-like and other aggregation procedures have developed in many other nations. See generally Deborah R. Hensler, *From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally*, 65 U. KAN. L. REV. 965 (2017). This is somewhat ironic because in the Golden Age of the American class action many around the globe took pleasure in saying at conferences or in private conversation that our practice under Rule 23 was quite irresponsible and unacceptable.

76. The subcommittee of the Civil Rules Advisory Committee appointed to evaluate and propose amendments to Rule 23 undertook a consideration of single-issue classes, but abandoned the subject after almost two years. See ADVISORY COMM. ON CIVIL RULES, RULE 23 SUBCOMMITTEE REPORT 87 (Nov. 5–6, 2015), <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-november-2015> [<https://perma.cc/VD4J-6N3Z>].

D. Discovery

Another illustration of the stop-sign phenomenon relates to discovery, which no longer is fully committed to providing litigants equal access to all relevant data as was the original objective of the Rules promulgated in 1938. There have been sequential restrictions on it by Federal Rule amendments over the past 40 years,⁷⁷ including redefining the scope of discovery, reducing its availability, and creating presumptive limits on its use. Additionally, the most recent amendment imposes a new “proportionality” requirement in Rule 26(b)(1) to be applied by “considering” six factors, a few of which are quite amorphous or subjective. Some observers are concerned that this latest linguistic change creates an additional restraint on the availability of discovery. Its significance is yet to be seen.⁷⁸ At a minimum, “proportionality” shows signs of producing a fair

77. Since 1983 almost all the amendments to the Federal Rules relating to discovery have encouraged judges to contain the process. See 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, 353–56 (2013) [hereinafter Miller, *Deformation of Federal Procedure*]. It seems fairly obvious that discovery restrictions can impact other procedural and substantive policies and should be undertaken cautiously. Broad access to discovery is often a necessity in lawsuits under federal substantive statutes and other matters of public policy because in those contexts, we often are especially dependent on litigation to augment governmental enforcement of federal normative standards. Events in both the financial and real estate markets during the last severe recession, for example, have laid bare the consequences of under-enforcement of federal regulatory policies. It seems odd, therefore, to impede the efficacy of private enforcement of national as well as state policies by limiting discovery. Discovery is often the key that opens the door to information critical to remediating violations of important constitutional, statutory, and common law principles. See generally Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CAL. L. REV. 806, 818 (1981) (explaining that discovery is essential to “the evolution of substantive law”).

78. See David Crump, *Goodbye, “Reasonably Calculated,” You’re Replaced by “Proportionality”*: *Deciphering the New Federal Scope of Discovery*, 23 GEO. MASON L. REV. 1093, 1094 (2016) (“[T]he criterion of ‘relevance’ is intentionally demoted in importance.”); Patricia H. Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083 (2016) (opining that proportionality will likely further restrict the ability to obtain information). A more optimistic view—I hope it is not wishful thinking—is offered in Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 28–33 (2016) (arguing that the 2015 amendments are unlikely to alter practice under the Federal Rules significantly).

amount of motion practice.⁷⁹ Although individually these amendments might not represent a dramatic undermining of federal discovery, collectively they clearly look in a philosophically different direction than did the original rules, which allowed discovery of anything “relevant to the subject matter of the action” and were designed to operate in a simple, self-executing way.⁸⁰

Some courts have quoted the Chief Justice’s enthusiastic—some might say overstated—description of the amendment, even though his remarks are not part of the Rule itself. JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT OF THE FEDERAL JUDICIARY 5 (Dec. 31, 2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> (“The amendments may not look like a big deal at first glance, but they are.”) [<https://perma.cc/KU69-JBC3>]. A recent canvas of the cases under the new discovery rules in the class action context by a distinguished proceduralist who was involved in drafting the new rules suggest no significant changes in governing principles has taken place. Robert H. Klonoff, *Application of the New Discovery Rules in Class Actions: Much Ado About Nothing*, 71 VAND. L. REV. ____ (2018).

79. See, e.g., *Panel Specialists, Inc. v. Tenawa Haven Processing, L.L.C.*, 2017 WL 3503354, at *4 (D. Kan. Aug. 16, 2017) (concluding that a request for specific information concerning the markups charged other customers was not proportional to the needs of the case and would burden a small, family-owned company; the magistrate judge thought it was a close case); *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562, 564 (D. Ariz. 2016) (stating that the proportionality inquiry “requires input from both sides”); *Hibu, Inc. v. Peck*, 2016 WL 4702422, at *2 (D. Kan. Sept. 8, 2016), *review denied*, 2016 WL 6462044 (D. Kan. Nov. 1, 2016) (“Moving the proportionality provisions to Rule 26 does not place on the party seeking discovery the burden of addressing all proportionality considerations”); *Jackson v. E-Z-GO Div. of Textron, Inc.*, 2016 WL 6211719, at *5 (W.D. Ky. Oct. 24, 2016) (finding that compelled discovery of “information from former counsel, information from independent third parties that *currently* perform services for Defendants, and claims that *may* involve one of the four design features of concern” was not disproportionate); *Robertson v. People Magazine*, 2015 WL 9077111, at *2 (S.D.N.Y. Dec. 16, 2015) (“[T]he 2015 amendment does not create a new standard; rather it serves to exhort judges to exercise their preexisting control over discovery more exactly. . . .”).

80. It is generally acknowledged that in routine litigation, discovery is modest—often nonexistent—in keeping with the dimension of the case, and usually does not require judicial supervision. See EMERY G. LEE III & THOMAS E. WILLING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2009) (discussing findings from a survey of attorneys regarding discovery in recently closed civil cases); EMERY G. LEE III & THOMAS E. WILLING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2010).

E. Expert Witnesses

Hearings to qualify expert witnesses have proliferated and become protracted. This shift is primarily because of the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁸¹ which in the name of judicial gatekeeping—admittedly a worthy objective—has made expert qualification for testimonial purposes on economic, scientific, and technical matters more difficult to achieve and a major procedural obstacle with attendant risks, costs, and delays. On occasion, the *Daubert* hearing has become a trial within a trial. This process most likely burdens plaintiffs more heavily than defendants and, of course, is yet another pretrial stop sign. Indeed, given the importance of expert testimony in many types of cases, the *Daubert* hearing can amount to a “Road Closed”—not merely a temporary “stop”—sign.

F. Summary Judgment

Finally, resort to the summary judgment motion clearly has increased in recent times; when the motion is granted, it operates as a terminal stop

81. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Two other cases complete the *Daubert* trilogy. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158 (1999) (applying *Daubert* to a tire failure expert witnesses); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146–47 (1997) (finding no abuse of discretion in the district court's exclusion of scientific epidemiological expert testimony). See generally Andrew B. Gagen, *What is an Environmental Expert? The Impact of Daubert, Joiner and Kumho Tire on the Admissibility of Scientific Expert Evidence*, 19 UCLA J. ENVTL. L. & POL'Y 401, 447 (2002) (discussing the broad impact of the *Daubert* trilogy on environmental litigation); Robert J. Goodwin, *The Hidden Significance of Kumho Tire Co. v. Carmichael: A Compass for Problems of Definition and Procedure Created by Daubert v. Merrell Dow Pharm., Inc.*, 52 BAYLOR L. REV. 603, 646 (2000) (emphasizing how the broad discretion given to judges as “gatekeepers” creates inconsistency in results); Christopher B. Hockett, Geraldine M. Alexis & Christina M. Wheeler, *Revisiting the Admissibility of Expert Evidence in Antitrust Cases*, 15 ANTITRUST 7 (2001) (finding that after *Kumho Tire*'s application of *Daubert* to soft sciences, challenges frequently succeed even against highly qualified experts, and can involve extensive evidentiary hearings). Most states have adopted the *Daubert* approach, but recently the Florida Supreme Court rejected inserting it as a rule in the Florida Evidence Code because of “grave concerns about the constitutionality of the amendment” in terms of its possible effect on the jury-trial right and access to the courts. See *In re Amendments to the Fla. Evidence Code*, 210 So. 3d 1231, 1239 (2017).

sign.⁸² Indeed, it was the 1986 Supreme Court decisions in *Celotex Corp. v. Catrett*,⁸³ *Anderson v. Liberty Lobby, Inc.*,⁸⁴ and *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*,⁸⁵—the so-called summary judgment trilogy—that began the procedural retrenchment I am describing. The opinions in these cases appear to have encouraged heightened invocation of the motion by establishing a nebulous “plausibility” standard that, like the previously discussed pleading “plausibility” standard governing motions to dismiss, seems to promote fact-finding and evidence-weighting by judges. As is true of the motion to dismiss, a summary judgment motion will be decided on the basis of judicial subjectivity and a paper record—sometimes an obscenely large one—not live testimony subject to cross-examination, let alone a trial with a jury.⁸⁶ Thus, a motion historically

82. See Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 896 (2007) (showing an increase in motions made from 12% to 21% of the sample cases from 1975 to 2000 and an increase in the grant rate from 6% to 12% in those years); Joe S. Cecil, *Trends in Summary Judgment Practice: A Summary of Findings*, 1 FJC DIRECTIONS 11, 16–17, 19 n.10 (1991) (discussing the increase in summary judgment motions filed, opining that the increase may be because of increased dispositions of asbestos cases). See generally 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, 1074–1132, 1048–57 (2003) [hereinafter Miller, *Pretrial Rush to Judgment*].

83. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

84. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

85. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

86. See *Scott v. Harris*, 550 U.S. 372 (2007). This highly controversial decision, see Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009), is exhaustively analyzed in Tobias Barrington Wolff, *Scott v. Harris and the Future of Summary Judgment*, 15 NEV. L.J. 1351 (2015). Professor Wolff expresses concern that the *Scott* opinion has destabilized the historic presumption in favor of the non-moving party, as well as the practice of looking at the record in the light most favorable to that party, and has inappropriately permitted interlocutory review of a denial of the motion. See generally Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 401–02 (2011); Miller, *Pretrial Rush to Judgment*, *supra* note 82, at 1074–1132 (evaluating the importance of oral testimony and jury trial); Nathan S. Richard, *Judicial Resolution of EMTALA Screening Claims at Summary Judgment*, 87 N.Y.U. L. REV. 591, 635 (2012) (“The frequent inability of plaintiffs suing under . . . [the Emergency Medical Treatment & Active Labor Act] to survive a summary judgment has substantially curtailed the Act’s capacity to remedy and deter disparities in emergency-department screenings. At summary judgment, many federal courts . . .

designed solely to determine whether a case is trial-worthy or resolvable by the court as a matter of law has been transmogrified into a judge's subjective exploration of the claim's "plausibility."

The concern is that the motion may now be used to dispose of cases that previously might have been considered trial-worthy because the record revealed a "genuine dispute as to [a] . . . material fact," in theory the only issue to be decided on a summary judgment motion according to Federal Rule 56 and its many state counterparts. That result, I believe, contravenes our commitment to a right to a meaningful day in court, elements of due process, and trial by jury when applicable.⁸⁷ Because the motion is primarily a defense weapon, it is not surprising that it is invoked primarily by defendants. Moreover, the process of making, responding, and adjudicating the motion has become protracted, resource consumptive, and, when granted, vulnerable to reversal on appeal. One suspects that in many instances it might be more efficient to try the case, raising the

are highly deferential to the assertions, judgments, and perceptions of treating physicians. To the extent that this practice constitutes a 'weighing of the evidence,' it amounts to an aggressive, if not improper, use of summary judgment.'").

87. See Miller, *Deformation of Federal Procedure*, *supra* note 77, at 310–12 (observing that what is being decided "as a matter of law" has been enlarged); Miller, *Pretrial Rush to Judgment*, *supra* note 82, at 1062–72, 1074–77 (arguing that the summary judgment trilogy has promoted paper trials); David L. Shapiro, *The Story of Celotex: The Role of Summary Judgment in the Administration of Civil Justice*, in *CIVIL PROCEDURE STORIES* 359, 386–87 (Kevin M. Clermont ed., 2d ed. 2008) (summarizing the tension between summary judgment and constitutional concerns); see also John Bronsteen, *Against Summary Judgment*, 75 *GEO. WASH. L. REV.* 522, 539–43 (2007) (arguing that summary judgment is inherently pro-defendant); 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); Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 *CORNELL L. REV.* 193 (2014); 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). In a recently published book, SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* (2017), the authors persuasively argue that the hyperactivity in granting summary judgment motions in civil rights, age discrimination, and disability cases—all matters governed by protective federal statutes—usurps the role of the jury on such questions as what constitutes discrimination by effectively engaging in fact-finding and deciding how the facts should be applied. An extreme position on this subject is taken in Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 *VA. L. REV.* 139, 148–58 (2007) (contrasting the summary judgment motion with English common law procedural devices).

question of what really motivates the widespread invocation of the motion.⁸⁸ When today's summary judgment practice is combined with the other procedural impediments I have catalogued and others I might have added to my list,⁸⁹ I am led to ask: what has happened to that relatively uncluttered Gold Standard of my youth?⁹⁰

88. Obviously, the interposition of a summary judgment motion postpones (and possibly eliminates) any trial and probably lowers the settlement value of the case. A distinguished federal judge takes a dim view of the frequency with which the motion is made, the resources expended, and the marginal results achieved. Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599, 1663–70 (2016).

89. For example, a number of years ago the Supreme Court imposed constitutional limitations on punitive damages, previously thought to be a matter of state law. *See, 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); *TXO Prods. Corp. v. All. Res. Corp.*, 509 U.S. 443, 453–54 (1993) (same). In effect, these cases federalized the question of how to define the upper limit of a punitive damage award. The decisions by the Court preempting state law on that subject have been criticized. *See generally* Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages are Unconstitutional*, 53 EMORY L.J. 1, 10 (2004) (discussing the potential harms caused by unchecked jury awards of punitive damages and judicial responses to such harms). Additional stop signs take the form of judicial receptivity to motions to dismiss based on standing, preemption, immunity, abstention, exhaustion, time limitations, and other threshold matters.

90. I have written extensively—some might say excessively—on these matters. *See* Miller, *Deformation of Federal Procedure*, *supra* note 77; Miller, McIntyre *in Context*, *supra* note 24; Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What's Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH. L. REV. 587 (2011); Miller, *Double Play on the Federal Rules*, *supra* note 34; Miller, *Pretrial Rush to Judgment*, *supra* note 82. A number of prominent proceduralists have as well. *See generally* Paul D. Carrington, *Protecting the Right of Citizens to Aggregate Small Claims Against Businesses*, 46 U. MICH. J.L. REFORM 537 (2013) (discussing the “subversion” of Rule 23(b)(3)); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986). The effect of these procedural developments in two important public policy arenas is canvassed in Suzette Marie Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455 (2014); Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 307 (2010). Other commentators argue that the Supreme Court's decisions “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.

II. THE PRIVATIZATION OF CIVIL DISPUTE RESOLUTION

The easy-access philosophy underlying the original Federal Rules welcoming citizens to the courthouse also is being displaced by significant pressures that are diverting disputes from the public court system to mediation, arbitration, and other forms of alternative dispute resolution.⁹¹ Many businesses and employers now insist on private dispute resolution with their customers and employees through the widespread use of contractual mandatory arbitration provisions that expressly forbid resort to the courts; many of these provisions also prohibit the use of any form of aggregate arbitration. These clauses impact important areas of substantive law and affect a range of consumer, financing, employment, and small business transactions. These activities are engaged in by millions of people. Thus, dispute resolution is being privatized by a process that is invisible, under the control of industry, not constrained by rules of evidence or procedure, and lacks any meaningful judicial or other review.

The expansive use of contractually mandated arbitration undermines the availability of the class action and other aggregation methods. It is fueled by the Supreme Court's seemingly boundless application of the Federal Arbitration Act ("FAA").⁹² Of particular concern is the Court's

1543 (2014) [hereinafter Burbank & Farhang, *Litigation Reform*]; Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 928–30 (2000); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1108 (2006); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353–54 (2010); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 314–32 (2012).

91. See the comprehensive discussion of this subject in Judith Resnik, *The Privatization of Process: Celebration and Requiem for the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1802–06 (2015).

92. Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1–16 (2012)). Some statutes void arbitration clauses in certain limited contexts. *E.g.*, 10 U.S.C. § 987(e)(3), (f)(4) (except for residential mortgages and car loans, arbitration clauses in payday loans and consumer credit contracts with members of the military and their family members are void); 15 U.S.C. § 1226(a)(2) (prohibiting pre-dispute arbitration clauses in automobile franchise agreements). On the other hand, some federal statutes provide for the arbitration of disputes. *E.g.*, Federal Insecticide, Fungicide, and Rodenticide Act of 1947, Pub. L. No. 114-38 (codified as amended at 7 U.S.C. §§ 136–136y); Amateur Sports Act of 1978, Pub. L. No. 95-606, § 205(c)(1), 92 Stat. 3045 (codified as amended at 36 U.S.C. § 220529) (any party aggrieved by a

validation of these clauses—including their class action and aggregate arbitration waivers—in *AT&T Mobility L.L.C. v. Concepcion*⁹³ and *American Express v. Italian Colors Restaurant*.⁹⁴ To me it was strikingly inappropriate to do so in these cases. *Concepcion* involves a consumer's claim that the defendant had advertised a "free" phone but then improperly charged him \$30 for sales tax. *Italian Colors* is a federal antitrust action pursued by small businesses that asserted claims that were not economically substantial enough to be brought as individual actions or arbitrations.

Concepcion authorizes the preemption of state contract law doctrines, such as unconscionability (the Arbitration Act might have been interpreted to preserve them),⁹⁵ and, like CAFA, is another example of the federalization of state law claims.⁹⁶ *Italian Colors* enables the circumvention of federal substantive statutes, such as the antitrust and securities laws, because the

determination may seek review by any regional office of the American Arbitration Association); Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 4221(a)(1), 94 Stat. 1208 (codified as amended at 29 U.S.C. § 1401) (any dispute between an employer and the sponsor of a multiemployer plan concerning a pension determination); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 921, 124 Stat. 1376, 1847 (2010) (SEC rule on investor agreements).

93. *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333 (2011); *see also* *DirectTV v. Imburgia*, 136 S. Ct. 463 (2015).

94. *Am. Express v. Italian Colors Rest.*, 570 U.S. 228 (2013). The Financial Industry Regulatory Authority ("FINRA") reaffirmed its bar on enforcing pre-dispute class action waivers after the Supreme Court decisions. Charles Schwab & Co., 2014 WL 1665738, at *18 (FINRA April 24, 2014).

95. 9 U.S.C. § 2. In *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017), the Court reaffirmed its preemption of any state contract rule that reflects "discrimination on its face against arbitration" and "displaces any rule that covertly accomplishes the same objective." The Court struck down Kentucky's requirement of a "clear statement" waiving "the right to go to court and receive a jury trial" because it was "tailor-made to [apply to] arbitration agreements" and singled them out "for disfavored treatment." *Id.* at 1423; *see also* *Allied Bruce Terminex Cos. v. Dobson*, 513 U.S. 265 (1995) (holding that state laws singling out arbitration clauses are subject to the FAA). So much for Kentucky's attempt to protect the exercise of two constitutional rights.

96. *See, e.g., Concepcion*, 563 U.S. at 333 (consumer claim); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) (state claim against a nursing home); *Circuit Cities Stores, Inc. v. Adams*, 532 U.S. 106 (2001) (state sex discrimination claim); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (age discrimination); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (California's Franchise Investment Law).

Court simply has declared that the Arbitration Act trumps them.⁹⁷ In effect, the Court has created a powerful federal common law of arbitration.⁹⁸ Thus, a supposed, but largely judicially fabricated, national commitment to arbitration has enabled a dramatic impairment of access to the courts. The decisions also deprive people of the opportunity to participate in a class action or aggregate arbitration of related and sometimes identical matters, which often is an economic necessity since the individual claims typically have a negative value from a dispute resolution perspective.⁹⁹

97. See, e.g., *Italian Colors*, 570 U.S. at 228 (antitrust claims); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012) (Credit Repair Organization Act); *Rodriguez de Quijas v. Shearson Am. Express, Inc.*, 490 U.S. 477 (1989) (securities claim); *Shearson Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (Racketeer Influenced and Corrupt Organizations Act claims); *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (stating that an antitrust claim will be “effectively vindicated” in an arbitral forum); *Jones v. Waffle House, Inc.*, 866 F.3d 1257 (11th Cir. 2017) (Fair Credit Reporting Act).

98. See Michael J. Yelonsky, *Fully-Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729 (2012).

99. The extraordinary expansion of the FAA’s application by the Supreme Court and the statute’s legislative history are discussed in Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U.L. REV. 1420, 1426–32 (2008); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265 (2015); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, The Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2860–71 (2015) [hereinafter Resnik, *Diffusing Disputes*]; Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1635–42 (2005); see also Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 317 [hereinafter Gilles, *The Day Doctrine Died*]. The diversion of disputes to arbitration and other forms of alternative dispute resolution also have been thought desirable to help ameliorate the growing caseloads in the federal courts and to husband their limited resources. See, e.g., *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981) (stating that the purpose of the FAA is “to relieve congestion in the courts and to provide parties with an alternative method of dispute resolution”), *abrogated on other grounds by* *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). Congress also has promoted this movement. See Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 621–658). As a distinguished scholar of the subject has pointed out, the “Supreme Court has not produced a single decision finding arbitration inadequate, inaccessible, or ineffective to vindicate rights.” Resnik, *Diffusing Disputes*, *supra*, at 2886. I submit, as she and the dissenting Justices have, that *American Express* fits that description perfectly. I sense (perhaps it is unjustified optimism) that some courts are not eager to extend the

In the consumer and financing fields, as well as in many employment and small business contexts, these no-class-or-aggregate-arbitration clauses are completely adhesive.¹⁰⁰ They are not the product of arm's length bargaining—or any bargaining—in most cases. Invocation of the “freedom of contract” cliché to justify them defies reality. Nonetheless, people are being subjected to these clauses in contracts about a wide range of basic consumer transactions involving both societal amenities and necessities as well as being denied the protection of federal statutes and state law.¹⁰¹ Some academics depressingly express concerns that permitting the enforcement of these clauses is the “*coup de grace*”—the end of any effective aggregate procedure for handling a wide variety of claims that have been subjected to mandatory arbitration provisions.¹⁰²

The Supreme Court's decisions are based on a statute enacted almost a century ago for resolving inter-corporate disputes between sophisticated entities, not consumer, employment, or small business claims. It is

Supreme Court's arbitration decisions. For example, in *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017), the California Supreme Court declined to enforce an arbitration clause in a credit card agreement waiving the right to seek public injunctive relief in any forum. The court concluded that a California statute providing that “a law established for a public reason cannot be contravened by a private agreement,” CAL. CIV. CODE § 3513 (West 2017), is a generally applicable contract defense, does not discriminate against arbitration, and therefore is not preempted by the FAA. *Id.* at 94–98. *But cf.* the cases cited *supra* note 95.

100. Various aspects of the utilization of these clauses are discussed in the following articles. Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REF. 871 (2008); Gilles, *The Day Doctrine Died*, *supra* note 99; Resnik, *Diffusing Disputes*, *supra* note 99; Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. 1 (2013); Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309 (2015).

101. The Court was once far more protective of consumers and employees regarding arbitration clauses. *See, e.g.*, *Wilko v. Swan*, 346 U.S. 427, 437 (1953); *cf.* *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). The same is true of people who lacked “bargaining power,” *see, e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting). *See generally* J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015); Resnik, *Diffusing Disputes*, *supra* note 99, at 2836–39.

102. *See* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627, 658–60 (2012) (“Class actions are on the ropes.”); Resnik, *Diffusing Disputes*, *supra* note 99 (arguing that the diffusion of disputes to private, unaccountable, and unknowable adjudicators is unconstitutional).

apparent that the Court's striking attraction for arbitration reflects its sense of the limited resources of the federal judiciary and perhaps a lack of confidence in state and federal trial courts, as well as a mistrust of juries; it also may be a byproduct of the anti-litigation campaign that has been waged for several decades in the courts and the public arena by the defense bar and business interests.¹⁰³

Moreover, despite Justice Scalia's assertion in his *Concepcion* and *Italian Colors* opinions that group arbitration does not work and is inconsistent with the supposed economies and efficiencies of arbitration,¹⁰⁴ there is considerable experience with aggregate and class arbitration that does not reveal any intractable difficulties.¹⁰⁵ And what of the other values that are at stake? Little or no attention has been paid to the possibly deleterious effect of those clauses on traditional due-process notions based on the day-in-court principle, the jury trial guarantee, federalism, transparency of process, substantive law development, and the need for oversight of arbitration practices, let alone to the potential negative effect on the enforcement of important public policies that result from diverting dispute resolution away from the public court system.¹⁰⁶

103. See discussion *infra* notes 173–182.

104. See, e.g., *Italian Colors*, 570 U.S. at 228; *Concepcion*, 563 U.S. at 333; see also *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012); *Rodriguez de Quijas v. Shearson Am. Express, Inc.*, 490 U.S. 477 (1989).

105. At the time *Concepcion* was decided, the rules of the American Arbitration Association provided for class arbitration. AM. ARB. ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (2003), <https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf> [<https://perma.cc/GGS4-AX5A>]. See generally David Horton, *Mass Arbitrations and Democratic Legitimacy*, 85 U. COLO. L. REV. 459 (2014). The Court's negative view of group adjudication in favor of arbitration stands in contrast with the apparent growth in the use of class actions and other aggregation techniques in the courts. See generally Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1643 (2017) ("As a practical matter . . . [these procedures] offer agencies important new tools to respond to rising case volumes while promoting legal access.").

106. The many critical commentaries on the two Supreme Court decisions include Carrington, *supra* note 90; Gilles, *The Day Doctrine Died*, *supra* note 99; Burt Neuborne, *Ending Lochner Lite*, 50 HARV. C.R.-C.L. L. REV. 183, 204 n.136 (2015) (arguing mandatory arbitration violates freedom of association). See generally Resnik, *Diffusing Disputes*, *supra* note 99, *passim* (the Supreme Court's arbitration decisions have created an unconstitutional system); see also Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 HARV. L. & POL'Y REV. 329 (2015); Sara E. Costello, *Class Action Waivers Hang in the*

It seems obvious that most people are not even aware that they are limited to one-by-one arbitration should they have the fortitude and want to pursue a claim against their contracting partner.¹⁰⁷ The available evidence shows that arbitration is rarely invoked on an individual basis.¹⁰⁸ Almost no consumer, employee, or small business has the ability, training, or resources to navigate the arbitration process effectively.¹⁰⁹ It simply is not a meaningful substitute for the possibility of going to a court of limited monetary jurisdiction or vicariously participating in a class action or aggregate arbitration proceeding.¹¹⁰ In the few instances in which individual arbitration is pursued, the claimant typically is opposed by a substantial company represented by a lawyer experienced by prior participation in similar proceedings and an arbitrator who may well have

Balance, 42 LITIG. NEWS, Winter 2017, at 10 (2017); Jack Downing, Note, *An Important Time for the Future of Class Action Waivers and the Power Struggle Between Business and Consumers*, 81 MO. L. REV. 1151 (2016). *But cf.* Michael Hoening & Linda M. Brown, *Arbitration and Class Action Waivers Under Concepcion: Reason and Reasonableness Deflect Strident Attacks*, 68 ARK. L. REV. 669, 670 (2015) (“There are several cogent reasons for the continued vitality of class action waivers.”).

107. See CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTIONS ACT § 1.4.2, at 11 (Mar. 2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [hereinafter ARBITRATION STUDY: REPORT TO CONGRESS] (finding that consumers are generally unaware of whether their credit card contracts include arbitration clauses) [<https://perma.cc/QTMA-33JD>].

108. *Id.* § 7.3, at 8 (describing the infrequency of individual consumer-initiated arbitration claims in the credit market); see also Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUDS. 1 (2011).

109. The assertions in the Supreme Court’s majority opinions in these cases that arbitration is more effective, cheaper, faster, and less burdensome than litigation are subject to doubt given the absence of empiric proof to that effect and the lack of the metrics needed to make the comparison. See Andrea Cann Chandrasekher & David Horton, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57 (2015); Resnik, *Diffusing Disputes*, *supra* note 99, at 2812–14 (“[T]he number of documented consumer arbitrations is startlingly small.”). Some commentators, however, argue that arbitration is preferable to the class action. See, e.g., Alan S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration: What Does the Future Hold After Concepcion?*, 8 J. BUS. & TECH. L. 345 (2013).

110. This was the conclusion of the Consumer Financial Protection Bureau in its arbitration report. See ARBITRATION STUDY: REPORT TO CONGRESS, *supra* note 107, § 1.4.3, at 11.

an economic interest to favor repeat players.¹¹¹ Moreover, lawyers frequently are unwilling to undertake arbitration claims, especially on an individual basis. In short, the picture is so discouraging that people overwhelmingly decide not to pursue their claims despite their potential merits.

Two things should be mentioned that somewhat ameliorate the effects of *Concepcion* and *Italian Colors*. First, in certain contexts a very significant percentage of mandatory, no-aggregation arbitration clauses have a carve-out that allows the consumer to go to a small claims court.¹¹² They generally are thought to be consumer friendly. Many of those courts, however, do not have class action or aggregate procedures, and some are not empowered to grant equitable relief to stop a practice found offensive. Second, both the American Arbitration Association and the Judicial Arbitration and Mediation Service (“JAMS”), the two most significant providers of arbitrator services, have protocols assuring a modicum of procedural regularity.¹¹³

Although there initially was some movement in Congress to overturn the Supreme Court’s decisions by legislation,¹¹⁴ that movement has become extremely unlikely given the outcome of the 2016 presidential and congressional elections. Similarly, the young Federal Consumer Financial Protection Bureau (“CFPB”),¹¹⁵ which was created as a watchdog agency

111. Sometimes, the deck appears stacked against the claimant. See Jessica Silver-Greenberg & Michael Corkery, *Beware of the Fine Print Part II, in Arbitration, a ‘Privatization of the Justice System’*, N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?_r=0 (part of a three-part series critical of arbitration clauses in consumer contracts) [<https://perma.cc/E5A7-2Q8P>].

112. See ARBITRATION STUDY: REPORT TO CONGRESS, *supra* note 107, § 1.4.1, at 10.

113. See, e.g., AM. ARB. ASS’N, CONSUMER DUE PROCESS PROTOCOL (1980); JAMS POLICY ON CONSUMER ARBITRATIONS PURSUANT TO PRE-DISPUTE CLAUSES MINIMUM STANDARDS OF PROCEDURAL FAIRNESS (2009), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Stds-2009.pdf [<https://perma.cc/X78F-YC4Z>].

114. E.g., Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 2929 (2011); Consumer Mobile Fairness Act of 2011, S. 1652, 112th Cong. § 22 (2011). Neither bill got out of committee. The current bill is the Arbitration Fairness Act of 2017, S. 537, 115th Cong. § 402 (2017) (invalidating pre-dispute arbitration agreements in the employment, consumer, antitrust, and civil rights contexts).

115. Consumer Financial Protection Act of 2010, § 1028, 12 U.S.C. § 5518 (2012). The Bureau issued a report based on an extensive study that is extremely critical of various arbitration clause abuses. ARBITRATION STUDY: REPORT TO CONGRESS, *supra* note 107, § 1128(a). See generally Nicholas M. Engel, Comment,

following the mortgage crisis during the last decade and seemed so promising to consumer advocates a short time ago, has not been able to secure the effectiveness of its recent arbitration rule that would have effectively eliminated the application of *Concepcion* and *Italian Colors* in an array of important consumer contexts.¹¹⁶ Immediately after the rule was promulgated by the CFPB, the business community led by the Chamber of Commerce attacked it in Congress, which has the statutory power to reject administrative agency rulemaking.¹¹⁷ First the House of Representatives voted against the rule along partisan lines without any meaningful deliberation.¹¹⁸ Then, after months of intense lobbying and a war of words involving a large number of interested parties, the Senate also rejected it.¹¹⁹ Thus, the arbitration rule will not go into effect.¹²⁰ This represents a major

On Waiving Class Action Waivers: A Critique and Defense of the Consumer Financial Protection Bureau's Proposed Regulations, 89 TEMP. L. REV. 231 (2016).

116. 12 C.F.R. § 1040 (2017). The rule was issued on July 10, 2017 and would have gone into effect in 2018. The Chamber of Commerce and some members of Congress immediately called for the rule to be rejected by Congress. See Jessica Silver-Greenberg & Michael Corkery, *Rule Could Let Consumers Sue Financial Firms*, N.Y. TIMES, July 12, 2017, p. 1, col. 6, <https://www.nytimes.com/2017/07/10/business/dealbook/class-action-lawsuits-finance-banks.html> [<https://perma.cc/SL25-6FRH>].

117. Congressional Review Act, 5 U.S.C. §§ 801–808.

118. See, e.g., Michael Macagnone, *House to Vote to Overturn CFPB Arbitration Rule*, LAW360 (July 24, 2017), <https://www.law360.com/articles/947461/house-to-vote-to-overturn-cfpb-arbitration-rule> [<https://perma.cc/6UWU-BSNW>]; Yuka Hayashi, *House Votes to Repeal CFPB's Arbitration Rule*, WALL ST. J. (July 25, 2017), <https://www.wsj.com/articles/house-votes-to-repeal-cfpbs-arbitration-rule-1501017889?mg=prod/accounts-wsj> [<https://perma.cc/U3SM-82CZ>].

119. With two exceptions, the Senators voted along party lines and divided 50 to 50. That tie enabled Vice President Pence to cast the deciding vote to reject the CFPB's rule. It is impossible to know what avenues consumer interests may pursue regarding arbitration clauses in the future. In addition to the challenge in Congress, major business groups brought lawsuits in federal court attacking the constitutionality of the rule. See *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016); *Chamber of Commerce of the United States of America v. Consumer Fin. Prot. Bureau*, Case No. 3:17-cv-02670 (N.D. Tex. Sept. 29, 2017). A day after President Trump officially nullified the CFPB's work product, these actions were voluntarily dismissed.

120. Had the rule gone into effect it arguably would have represented a “congressional command” that would have overridden the judicial construction of the Arbitration Act, thereby limiting the application of *Concepcion* and *Italian Colors* in important consumer contexts. See *Am. Express v. Italian Colors Rest.*, 570 U.S. 228, 233–34 (2013); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98, 101–02 (2012); see also the cases cited *infra* note 125.

defeat for the CFPB and a corresponding victory for the business community. Beyond the loss of the arbitration rule fight, the very existence, or at least the leadership and direction of the Bureau, undoubtedly will change.¹²¹ Such is the tenor of the times in the United States.

There are possibilities for limiting the application of some aspects of the arbitration decisions, however. The Supreme Court has granted certiorari¹²² and heard argument in a consolidated trio of cases that may determine whether *Concepcion* and *Italian Colors* apply to employment contracts or whether bans on aggregate litigation and group arbitration in that context are unenforceable because they are inconsistent with the policies and procedures of the National Labor Relations Act.¹²³ Other

121. Plans have been underway for some time to circumscribe the CFPB's scope of operation, The Editorial Board, *Hands Off the Consumer Finance Bureau*, N.Y. TIMES, Feb. 10, 2017, p. A14, col. 1. Richard Cordray, the consumer-oriented director of the Bureau, was appointed by President Obama. He resigned shortly after Congress rejected the arbitration rule, months before the expiration of his five year Term. President Trump has appointed a much more business-friendly successor. See Stacey Cowley & Jessica Silver-Greenberg, *Richard Cordray's Exit From Consumer Bureau Gives Trump an Opening*, N.Y. TIMES (Nov. 15, 2017), <https://www.nytimes.com/2017/11/15/business/cordray-consumer-protection.html> [<https://perma.cc/LW8J-N8P3>]. See generally Ronald L. Rubin, *Cordray's Choice, To Save the Consumer Financial Protection Bureau, its Director Must Resign*, NAT'L REV. (March 17, 2017), <http://www.nationalreview.com/article/445758/richard-cordray-consumer-financial-protection-bureau-director-must-resign> (arguing that the CFPB's Director's partisanship encourages the Republican Party to dismantle the CFPB, and perhaps the way to save it is to change leadership) [<https://perma.cc/Y5WF-HKFX>].

122. *Ernst & Young v. Morris*, 137 S. Ct. 909 (2017), *cert. granted*, 137 S. Ct. 809 (2017). The courts of appeal are divided on this issue. Compare *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016) (determining that a concerted action waiver violates the NLRA), and *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017) (determining that an agreement barring collective arbitration violates the NLRA), with *In re LogistiCare Solutions, Inc. v. NLRB*, 866 F.3d 715 (5th Cir. 2017); *Murphy Oil U.S.A., Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017) (enforcing an arbitration clause); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (reversing the NLRB's decision invalidating a class action waiver); and *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) (enforcing a class action waiver). See Costello, *supra* note 106 (discussing the federal circuit court split on the validity of class action waiver provisions and the implications of that division).

123. National Labor Relations Act, Pub. L. No. 82-189, 65 Stat. 601 (codified at 29 U.S.C. §§ 151–169 (2012)). Courts occasionally have declined to enforce arbitration clauses when the process suffered from structural or procedural

efforts by certain federal agencies, such as the regulation of the Department of Health and Human Services (“HHS”) regarding nursing homes (which is also under attack),¹²⁴ to limit mandatory no-class arbitration clauses in contracts within their jurisdiction or to use their administrative enforcement powers to secure victim-specific relief when there is a statutory basis for doing so¹²⁵ may prove more successful—again, if they survive. Unfortunately, at best these provisions only provide a piecemeal and limited amelioration of the effect of the two Supreme Court decisions.

There also is the possibility that state attorneys general, using their *parens patriae* power, or private individuals acting on behalf of the state, might bring suit under the rubric of protecting the community’s health,

infirmities. *See, e.g.,* *Move, Inc. v. Citigroup Mkts, Inc.*, 840 F.3d 1152 (9th Cir. 2016) (finding the arbitrator misrepresented that he was a licensed attorney); *Hooters of Am. v. Phillips*, 173 F.3d 933, 939 (4th Cir. 1999) (finding a failure to provide “an impartial decision maker”). Judicial scrutiny of such matters may not be as intense as it once was, however.

124. 42 C.F.R. § 483.70(n)(1)(2), at 524 (2016) (barring the entry into pre-dispute arbitration agreements or requesting that a patient sign one as a condition of admission to a facility). The regulation has been challenged in courts in a number of states by nursing home groups, some of which have succeeded in securing an injunction against it taking effect. The Center for Medicare Services and the Justice Department were working on appeals at the end of President Obama’s administration, but the current Department apparently has abandoned that effort, leaving an injunction in force. In a parallel case, *Am. Health Care Ass’n v. Burwell*, 217 F. Supp. 3d 921 (N.D. Miss. 2017), against the Secretary of Health and Human Services and the Center for Medicare and Medicaid Services, to declare the rule barring entering into pre-dispute arbitration agreements unlawful, the district court granted a preliminary injunction prohibiting the rule’s enforcement. An appeal was dismissed by Thomas Price, who was then President Trump’s appointee as Secretary of HHS. *See generally* Robert Pear, *Trump Moves to Impede Consumer Lawsuits Against Nursing Homes*, N.Y. TIMES (Aug. 18, 2017), https://www.nytimes.com/2017/08/18/us/politics/trump-impedes-consumer-lawsuits-against-nursing-homes-deregulation.html?_r=0 [<https://perma.cc/5SNE-XY93>].

125. *See* *Equal Emp’t Opportunity Comm’n v. Waffle House, Inc.*, 534 U.S. 279 (2002) (determining that an arbitration clause does not prevent the EEOC from seeking back pay, reinstatement, and damages in an ADA enforcement action). Courts also have recognized that waivers are unenforceable when there is a “contrary congressional command.” *See* *Walthour v. Chipio Windshield Repair, L.L.C.*, 745 F.3d 1326, 1330–31 (11th Cir. 2014) (concluding that no such “command” can be found in the Fair Labor Standards Act); *see also* *Smallwood v. Allied Van Lines, Inc.*, 660 F.3d 1115 (9th Cir. 2011) (holding foreign arbitration clauses are precluded by the Carmack Amendment).

welfare, and safety.¹²⁶ Perhaps the most dramatic illustration of this approach is the group of parallel actions by various state attorneys general against the tobacco industry seeking reimbursement for the states' increased medical expenses resulting from treating ailments caused by smoking.¹²⁷ That collective approach led to a settlement with all the states of over \$200 billion.¹²⁸

Neither the state nor a third party acting for the state is bound by an arbitration clause because they are not parties to the contract.¹²⁹ And

126. The state must have its own interest in the litigation that is independent from the claims of the individual citizens. *See, e.g., Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938); *Georgia ex rel. Hart v. Tenn. Copper Co.*, 206 U.S. 230 (1907). For example, the California's Private Attorneys General Act of 2004 empowers an employee to bring an action on behalf of current or former employees to recover civil penalties for Labor Code violations. CAL. LABOR CODE §§ 2698–2699.5 (West 2017). The California Supreme Court has ruled that an action under the statute is not a class action. *See Iskanian v. CLS Transp. L.A., L.L.C.*, 327 P.3d 129 (Cal. 2014).

127. *See Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997) (concluding that the state had authority to bring a common-law *parens patriae* action without statutory authority). *See generally* Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859 (2000).

128. Ten states have settled their suits against Volkswagen for environmental damage caused by the company's cheating on the emission control rules established by the states. The settlement amount is reported to be \$157 million. *See* Bill Vlasic, *Volkswagen to Pay 10 States Over Environmental Claims*, N.Y. TIMES, March 30, 2017, at p. B3, col. 1.

129. *Parens Patriae* actions have been used in a variety of contexts, including consumer claims and mass torts. *E.g., Alfred L. Snapp & Sons v. Puerto Rico*, 458 U.S. 592 (1982) (determining that Puerto Rico could proceed in *parens patriae* to protect its economic interests from violations of federal law); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972) (allowing the state to sue for antitrust violations in its proprietary capacity and on the basis of *parens patriae* on behalf of its citizens); *Missouri v. Illinois*, 200 U.S. 496 (1901) (allowing suit based on a nuisance theory). *See generally* Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919 (2000); Gilles & Friedman, *supra* note 102, at 658–75 (arguing that state attorneys general should take leadership positions using private lawyers when needed); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012) (discussing provisions empowering actions to recover money on behalf of citizens); Margaret S. Thomas, *Parens Patriae and the States' Historic Police Power*, 69 SMUL. REV. 759 (2016) (concluding that *parens patriae* litigation has its roots in the states' police power).

because a *parens patriae* action is not a class action, the state has the additional advantages of not being subject to the often cumbersome prerequisites and procedures of Rule 23 and CAFA's federalization of most class and mass actions.¹³⁰ But the *parens patriae* possibility depends on whether a particular state has given its attorney general or private individuals acting on behalf of the state standing to bring such an action, whether the political climate in that state favors or discourages *parens patriae* actions and whether the attorney general has sufficient internal resources or is willing to retain experienced private attorneys to prosecute the action, as was done in the tobacco litigation. *Parens patriae* actions, however, often present other procedural difficulties and concerns.¹³¹ Moreover, any defense interests that might be negatively affected by such an action most certainly would lobby against its institution.

There is yet another departure from the courts worth noting. Following certain calamities, special private and governmentally sanctioned dispute resolution mechanisms have been established that in some respects are thought more efficient, cheaper, and less formal than the judicial process

130. See *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161 (2014). This case is extensively analyzed in Vairo, *supra* note 63, at 520–26. Also, these actions probably would not be affected by the possible enactment of the Fairness in Class Action Litigation Act described in note 66, *supra*.

131. Because it is not a class action, a *parens patriae* action would not be governed by the protective provisions prescribed by Rule 23, particularly those applicable to Rule 23(b)(3) actions, most notably a court determination of adequacy of representation, notice to all those potentially affected by the action, and the right to opt out. See *Equal Emp't Opportunity Comm'n v. Bass Pro Outdoor World, L.L.C.*, 826 F.3d 791 (5th Cir. 2016). The absence of these and other procedural protections raises concerns about such matters as the quality of the attorney general's representation of the often divergent interests of the various people and entities in the state, the possibility of political or ideological conflicts of interest, the fairness, reasonableness, and adequacy of any settlement agreed to by the attorney general or her chosen surrogate, the propriety of any attorney's fee arrangement or award if private counsel is employed, and whether every citizen or resident of the state is bound by the judgment or is free to bring an individual (or perhaps a class) action after the attorney general's action is resolved. See Lemos, *supra* note 129 (discussing these and other concerns about *parens patriae* actions). Problems also might arise when one or more private actions are proceeding at the same time as one or more *parens patriae* actions. See, e.g., *California v. IntelliGender, L.L.C.*, 771 F.3d 1169 (9th Cir. 2014) (determining *parens patriae* proceeding banned by a prior settlement of class actions brought on behalf of California consumers). Perhaps *parens patriae* actions should be judicially treated as quasi-class actions. See discussion *infra* notes 155–162. At a minimum, the importance of judicial and citizen oversight of the proceeding and its aftermath should be recognized and assured by the court.

for compensating victims. Two exemplars of this approach are the statutory arrangement for claims arising out of the 9/11 terrorist attack on the Twin Towers in New York City¹³² and the fund established by British Petroleum following the Deepwater Horizon oil spill in the Gulf of Mexico.¹³³ Public and private arrangements like these replace the public court system and do not have most of the indicia of traditional civil litigation. The merits of these ad hoc mechanisms may be considerable, but they offer little to no transparency or assurance that all claimants will be treated equally and do not employ procedural and evidentiary rules or appellate judicial review comparable to those available in the public courts. But these concerns may just be academic quibbles.

Specialist Kenneth R. Feinberg's "rough justice" approach for the private resolution of related claims stands out.¹³⁴ Of course, thus far there is only one Ken Feinberg who has a special genius and boundless energy for handling matters of this type.¹³⁵ Realistically, these arrangements are

132. Air Transportation Safety and Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (codified at 49 U.S.C. § 40101 (2012)). See generally LLOYD DIXON & RACHEL KAGANOFF STERN, RAND INSTITUTE FOR CIVIL JUSTICE, COMPENSATION FOR LOSSES FROM THE 9/11 ATTACKS (2004), <http://www.rand.org/publications/MG/MG264/> [<https://perma.cc/M7WB-4VQB>]; Peter Schuck, *Special Dispensation*, AM. LAW., June 1, 2004, at 69-71; Anthony J. Sebok, *What's Law Got to Do With It? Designing Compensation Schemes in the Shadow of the Tort System*, 53 DEPAUL L. REV. 501, 517 (2003).

133. *In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014), cert. denied, 135 S. Ct. 401 (2014). See generally John S. Backer, Jr., *The BP Gulf Oil Spill Class Settlement: Redistributive "Justice"?*, 19 TEX. REV. L. & POL'Y 287 (2015) (questioning the settlement); Catherine M. Sharkey, *The BP Oil Spill Settlement, Classwide Punitive Damages, and Societal Deterrence*, 64 DEPAUL L. REV. 681 (2015) (discussing criticisms of the settlement).

134. In addition to 9/11 and BP, Ken has been appointed to administer such matters as the Boston Marathon bombing, the Penn State sex-abuse scandal, and the shootings in the Orlando, Florida Pulse nightclub. In Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397 (2014), the authors demonstrate that despite the lower transaction costs, speed, and informality achieved by the Gulf Coast Claims Facility established by BP, the payments made pursuant to the settlement of the class action that replaced it were measurably higher. The authors theorize that for various reasons BP secured a greater degree of finality from the class action and was willing to pay a "peace premium" for a global resolution. They conclude that both sides did better in the public system. *Id.* at 412; see also D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1192-98 (2013).

135. Another gifted practitioner of this art is Professor Francis E. McGovern of Duke Law School, who has served as a special master in several high-profile disputes, including asbestos and hazardous waste cleanup cases, and various mass

one-off departures from the public court system that will be created only in a limited number of special circumstances. They are motivated by an understandable desire for consistency in result, expeditious handling of claims arising from particular events that cry out for special treatment, procedural informality, and claimant privacy. These are things dispersed individual lawsuits cannot guarantee. Although these private arrangements are infrequent and have a contained scope, they represent another manifestation of the “outsourcing” of the resolution of civil claims that normally would fall within the ambit of the public courts and at some level reflect a lack of confidence in the judicial process.¹³⁶

III. RELATED RELEVANT PROCEDURAL PHENOMENA

To appraise the current state of civil litigation in the United States, particularly in the federal courts, it is important to consider other procedural phenomena that neither Judge Rubin nor I could have foreseen when we were young professionals, but today are major aspects of the civil litigation panorama. What follows focuses on two of them—multidistrict litigation and case management. Both are integrally related to the procedural developments discussed earlier.

A. *Multidistrict Litigation*

The first of these had its genesis in 1968 when Congress created the Judicial Panel on Multidistrict Litigation,¹³⁷ a special tribunal of seven federal judges appointed by the Chief Justice empowered to transfer all cases in the federal courts “involving one or more common questions of

tort matters, such as the Station nightclub fire in West Warwick, Rhode Island. *See Faculty Profile, Professor Francis E. McGovern, DUKE*, <https://law.duke.edu/fac/mcgovern/> [<https://perma.cc/SYH7-F84W>].

136. The ongoing quest for ways of resolving mass claims without endless litigation in the courts includes resort to aggregation through bankruptcy. *See* 11 U.S.C. § 524(g). *See generally* Troy A. McKenzie, *Bankruptcy and the Future of Aggregate Litigation: The Past as Prologue?*, 90 WASH. U. L. REV. 839 (2013).

137. 28 U.S.C. § 1407. The background that led to the enactment of the statute is set forth in Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621 (1964). *See generally* 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS* §§ 3861–3868 (4th ed. 2013); Andrew D. Bradt, “*A Radical Proposal*”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017); Jaime Dodge, *Facilitative Judging: Organizational Design in Mass Multidistrict Litigation*, 64 EMORY L.J. 329 (2014).

fact” to a single district judge “for coordinated or consolidated pretrial proceedings.” The statute was an early response to the emerging problem of handling what was then called “The Big Case.”

The consolidation of dispersed but related cases for group pretrial processing under the governance of a single judge has become an increasingly ubiquitous feature of federal litigation and now has counterparts in a number of states.¹³⁸ It is a reflection of the quest for efficiency, economy, and consistent treatment of related claims. Multi-district-litigation (“MDL”) practice under the statute, which has now been with us for 50 years, has become transformative. Indeed, it is fair to say it has become a mega-phenomenon. Excluding pro se cases, it is estimated that close to 40% of the civil cases in the federal courts are part of an MDL.¹³⁹ That statistic is truly stunning. Because class certification has become so difficult to secure and the process of seeking it freighted with so many burdens,¹⁴⁰ there has been a pronounced shift by many lawyers to the MDL alternative for aggregating claims. As a result, the class action has been partially absorbed and replaced by MDL practice; it is not unusual for one or more class actions to be embedded in an MDL.

The transferee judge has enormous control over the consolidated cases even though the statute requires, as the Supreme Court has held,¹⁴¹ that the

138. Among the state provisions most analogous to the federal statute are CAL. CIV. PROC. CODE §§ 404–404.9 (West 2017) (authorizing coordination of cases sharing a common question of fact or law if it will promote the ends of justice); *see* 22 N.Y. COMP. CODES R. & REGS. tit. 22, §§ 202.69–202.70(a)-(b) (enumerating the jurisdiction of the Commercial Division of the Supreme Court of the State of New York over 12 types of business actions); TEX. GOVT. CODE ANN. § 74.161 (West 2017); TEX. RULES JUD. ADMIN. r. 13 (coordination of cases having one or more common questions).

139. *See* DUKE LAW CTR. FOR JUDICIAL STUDIES, MDL STANDARDS AND BEST PRACTICES x n.2 (2014), https://law.duke.edu/sites/default/files/centers/judicial_studies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf (“In 2014, these MDL cases make up 36% of the civil case load.”) [<https://perma.cc/PK9L-BTBG>]; Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017) [hereinafter Burch, *Monopolies*] (noting that from 2002 to 2015 MDL proceedings “leapt from sixteen to thirty-nine percent” of the civil caseload). There was a decline in grants of consolidation petitions by the Panel in 2016. *See* U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., CALENDAR STATISTICS JANUARY THROUGH DECEMBER 2016, http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2016.pdf (2017) [<https://perma.cc/BG4Y-YEZK>].

140. *See* discussion *supra* Part II.C.

141. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (concluding that the text of the MDL statute requires retransfer to the

individual litigation units must be returned to the Panel and then sent to the courts in which they originated when pretrial proceedings have been concluded. As a practical matter, however, the overwhelming majority of transferred cases are resolved by settlement, a pretrial dispositive motion before retransfer, or remain in place by consent, further empowering the transferee judge and the lawyers who control the MDL.¹⁴² “Work outs” are typically achieved, sometimes following carefully selected bellwether trials, such as in the *In re Vioxx Products Liability Litigation* (pharmaceutical)¹⁴³ and *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liability Litigation* (implant)¹⁴⁴ matters. In the *In re Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation* (emissions),¹⁴⁵ two significant settlements were

Panel). Legislative attempts to overrule *Lexecon* to empower the transferee judge to retain and adjudicate the cases have failed. *See, e.g.*, Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. (2005); Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001, H.R. 860, 107th Cong. (2001) (the portion of the bill concerning *Lexecon* died in the Senate Judiciary Committee, but the section dealing with mass disasters is now codified in 28 U.S.C. § 1369). *See generally* Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward A Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245 (2008) [hereinafter Marcus, *Cure-All for an Era of Dispersed Litigation*].

142. One prominent commentator on MDL litigation estimates “that just 2.9% of cases return to their original districts.” *See* Burch, *Monopolies*, *supra* note 139, at 72. Resolution in the transferee court by a judge who has become steeped in the dispute and its management may well be preferable to dispersing the consolidated individual units to numerous judges who are not familiar with the case or cases being transferred to him or her, which would subject them to variances in court dockets, delays, rules of procedure, and appellate review. All of these factors are likely to postpone the dispute’s overall resolution and produce significant differences in management and result. On the other hand, collective resolution in the transferee court may be at the expense of the individual autonomy, accuracy, and attention to the variousness of state laws and the circumstances of individual litigants. *See* discussion *infra* notes 151–162 and accompanying text.

143. *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789 (E.D. La. 2007).

144. *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liab. Litig.*, 787 F. Supp. 2d 1358 (J.P.M.L. 2011). The first bellwether trial resulted in a defense verdict; in the second, a jury awarded compensatory and punitive damages totaling approximately \$500 million; the third led to a plaintiffs’ verdict of \$502 million; the second and third verdicts are now in the Court of Appeals for the Fifth Circuit. A fourth bellwether trial is now in progress.

145. *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, and Prods. Liab. Litig.*, 229 F. Supp. 3d 1052 (N.D. Cal. 2017).

efficiently accomplished without any trial through the collaboration of the company, the plaintiffs' steering committee, and the transferee judge.¹⁴⁶

State court actions are not covered by the federal statute, but the global settlement of an MDL proceeding often embraces the parallel state cases, even those that could not have been initiated in a federal court for jurisdictional reasons.¹⁴⁷ Indeed, because defendants typically want to secure maximum preclusion and closure from a settlement, they often are willing to pay a "peace premium" if the settlement truly is global and embraces cases in both the federal and state courts.¹⁴⁸

MDL consolidation often affords individual plaintiffs and class members a forum for asserting claims that otherwise might have near-zero or negative litigation value, would languish indefinitely in various courts around the country, or yield inconsistent results if each claim had to be brought individually in separate federal and state courts. Furthermore, given today's judicial attitudes, most mass and toxic tort matters probably could not be certified as class actions, especially when the class members' rights are governed by the laws of multiple states.¹⁴⁹ Those are all positive attributes of an MDL. But the implicit—and clear—culture of MDL transferee judges and lead counsel on both sides appears to have become the facilitation of settlement—as noted, preferably a global one embracing state cases.¹⁵⁰ Indeed, settlement has become a dominant motif of MDL

146. No trials were held, presumably because liability was conceded. The settlement terms are quite favorable for the class members, in part because the company wants to put the unfortunate affair behind it. In contrast to the progress in this country, proceedings in Germany where Volkswagen clearly is "at home" are barely underway. Germany does not have a class action procedure comparable to Federal Rule 23.

147. See Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 793–98 (2010) (discussing a shift from using class action procedures to multidistrict-litigation procedures to manage and resolve tort litigation).

148. See generally Issacharoff & Rave, *supra* note 134; see also Rave, *supra* note 134, at 1192–98.

149. See *supra* note 58. Judge Rubin recognized at an early date that mass torts were a national—not a local—problem and called for a federal statute governing product and disaster litigation as well as proportionate liability when causation is unclear. Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429 (1986).

150. See generally RICHARD NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* (2007); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011); Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlement*, 46 STAN. L. REV. 1339, 1340 (1994) ("Of-cited figures estimating settlement rates of between 85 and 95 percent are misleading; those figures represent all civil cases that

practice. This is an understandable aspect of today's focus on litigation efficiency and economy and a manifestation of how lawyers and judges often seem to avoid merit determinations.

I am not a troglodyte. I understand that "going to the merits" often is costly and risky. Like most observers I believe settlement usually is desirable, perhaps even to be prayed for. But I doubt it always should be an institutional driver. Remember, even assuming that the MDL process is efficient, reduces inconsistencies in result and treatment, achieves litigation peace, and federal judges apparently enjoy and take professional pride in managing and resolving these behemoths, consolidation does compromise the traditional right of individual plaintiffs to determine when to sue, choose a forum, be represented by a lawyer of his or her choice, and control or meaningfully participate in the process.¹⁵¹

do not go to trial."); Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183 (2008); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177 (2009); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004); David Marcus, *Some Realism About Mass Torts*, 75 U. CHI. L. REV. 1949 (2008); Marcus, *Cure-All for Dispersed Litigation*, *supra* note 141, at 2288–89 (noting the settlement orientation); Francis E. McGovern, *A Model State Mass Tort Settlement Statute*, 80 TUL. L. REV. 1809 (2006); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1111 (2010); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation of a Class Action Is Not Possible*, 82 TUL. L. REV. 2205 (2008); Charles Silver, *Merging Roles: Mass Tort Lawyers as Agents and Trustees*, 31 PEPP. L. REV. 301 (2004); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

151. It has been argued that the understandable preoccupation with the efficiency of aggregation and achieving finality has obscured its negative effects on other systemic values. *E.g.*, Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667 (2013). Also, because multidistrict litigation involving hundreds or thousands of cases often is in the hands of repeat players, principal-agent concerns have been raised about whether the interests of individual clients are being subordinated to the interests of those controlling the litigation. *E.g.*, Burch, *Monopolies*, *supra* note 139 (offering suggestions for restoring competition); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445 (2017); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 117–18, 128 (2015); Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEGAL STUD. 424, 424 (2013); *see also* Abbie R. Gluck, *Unorthodox Civil Procedure: Modern*

Consider the saga of someone with a small but reasonably meritorious grievance—perhaps one under a protective federal or state consumer or products statute—who consults a lawyer in Baton Rouge. Let us assume she is an accomplished practitioner but cannot take the case for economic reasons, a conflict of interest, some other commitment, or a lack of experience in the relevant substantive field. But to help someone who perhaps is a relative, neighbor, past client, or to pursue the public interest, she passes the matter along to an “aggregator,” perhaps a lawyer in or near New Orleans, who is developing an “inventory” of similar cases. When the aggregator brings that “inventory” to a federal court, either as an original action or by removal, it will be consolidated with similar cases and inventories by the Multidistrict Litigation Panel and sent to a transferee judge in a jurisdiction, possibly one (in a galaxy) far, far away. If our Baton Rouge lawyer and New Orleans aggregator are not part of the MDL elite of repeat players, and thus unlikely to be on the Plaintiffs’ Steering Committee, our hypothetical claimant has been consigned to a largely non-transparent distant world in which he and his counsel have little or no voice.¹⁵² It is legitimate to wonder whether, under certain

Multidistrict Litigation’s Place in the Textbook Understandings of Procedure, 165 U. PA. L. REV. 1669 (2017) (analyzing the unique aspects of MDL proceedings based on interviews with 20 judges).

152. There is some evidence that in certain cases there is a possibility of participation by individual class members or MDL claimants or their counsel previously thought not to be feasible. That apparently was and continues to be true in the *NFL Concussions* case, *In re Nat’l Football Players’ Concussion Injury Litig.*, 307 F.R.D. 351 (E.D. Pa. 2015), *aff’d*, 821 F.3d 410 (3d Cir. 2016), for example. See Cabraser & Issacharoff, *supra* note 64 (discussing the emergence of active class member participation). See generally Robert H. Klonoff, Mark Herrmann & Bradley W. Harrison, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727 (2008); Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J.L. SOC. PROBS. 451 (2012). In the *NFL Concussions* case, for example, District Judge Anita Brody held a post-settlement hearing regarding the distribution of benefits that players could attend by way of the Internet, Post-Settlement Hearing, *In re Nat’l Football Players’ Concussion Injury Litig.*, 307 F.R.D. 351 (E.D. Pa. 2015), <http://events7.mediasite.com/Mediasite/Play/8ad6d89e23e3487797b85b34a2f684c31d> [<https://perma.cc/XG28-TWHW>]. The level of participation Cabraser and Issacharoff describe in cases like *NFL Concussions* and *Volkswagen Emissions* probably cannot be realized or be meaningful in small claim class actions and MDL proceedings. But the Internet undoubtedly provides an excellent medium for seeking the participation of people anywhere in the world in anticipated or commenced litigation as in those cases. See generally John Coffee, *The Globalization of Entrepreneurial Litigation: Law, Culture and Incentives*, 165 U.

circumstances, the individual should be permitted to exit the consolidated proceeding as members of Rule 23(b)(3) class actions are permitted to do.¹⁵³ But would that undermine the aggregative value of the MDL procedure?¹⁵⁴

Some academics and practitioners have raised a concern about certain powers transferee judges occasionally assume. For example, in some cases they create what are termed “quasi-class actions,” as in *In re Zyprexa Products Liability Litigation*¹⁵⁵ and *In re World Trade Center Lower Manhattan Disaster Site Litigation*,¹⁵⁶ by asserting control over attorneys’ fees and appraising the quality of the private settlements the parties have

PA. L. REV. 1895 (2017). The same medium is being used for transmitting settlement notices and facilitating aspects of the benefit distribution process. *E.g.*, *In re Online DVD-Rental Antitrust Litig.*, 739 F.3d 934 (9th Cir. 2015).

153. See generally Burch, *Disaggregating*, *supra* note 151, at 681–87 (discussing various advantages of recognizing some right of exit); Roger C. Cramton, *Individualized Justice, Mass Torts, and “Settlement Class Actions”: An Introduction*, 80 CORNELL L. REV. 811, 821–22 (1995) (referring to individuals in aggregate litigation as “kidnapped” riders).

154. The Supreme Court’s denial of personal jurisdiction in *Bristol-Myers*, *supra* notes 26–29, over nonresidents whose claims are not related to the defendant’s in-forum activities raises questions about a transferee court’s ability to adjudicate an MDL’s merits—as opposed to simply managing its pretrial proceedings—absent the parties’ consent with regard to those plaintiffs and defendants who do not have a jurisdictionally sufficient relationship with the transferee forum. It certainly suggests that the consent must be actual and not virtual. See *Armstrong v. LaSalle Bank Nat’l Ass’n*, 552 F.3d 613 (7th Cir. 2009). Some of these issues have been raised in connection with bellwether trials in a mandamus petition in *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liab. Litig.*, 787 F. Supp. 2d 1358 (J.P.M.L. 2011). Since the decision in *Bristol-Myers* is constitutionally based, it is questionable whether even amending the MDL statute to authorize the transferee court’s adjudication of the merits, as has been periodically proposed, see *supra* note 141, could provide personal jurisdiction over the unaffiliated participants, although the argument for that result might be stronger with regard to those plaintiffs who file directly in the transferee forum or if the remark in the *Bristol-Myers* opinion about the possibility that a different constitutional personal jurisdiction standard exists for the federal courts—or at least in federal question cases—shows signs of vitality. See *supra* note 28 and accompanying text.

155. *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006); see also *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).

156. *In re World Trade Center Lower Manhattan Disaster Site Litig.*, 758 F.3d 202 (2d Cir. 2014).

reached. The Multidistrict Litigation Act is silent on these matters. Moreover, these activities have been undertaken without explicit provision for protections comparable to those available in some or all Rule 23 class actions—adequacy of representation, notice, predominance, superiority, opt-out, and judicial approval of class counsel, attorneys’ fees, and settlement. None of these are provided for by the Act.

Treating an MDL as a quasi-class action results in heightened control of the litigation by the transferee judge and diminished participation by those lawyers who are not among the lead counsel. Thus, some have wondered where the judicial authority to do it comes from.¹⁵⁷ Perhaps it is a byproduct of a federal judge’s inherent or managerial power to appoint and compensate lead counsel and to protect the absentee claimants.¹⁵⁸ Or perhaps it simply reflects some notion of necessity or a variation on the ancient equity maxim that regards “as done that which ought to be done.”¹⁵⁹ Critics assert, however, that there is no judicial authority to second guess, let alone veto, what private parties have chosen to do in connection with a non-class action settlement.¹⁶⁰

Judicial involvement may well be desirable, however. Given the high settlement rate in class actions and MDL proceedings, there always have been concerns about whether the plaintiffs’ lead counsel actually negotiates for the best terms for their clients—particularly the absent

157. See generally Allan Erbsen, *From “Predominance” to “Resolvability”*: A New Approach to Regulating Class Actions, 58 VAND. L. REV. 995, 1014–23 (2005) (rethinking the principles that animate class actions and rejecting the predominance test); 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) [hereinafter Mullenix, *Dubious Doctrines*] (arguing that quasi-class actions do not resolve claims by giving full consideration to the interests of individual injured parties); Silver & Miller, *supra* note 150 (proposing an alternative method of MDL management to allow lawyers to design governance structures).

158. See, e.g., *In re Air Crash Disaster at Fla. Everglades on December 29, 1972*, 549 F.2d 1006 (5th Cir. 1977); *In re Vioxx Prods. Liab. Litig.*, 802 F. Supp. 2d 740 (E.D. La. 2011); *In re Genetically Modified Rice Litig.*, 2010 WL 716190, at *4 (E.D. Mo. Feb 24, 2010).

159. LON L. FULLER, *LEGAL FICTIONS* 33 (Stanford Univ. Press 1967).

160. See generally Erichson, *supra* note 157 (arguing that the parties have not consented to judicial intervention); Mullenix, *Dubious Doctrines*, *supra* note 157 (arguing that quasi-class actions do not sufficiently consider the interests of individual injured parties); Silver & Miller, *supra* note 150 (proposing an alternative method of MDL management to allow lawyers to design governance structures).

claimants.¹⁶¹ To what extent might they, perhaps unintentionally, become distracted by self-interest? That could take the form of plaintiffs' lead counsel foregoing pressing for additional monies or other remedies that could benefit the plaintiffs in exchange for the defendants' cooperation regarding the attorneys' fee that ultimately will be sought from the court. Thus, it is important that the presiding judge in class and other aggregated proceedings carefully scrutinize the behavior and performance of attorneys when they petition for fees and cost reimbursement, as well as the terms of every settlement, particularly regarding appraising the true value of what the claimants will receive. Unfortunately, in some cases certain settlement elements have been found to be of little or no value.¹⁶²

B. Judicial Management

MDL practice exemplifies another transformation in our civil justice system: the birth, maturation, and pervasiveness of judicial management. This is one of the most significant procedural developments that has occurred during my professional life. It is one that has dramatically altered

161. See Burch, *Monopolies*, *supra* note 139, at 74–75 (“[S]elf-interest can take over if left unchecked, and no checks exist.”); Erickson, *supra* note 157; Christopher B. Mueller, *Taking a Second Look at MDL Product Liability Settlements: Somebody Needs to Do It*, 65 KAN. L. REV. 531 (2017) (questioning the legitimacy and processing of these settlements and suggesting the need for collateral review); Mullenix, *Dubious Doctrines*, *supra* note 157. See generally Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 82 NOTRE DAME L. REV. 859 (2016) (discussing the signs of a settlement that harms claimants and benefits their counsel and defendants); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337; Silver & Miller, *supra* note 150, at 134 (suggesting that settlements should simply refer the question of fees to the court); Margaret S. Williams, Emery G. Lee III & Catherine R. Borden, *Repeat Players in Federal Multidistrict Litigation*, 5 J. TORT L. 141 (2012) (discussing the impact of generalist versus specialist plaintiff attorneys on the operation of multidistrict litigation proceedings).

162. See, e.g., *In re: Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551 (7th Cir. 2017) (characterizing the settlement as “worthless”); see discussion *infra* notes 180–181; *Pearson v. NBTY*, 772 F.3d 778 (7th Cir. 2014) (finding a short-term product labelling change to be of no value to the class); *Dennis v. Kellogg Corp.*, 697 F.3d 858 (9th Cir. 2012) (expressing concern that “self-interest” influenced the negotiation’s outcome). See generally Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015) (arguing fees should be awarded based on what benefits the lead lawyers actually achieve for the plaintiffs).

the respective roles of judges and lawyers in civil litigation. Management had its genesis in the unique and effective handling of a massive cluster of related antitrust cases by a group of federal judges specially appointed by Chief Justice Earl Warren in the 1960s. That resulted in attention being focused on the “problem” of what was then called “The Big Case” and led to the 1968 enactment of the Multidistrict Litigation Act, the publication of the quasi-official Manual for Complex Litigation, the explicit validation of judicial management in the complete revision of Federal Rule 16 in 1983, and the simultaneous expansion of judicial control over the discovery process.

Perhaps a *mea culpa* is in order. I was a co-conspirator in these developments because I worked with the judicial authors of the Manual, drafted part of it, and was the Reporter for the Federal Rules Advisory Committee that proposed the 1983 Federal Rule amendments that validated and encouraged judicial management. So, it was on my watch that Rule 16 was transformed from a simplistic and largely useless eve-of-trial pretrial conference into an elaborate management menu envisioning multiple pretrial conferences and orders—replete with sanctions for noncompliance with its dictates.¹⁶³ And it was on my watch that the core discovery rule, Federal Rule 26, was amended to promote the judicial monitoring of discovery to avoid it becoming redundant or disproportionate.¹⁶⁴

Other than a few experiments after the Second World War, judicial management prior to these developments was virtually non-existent. It was not thought to be a proper “judicial” function to be a participant in the

163. See generally 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 1521–1531 (3d ed. 2010). Rule 16 was amended again in 1993 to enhance certain aspects of judicial management and to refer—and thereby encourage resort to—alternative dispute resolution. A number of states have parallel provisions. See, e.g., CAL. CIV. PROC. CODE § 575 (West 2017); IOWA R. CIV. P. 1.602 (2017); MINN. R. CIV. P. 1601 (2017).

164. See 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2008.1 (3d ed. 2010). My contemporary thoughts about the 1983 amendments are summarized in ARTHUR R. MILLER, FED. JUDICIAL CTR., THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY (Education and Training Series 1984). I testified against the 2015 amendment to Rule 26 regarding discovery proportionality because in my view it transformed the 1983 recognition of judicial discretion to limit discovery if it proved to be excessive into something that can be applied as a premature precondition on discovery, which I hope does not come to pass. Statement of Arthur R. Miller Before the Advisory Committee on Civil Rules, Phoenix, Ariz. (Jan. 9, 2014), http://www.uscourts.gov/sites/default/files/fr_import/ST2015-01.pdf [<https://perma.cc/9T3P-HZWN>]. See *supra* note 78.

processing of a case rather than simply acting as an umpire regarding the litigation decisions made by the attorneys. Many district judges even believed that involvement in the settlement process was particularly inappropriate. Indeed, when I appeared at various judicial conferences and training sessions to discuss management and the import of the 1983 Federal Rule amendments, I encountered a fair amount of hostility to the concept from many judges. That change in their job description was extremely controversial.¹⁶⁵ Today it is taken for granted that management is part of what judges do and lawyers treat judicial involvement and participation as quite normative.

It probably is true that the contemporary commitment to judicial management, especially when linked to the increased importance of summary judgment, heightened settlement pressures, and the omnipresence of highly complex multi-party, multi-claim cases, promotes efficiency and case disposition—laudable goals in the abstract and certainly the motivation for much of what has happened in recent decades. But one might ask: is the quest for “efficiency” through management, “gatekeeping,” and promoting pretrial disposition being achieved at the expense of other values long thought central to the goals of our civil justice system? Should management and gatekeeping trump and replace merit adjudication? To what extent has management reordered the relationship between the court and counsel, particularly in class actions and MDL proceedings, perhaps eroding elements of the “adversary” system? And if that is true, is that good or bad one might ask. Are many of our federal and state judges increasingly becoming managers rather than adjudicators? Judge Higginbotham of the Fifth Circuit Court of Appeals has expressed concern that our courts have taken on the trappings of administrative

165. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378–80 (1982). Professor Resnik expressed concern about the potential for judges to abuse their discretionary power under a case management regime. Other scholars believe the rewards of management outweigh its risks. See Steven Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984) (critiquing Professor Resnik’s concerns and arguing that judicial management is beneficial). See generally 6A WRIGHT, MILLER & KANE, *supra* note 163; Miller, *Pretrial Rush to Judgment*, *supra* note 82, at 1003–07; Miller, *Double Play on the Federal Rules*, *supra* note 34, at 54–57. Congress joined the management bandwagon when it enacted the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471–482 (2012), now largely sunset, which called upon each district court to develop an expense and delay plan that included considering using “litigation management.”

agencies and wonders how the activities of agencies can be distinguished from those of courts.¹⁶⁶

IV. WHY HAS ALL OF THIS HAPPENED?

Many reasons are advanced. The cost, delay, and risks of contemporary litigation are popular explanations.¹⁶⁷ These concerns certainly make the pressure for enhancing the efficiency and economy of litigation and the desire to separate and terminate litigation chaff as early as possible understandable. But those reasonable objectives do not necessarily explain or justify all that has transpired. Two related explanations that reflect the political and social realities of the times we live in suggest themselves. First, I do not think it is unfair to say that a number of the Justices on the current Supreme Court as well as other judges have a predilection, perhaps subliminal, that favors business and governmental interests.¹⁶⁸ A number

166. Patrick Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745 (2010); *see also* the references *infra* note 169.

167. There is a fair amount of data indicating that the civil system is performing considerably better than the negative suppose “common wisdom” suggests. *See generally* STEVEN P. CROWLEY, CIVIL JUSTICE RECONSIDERED 93–116 (2017); Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085 (2012) [hereinafter Reda, *Cost-and-Delay Narrative*]. The available empirical evidence, for example, suggests that litigation costs are tied to litigation stakes and may not be exorbitant when viewed from that perspective. *See* Miller, *Double Play on the Federal Rules*, *supra* note 34, at 61–71; Reda, *Cost-and-Delay Narrative*, *supra*, at 1111–32; *see also* THOMAS E. WILLGING, DONNA STIENSTRA, JOHN SHAPARD & DEAN MILFICH, FED. JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED CIVIL CASES 52 (1997); Thomas E. Willging, Donna Stienstra & John Shapard, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998). My mentor who served as the Reporter to the Advisory Committee on Civil Rules in the 1960s expressed the view on the Federal Rules’ 50th Anniversary that they were working well. He noted that they supported “revolutions in the substantive law” and asserted that “the much-criticized discovery function and class action remain together the scourge of corporate and governmental malefactors.” Benjamin Kaplan, *A Toast*, 137 U. PA. L. REV. 1879, 1891 (1989). Of course, that comment was made before most of the procedural retrenchment I described earlier occurred.

168. *See generally* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT, THE BATTLE FOR CONTROL OF THE LAW (2008) (examining conservative challenges to legal liberalism); Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 92 MINN. L. REV. 1431, 1470–73 (2013) (concluding that business is favored by the Roberts Court);

of judicial opinions in recent years, such as some I have referred to, show that orientation. Second, I think it is fair to say that some Justices and other judges are disenchanted with civil litigation for various reasons.¹⁶⁹

Sensing that shift in judicial attitude and reacting to the difficulties, costs, and risks of today's large-scale civil litigation, especially the possibility of going to trial before a jury, certain conservative and pro-business political and defense interests have been energetically waging an anti-litigation war for many years to limit resort to the courts and to affect what happens in them.¹⁷⁰ Segments of both the business and legal worlds

Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731 (2014) (reaching the same conclusion); Wasserman, *supra* note 90 (asserting that the Roberts Court has reshaped the rules of civil procedure to the benefit of business interests). A similar attitude has been manifested in Congress, accounting for the enactment of such business-oriented procedural legislation as the Private Securities Litigation Reform Act of 1995, Pub. L. No. 105-67, 109 Stat. 737 the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105353 and the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2012). It also explains the speed with which the proposed Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. (2017), described *supra* note 66, went through the House of Representatives without any meaningful scrutiny.

169. The growth of court caseloads in many parts of the country, the expansion and complexity of substantive law, and the bureaucratization of the federal judiciary should not be ignored as factors contributing to today's preoccupation with efficiency and gatekeeping. See generally Owen N. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1982) (looking at the transformation of the judiciary into a large-scale organization); Diarmuid F. O'Scannlain, *Access to Justice within the Federal Courts—A Ninth Circuit Perspective*, 90 OR. L. REV. 1033 (2012) (a distinguished federal judge describing the limited capacity and resources of the federal courts); Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2605 (1998) (noting the emergence of an administrative judiciary).

170. The political aspects of the anti-litigation war, which the authors refer to as the counterrevolution to the growth of the Litigation State, is chronicled in BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, *supra* note 11, at 16–62. The current judicial love affair with arbitration is evidence of that disenchantment. The pro-arbitration movement is recounted in Gilles, *The Day Doctrine Died*, *supra* note 99; see also Miller, *Deformation of Federal Procedure*, *supra* note 77, at 322–31 & nn.135–69 (explaining the growth of, and the Supreme Court's support for, arbitration). See generally Resnik, *Diffusing Disputes*, *supra* note 99; Siegel, *supra* note 90 (arguing that the Rehnquist Court was consistently motivated by its mistrust of civil litigation). The class-action has

have engaged in a strident and rather successful campaign against the class action—indeed, against litigation in general—both in the courts and in the public arena that undoubtedly has affected politicians, public perception, and perhaps some judges. Indeed, in addition to being instrumental in causing the procedural retrenchment and erection of stop signs I described earlier and motivating numerous constrictions of substantive law, the campaign has influenced who is elected and appointed as judges in various parts of the country.¹⁷¹ Not surprisingly, it has dampened the willingness of some members of the plaintiffs' bar to undertake risky, even potentially meritorious, cases.¹⁷²

The defense bar and its clients have devoted extraordinary resources to these endeavors that cannot be matched by those on the plaintiffs' side, which historically has not been able to organize itself effectively—although it seems to be doing better of late—and is divided philosophically along entrepreneurial and public interest lines. The anti-litigation forces have played on the distrust many Americans have of lawyers, particularly

been a primary target of defense interests in the anti-litigation war. See Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495 (2017).

171. See generally Adam Bonica & Maya Sen, *The Politics of Selecting the Bench from the Bar: The Legal Profession and Partisan Incentives to Politicize the Judiciary* (Harvard Kennedy School Faculty Research Working Paper Series, RWP15-001, 2015), <https://research.hks.harvard.edu/publications/workingpapers/Index>. (noting that although lawyers tend to be liberal, judges tend to be conservative, arguing that the disparity reflects the politicization of the judiciary) [<https://perma.cc/7U39-MCGS>]. See, e.g., SCOTT GREYTAK, ALICIA BANNON, ALLYSE FALCE, LINDA CASEY & LAURA KINNEY, BRENNAN CTR. FOR JUSTICE, *BANKROLLING THE BENCH: THE NEW POLITICS OF JUDICIAL ELECTIONS 2013–14* (2015), <http://newpoliticsreport.org/report/2013-14/> [<https://perma.cc/SQ43-TD4X>]. Conservative Justices on the Supreme Court have been found to have a lower pro-private enforcement voting rate than liberal Justices, supporting the notion that “the long decline in pro-private enforcement outcomes has been driven by the votes of conservative justices.” BURBANK & FARHANG, *RIGHTS AND RETRENCHMENT*, *supra* note 11, at 115.

172. See generally CASS R. SUNSTEIN, DAVID SCHAKADE, LISA M. ELLMAN & ANDRES SAWICKI, *ARE CASES POLITICAL: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (Brookings Inst. Press 2006) (claiming that the political convictions of judges affect their decisions in cases when the law does not provide a clear answer); TELES, *supra* note 168 (charting the development of the conservative legal movement from the 1970s); Elizabeth Thornburg, *Cognitive Bias, the “Band of Experts,” and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 756–57, 772–83 (2016) (describing and debunking the “decades-long anti-litigation lobbying effort” that is “designed to convince all of us that litigation is pathologically abusive”).

plaintiffs' lawyers;¹⁷³ characterized lawsuits as abusive, frivolous, and extortionate; and painted class actions as "lawyer's cases" that award class attorneys millions of dollars in fees but give individual class members only pennies or a few dollars—conveniently ignoring the cumulative value of the class's recovery. In addition, they claim that lawsuits impose a "litigation tax" on Americans and impair the competitiveness of American businesses in the global marketplace.¹⁷⁴

The anti-litigation war has become a political issue and has had significant consequences. Populist judiciaries in several states have been voted out and replaced.¹⁷⁵ The campaign has been augmented—inadvertently, I suspect—by rather one-sided media attention, which often repeats dubious horror stories, embraces the defense portrayal of litigation, and often depicts the plaintiffs' bar in negative terms.¹⁷⁶

173. See generally Burbank & Farhang, *Litigation Reform*, *supra* note 90 (discussing President Reagan's public hostility towards public interest lawyers who he characterized as "a bunch of ideological ambulance chasers doing their own thing at the expense of the . . . poor who actually need help" and as "working for left-wing special interest groups at the expense of the public"); Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 Into the Twenty-first Century*, 44 UCLA L. REV. 1773, 1775 (1997) ("[F]rom the defendants' perspective, class actions are the ultimate weapon of legal terrorism, launched by litigation-mad, bottom-feeding, money-hungry, professional plaintiffs' lawyers."); Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 450 (2004) (people have "fulminated against the bar as . . . plagues of 'locusts'").

174. See generally Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986). Nonetheless, there probably is a consensus for the proposition that a significant portion of the inefficiencies, delays, and high costs of contemporary litigation is a result of lawyer behavior that produces unnecessary or avoidable proceedings resulting from lawyering styles, habits, hourly billing practices, and professional competition. See generally Marrero, *supra* note 88 (arguing that the procedural rules are not at fault; rather it is how the rules are practiced).

175. Just by way of example, between 2000 and 2009 Alabama had the highest campaign spending on judicial races of any state. The Alabama Supreme Court went from being entirely composed of Democrats in 1994 to completely Republican in 2004. See JOHN F. KOWAL, BRENNAN CTR. FOR JUSTICE, JUDICIAL SELECTION FOR THE 21ST CENTURY 9 (2016), https://www.brennancenter.org/sites/default/files/publications/Judicial_Selection_21st_Century.pdf [<https://perma.cc/4NZF-Z3RN>]; see also *id.* at 12 ("[J]udges increasingly face the threat of electoral retribution when they rule in ways that offend powerful interests.").

176. KOWAL, *supra* note 175, at 10 ("In the 2013-2014 election cycle, outside spending by interest groups, including political action committees and social welfare organizations, accounted for nearly 30 percent of total spending, nearly

The effects of this anti-litigation campaign and demonization of lawyers works against those in the lower and middle economic classes who are most in need of meaningful *entre* to the civil justice system.¹⁷⁷ That is an unfortunate echo of today's much discussed societal inequities reflecting the stunning disparity in political and economic power, income, and status in our nation. It has led some to argue that to a very significant degree the existing federal rulemaking structure, Supreme Court practice, and high-stakes litigation are dominated by an elite segment of the legal profession and the major entities they represent, enabling them to pursue an agenda that has led to the distortion of the civil justice system's procedure and has disadvantaged the people actually involved in the vast majority of cases in our courts.¹⁷⁸ Whatever the merit of these points, the

doubling the record share, pre-*Citizens United v. Federal Election Comm'n*, [558 U.S. 310 (2010)] of 16 percent in 2003-04 . . . from 1994 to 2014, spending on judicial races exceeded \$420 million. Much of that staggering sum went to fund television advertising.”). *See, e.g.*, WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 39 (2004); Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, the Media, and Litigation Retrenchment*, 65 DEPAUL L. REV. 293 (2016); Mark Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998); Thornburg, *supra* note 172, at 772–83. A textbook illustration is the media coverage of the so-called McDonald's coffee spill case, which consistently understated the gravity of the plaintiffs' injuries and her modest claim for relief, overstated the size of her recovery, and never really reported the nature of the defendant's fault. *See* Liebeck v. McDonald's Rests., P.T.S., Inc., 1995 WL 360309 (D.N.M. Aug. 18, 1994), *vacated by agreement*, 1994 WL 16777704 (D.N.M. Nov. 28, 1994). Seven years after the case ended HBO aired a documentary entitled *Hot Coffee* that finally put the matter in proper perspective. *HOT COFFEE* (The Group Entertainment 2011).

177. Some scholars have expressed concern that the various procedural restraints I have discussed have marginalized some people and social out-groups. *See* Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 504 (2012) (arguing that procedural limits on court access harm society by keeping marginalized plaintiffs from pursuing meritorious civil rights claims); Spencer, *The Restrictive Ethos in Civil Procedure*, *supra* note 90, at 361–62, 366–70 (“Civil procedure tends to . . . protect[] commercial defendants against claims by members of various out-groups.”).

178. *See, e.g.*, Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1050 (2015) (“As with politics and economics, a one percent regime [of procedure]—while good for the one percent—leaves the great ninety-nine percent far behind.”); Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559 (2015) (discussing the role of rulemaking in litigation reform, focusing on the backgrounds of the Advisory Committee members and the then-proposed

fact is that all of the procedural stop signs I described earlier¹⁷⁹ inhibit access, promote pretrial termination, and avoid full merit adjudication across the litigation spectrum. Analogous charges, of course, can be levelled at the consequences of the Supreme Court's endorsement of mandatory one-by-one arbitration clauses.

But let me try not to fall prey to the fallacy of the black and the white. I have to acknowledge that there have been some marginal—and some might even be called silly or frivolous—lawsuits that receive considerable attention and contribute to the negative imagery projected by defense interests and the media. Everyone has his or her favorite. Mine is a recent unfair trade practices class action under a state consumer protection statute providing for an attorney fee award against the fast food company Subway that advertises “foot-long” sandwiches. Occasionally, the plaintiff asserted, the sandwiches turn out to be only 11 or 11.5 inches long. The company insisted its sandwiches have the same food and nutritional content as those in the advertisements. Even if the case had factual merit and some potential for promoting compliance with consumer protection laws, the optics are bad. As it turned out, most of the sandwiches tested actually were 12 inches long and when they were less than that the shortage usually was only one-fourth of an inch. The class settled for about \$525,000, which went to the lawyers less the \$500 given to each of the ten named plaintiffs.¹⁸⁰ The district court's approval of the settlement was reversed by the court of appeals on the ground that it enriched only the lawyers and class representatives; the benefits to the other class members were characterized as “worthless.”¹⁸¹

amendments approved for consideration by the Judicial Conference's Standing Committee on Practice and Procedure); John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 38 LITIG. 26 (2012) (referring to a survey finding that “[a] substantial group of local plaintiffs' counsel resent the [Multidistrict Litigation] panel's role in facilitating national plaintiffs' counsels' 'takeover' of their cases.”). Judge Heyburn and Professor McGovern criticize the “repeat-player syndrome in the selection of plaintiffs' MDL counsel.” *Id.* at 30. Multidistrict Litigation is discussed *supra* notes 137–162.

179. See discussion *supra* Part II.

180. *In re: Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 316 F.R.D. 240 (E.D. Wis. 2016), *rev'd*, 869 F.3d 551 (7th Cir. 2017); see also Eric Goldman, *Why The Subway 'Footlong' Lawsuits Fell Short*, FORBES (2016), <https://www.forbes.com/sites/ericgoldman/2016/02/29/why-the-subway-footlong-lawsuits-fell-short/#261aac6869f2> [<https://perma.cc/H5V8-PEU6>].

181. *In re: Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551 (7th Cir. 2017).

Less “newsworthy” cases that perform a more significant policy-enforcing function rarely are given comparable media attention.¹⁸² Having spent many years dabbling in television, I understand that the “foot-long” story is one that is easy and “catchy” to tell and pictorialize. Moreover, realistically a newspaper reporter allotted only a few inches to tell her story or a television reporter with 30 or 45 seconds of airtime cannot be expected to include a lecture on the societal values of deterring wrongdoing, the importance of truth in advertising, or an explanation of the risks of contingent fee representation.

The “foot-long” lawsuit and others like it raise the basic question I asked at the outset: what are courts for? What is a “real case”? To me, a case that helps effectuate a statutory or judicially established policy prohibiting unfair trade practices or advertising misrepresentations is a “real” case, regardless of the gravity of the individual’s injury, the monetary stakes, or whether the lawyer’s motivation is an attorney’s fee or a societal good.¹⁸³ But I recognize that people have disparate views on the utility of using limited public resources—the courts—to litigate about practices and products that have not caused any palpable injury to some or most of the victims of deleterious behavior, and some critics deplore the possibility of overcompensation and over-deterrence.¹⁸⁴

The questions and choices are easily stated. Should the system exercise itself over “trivial” regulatory violations involving such things as data breaches, advertising, labelling, or packaging, and a host of other business practices that the law considers actionable under tort, contract, or

182. See BURBANK & FARHANG, RIGHTS AND RETRENCHMENT, *supra* note 11, at 225 (demonstrating that the media coverage of Supreme Court rulings on the private enforcement of rights is less than the coverage on decisions concerning the rights themselves, “helping to forestall public perceptions that justices are legislators in black robes”).

183. In class I sometimes teasingly analogize giving people a new substantive right to giving someone a Ferrari. It may be a wondrous gift, but it has no value if the recipient cannot afford gasoline. Analogously, it is the availability of an attorney and incentivizing him or her with the prospect of a fee award, as well as the availability of a functional aggregation procedure, that will fuel the substantive right and make it meaningful. Without that, the right will remain largely unused.

184. Occasionally, a note of judicial frustration is sounded. “This is another of the surprisingly many junk-fax suits under . . . the Telephone Consumer Protection Act.” *Chapman v. All Am. Painting, Inc.*, 796 F.3d 783, 784 (7th Cir. 2015) (Easterbrook, C.J.). See generally Marcus, *Bending in the Breeze*, *supra* note 45, at 520–30.

warranty theories?¹⁸⁵ Or should the system metaphorically close its eyes in the name of husbanding its limited resources for more “significant” matters? Do we think the answer is to leave these defalcations to the regulators, who we know are under-resourced and tend to be captured by those they supposedly regulate? Or should Americans just grin and bear deceptive economic practices and emotional slights?

V. SOME FINAL OBSERVATIONS

When I think of today’s penchant for early termination, the ubiquitous federal court judicial management dynamic and its osmosis into a number of state court systems, the movement out of the public court system into private dispute resolution in the form of mandatory contractual arbitration, mediation, Feinbergization, and related trends including mandatory disclosure, bellwether trials, and the pervasive work-out and settlement mentality in the bench and bar, it seems to me that a significant erosion of the merit-determination orientation of our civil system and the aspirations of the procedural Gold Standard have taken place. I never thought I would hear a federal district judge say to me that “if any case on my docket reaches trial, I have failed.” But I have. Also, I have no doubt that many of the changes I have described, particularly the procedural retrenchment

185. Recently, so-called “slack-fill” lawsuits have appeared claiming consumer injury when food packages are under-filled, giving the appearance that purchasers are getting more product than they actually are. *See, e.g., In re McCormick & Co., Inc. Pepper Prods. Mktg. & Sales Practice Litig.*, 215 F. Supp. 3d 51 (D.D.C. 2016) (holding that a competitor’s claim under the Lanham Act and for violations of state deceptive trade practices for slack-filled black pepper packaging was sufficiently stated); Paul Zibro, *McCormick Seeks to Dismiss “Slack Fill” Lawsuit*, WALL ST. J. (July 17, 2015), <https://www.wsj.com/articles/mccormick-seeks-to-dismiss-slack-fill-lawsuit-1437164034> [<https://perma.cc/858U-R4RV>]. Do these actions keep food companies honest or are they frivolous nuisance suits? These and other cases of this type, such as the Subway “foot-long” case, typically pose serious questions regarding the ascertainability of the class members—who purchased the challenged product or whose files were hacked? *See, e.g., Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012); *Oshana v. Coca Cola Co.*, 472 F.2d 506 (7th Cir. 2006). Most of the cases die an early death. *See, e.g., Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016) (affirming the grant of a motion to dismiss because plaintiff could not plausibly allege that the product’s design and packaging were deceptive when the correct weight was stated). *See generally* Joyce Hanson, *Slack-Fill Suits Boom Despite Few Class Wins*, LAW360 (Apr. 17, 2017), <https://www.law360.com/articles/912004/> [<https://perma.cc/69AK-FMT7>]. The proposed Fairness in Class Actions Act discussed in note 66, *supra*, would burden the processing of these “personal injury” claims in significant ways, including by insisting on ascertainability of class members at certification.

and “national policy” favoring arbitration, have contributed to what we now characterize as the “vanishing” trial and the demise of our commitment to the civil jury that many bemoan.¹⁸⁶ In parts of the country, our federal judges, to put it simply, have less and less “bench presence.”¹⁸⁷

The phenomena I have been discussing seem to be progressing as my television mentor, the late Fred Friendly, used to say—in a stealth-like “one-degree-it-is” fashion. Does anyone other than those benefitting or being burdened by the systemic changes notice or care about them? Is the ongoing procedural retrenchment and the flight from the courts positive or negative? Is arbitration speedier, more economic and “juster” than adjudication in the courts? Is management for trial more or less efficient than erecting stop signs and managing for settlement? Although system participants and observers have visceral feelings and a range of viewpoints, I submit we do not really know—and may never know—the answers to these questions. I have a feeling we are proceeding largely in the dark. Shouldn’t we worry about that? Shouldn’t we insist on some enlightenment, perhaps in the nature of a cost-benefit analysis comparing the “value” of procedural stop signs, MDLs, and judicial management versus more robust and efficient merit adjudication as well as an analysis of the competing “values” of the public and private systems? But who would we trust to do that analysis and would we believe whatever conclusions were offered?

The means for diverting cases away from an adjudication of their merits have greatly expanded in past decades. Many of the justifications for the procedural changes I have described are based on assumptions about the litigation world. They are not based on reliable evidence, and many of them are well-worn clichés peddled by interest groups who would prefer

186. Judge William G. Young of the District of Massachusetts has been a leading crusader on this subject. *See, e.g.*, *United States v. Massachusetts*, 781 F. Supp. 2d 1, 21–27 (D. Mass. 2011) (arguing in an addendum to his opinion against an “administrative model” of the courts); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK L. REV. 67, 73 (2006) (“[T]he civil jury trial has all but disappeared.”) (internal citations omitted); *see also* Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mozingo? A Trial Judge’s Lament over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99, 101 (2010) (discussing “the vanishing jury trial”); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL & LEGAL STUD. 459, 459 (2004); John H. Langbein, *The Disappearance of Civil Trials in the United States*, 122 YALE L.J. 522, 524 (2012) (arguing that our system should be termed “nontrial procedure”).

187. *See* Jordan M. Singer & William G. Young, *Bench Presence 2014: An Updated Look at Federal District Court Productivity*, 48 NEW ENG. L. REV. 565, 565 (2014) (discussing judges’ declining courtroom hours and the resulting consequences, such as reduced accuracy, fairness, and effectiveness of court services).

to close courthouse doors, countered by those trying to keep them open. One thing is clear: The pretrial process is now littered with procedural detours and stop signs that did not exist when Alvin and I were youngsters. Do we really know what they are accomplishing?

Perhaps it is naïve or too academic of me to suggest that maybe we should just start over, wipe the slate clean, and invent a new civil procedure system as we did in 1938.¹⁸⁸ Easier said than done, of course. A drastic reevaluation might mean that the existing Federal Rules, the Rules Enabling Act,¹⁸⁹ the Arbitration Act, and the Multidistrict Litigation Act would have to be rethought and might go under the legislative knife, or at least be reorganized. Similarly, our questionable commitment to procedural trans-substantivity might have to be interred; one set of universal court procedures regardless of substantive context, a worthy objective of the comparatively simple litigation world of the 1930s, probably does not make sense in the 2020s:¹⁹⁰ “One size does not fit all.”¹⁹¹ Segregating cases and

188. There are scholars who believe that the third iteration of American procedure—common law, code, and Federal Rule—has ended and opine that we already are in a fourth era that focuses on judicial management, mediation, arbitration, and efficiency, and less on merit adjudication. See Subrin & Main, *supra* note 90. Despite my lifetime commitment to the Gold Standard, I fear they are right.

189. Arguably decisions such as *Twombly*, *Iqbal*, and the summary judgment trilogy, as well as the politicization (and partial paralysis) of the rulemaking process indicate the Enabling Act might usefully be rethought. See Miller, *Deformation of Federal Procedure*, *supra* note 77. For example, the composition of the Civil Rules Advisory Committee has been criticized for its “homogeneity” and ideological biases. See, e.g., Thornburg, *supra* note 172, at 784–92.

190. See Miller, *Deformation of Federal Procedure*, *supra* note 77, at 370 (“For example, consideration should be given to abandoning the transsubstantive principle requiring that the Federal Rules be ‘general’ and applicable to all cases—a notion that supposedly is embedded in the Rules Enabling Act.”). See generally Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 324, 333–34 (2008) (stating that trans-substantivity is not an “independent value” of the Federal Rules); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1940 (1989) (“[U]niformity and trans-substantivity . . . are a sham.”); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 373 (2010) (discussing the history and precarious existence of trans-substantivity). *But cf.* ROBERT M. COVER & OWEN M. FISS, *THE STRUCTURE OF PROCEDURE* 75 (Foundation Press 1979) (arguing trans-substantivity promotes neutrality). Several of the existing Rules call for a different treatment of certain actions. See, e.g., FED. R. CIV. P. 9(b), 23.1, 23.2, 26(a).

191. See Richard McMillan, Jr. & David B. Siegel, *Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431 (1985) (proposing a fast-track process for certain disputes); Miller,

assigning them to different procedural tracks by dimension or complexity, as has been employed in other countries,¹⁹² and what we already do with limited jurisdiction and specialized courts at both the state and federal level, may be worth considering. Perhaps fast-tracking some categories of run-of-the-mine cases would lead to their expeditious merit adjudication. Why should they be plagued by “plausibility” pleading, proportionate discovery inquiries, and time and resource consuming summary judgment motion practice?¹⁹³

Realistically, I doubt that much of this is feasible in the near term. The undertaking would be too risky and grandiose. Moreover, a meaningful overhaul would call for the kind of consensus and political activity unlikely to materialize let alone bear fruit given the current makeup of Congress and the federal courts, as well as the lobbying power of the defense community. Questions about procedure are out of the shadows.

Deformation of Federal Procedure, *supra* note 77, at 370–71 (arguing that serious consideration should be given to the idea of “putting cases on different litigation tracks and devising different procedures that are deemed appropriate for the characteristics of the cases posted to each track”); Miller, *Double Play on the Rules*, *supra* note 34, at 118–25 (making similar suggestions); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENVER U. L. REV. 377, 398–405 (2010) (proposing a simple procedure for cases involving low-value disputes).

192. See ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE §§ 12.1–12.72 (3d ed. 2013) (describing tracking in the English system); ZIVILPROZESSORDUNG [ZPO] [CODE OF CIVIL PROCEDURE] §§ 592, 689 (Ger.), reprinted in ZIVILPROZESSORDUNG (C.H. Beck ed., 57th ed. 1999) (delineating the German system of summary proceedings for actions seeking payment of a sum of money or the delivery of goods); see also PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 425–28 (2004) (describing the German Code provision). Many civilian systems have specialized commercial courts or panels. See, e.g., CODE DE COMMERCE [C. COM.] [CODE OF COMMERCE] arts. L.721-1 to 724-7 (Fr.); GERICHTSVERFASSUNGSGESETZ [GVG] [Constitution of the Courts Act] § 105 (Ger.), reprinted in ZIVILPROZESSORDUNG (Richard Zöller ed., 23rd rev. ed. 2002).

193. The resource commitment by counsel and the court now common on summary judgment motions, for example, makes one wonder whether the frequency of today’s invocation of the procedure actually does not promote efficiency. See Marrero, *supra* note 88, at 1667–70. Judge Marrero suggests that the results of these motions may be “counterproductive” and are “decidedly unimpressive.” *Id.* There have been numerous expressions of concern at the state level about the federal procedural transformation discussed *supra* Part I, particularly with regard to the restrictions that impact the ability to secure the private enforcement of state law in the federal courts. See Diego A. Zambrano, *The States’ Interest in Federal Procedure*, 70 STAN. L. REV. __ (2018) (forthcoming 2018), https://chicagounbound.uchicago.edu/journal_articles/8818/ [<https://perma.cc/KW3G-WCEX>].

Whenever procedural changes are proposed these days, especially when the economic or regulatory consequences might be significant, the long knives come out and self-interest comes to the fore on both sides of the “v.”¹⁹⁴

I think the judge we remember and honor today had it right. He cautioned in a law review article: “No judge worthy of his office wants merely to dispose of cases as if he were working on an assembly line. We all seek the just result. We are all mindful of the adage that no case is decided until it is decided right.”¹⁹⁵ A few years later, in a well-known dissent, he wrote: “Judicial case management, avoidance of delay, and denial of unjustified continuances are all commendable. They are, however, only means to an end. That end is justice; justice done and perceived to be done.”¹⁹⁶

How true and how relevant to what is happening in our courts today. That passage obliges us to think. Are we still serious about achieving “the just, speedy, and inexpensive determination of every action and proceeding” as Federal Rule 1 implores? There always has been a sense that the application of the Federal Rules should accommodate all three of those objectives.¹⁹⁷ To me, “speedy” and “inexpensive” in Rule 1 should not be pursued at the expense of what is “just.” Although a short word, “just” embraces objectives of enormous significance that should not be subordinated to the other two. Should we—can we—preserve a Gold Standard procedural system? Can we afford not to? Even assuming it is efficient, does the current treatment of pleadings, discovery, motions to dismiss, class actions, expert witnesses, summary judgment, and the flight from the courthouse to arbitration and other private arrangements undermine the societal values of the public courts?

194. I am still capable of modest optimism on occasion. *See generally* Miller, *Preservation and Rejuvenation*, *supra* note 62, at 296–300.

195. Alvin B. Rubin, *Views From the Lower Court*, 23 UCLA L. REV. 448, 453 (1976).

196. *McDaniel v. Temple Indep. Sch. Dist.*, 770 F.2d 1340, 1353 (5th Cir. 1985) (Rubin, J., dissenting). A decade earlier, as a district judge, he wrote: “This feeling that justice is a supreme goal, this sense that it is a predicate to organized society, is no mere yearning, for it is only a fair proceeding . . . that we can with any legitimacy call another human being to account.” *United States v. McDaniels*, 379 F. Supp. 1243, 1249 (E.D. La. 1974).

197. Admittedly, these objectives always have been somewhat in tension with each other; the words are inherently ambiguous, and their meaning is quite subjective.

EPILOGUE

I leave these matters to those of you who are inheriting the system. After all, you are now the trustees of civil justice and cannot simply blame your predecessors for its warts and bumps and do nothing about them. You must now try to give the words in Rule 1 meaning for the future. As for me, having said my piece and having tried to channel Judge Rubin, perhaps it is time to lie down in a pasture, munch grass, and stop bothering people by asking them questions like: What are courts for?