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## BENDING IN THE BREEZE: AMERICAN CLASS ACTIONS IN THE TWENTY-FIRST CENTURY

Richard Marcus\*

*The green reed which bends in the wind is stronger than the mighty oak which breaks in a storm.*

—Confucius

*Going forward, the clear directive to plaintiffs seeking class certification—in any type of case—is that they will face a rigorous analysis by the federal courts, will not be afforded favorable presumptions from the pleadings or otherwise and must be prepared to prove with facts—and by a preponderance of the evidence—their compliance with the requirements of Rule 23.<sup>1</sup>*

—Judge Jane Boyle

It is always better to have the breeze at your back, but that surely has not recently been the case for class action proponents. At the risk of overstating, there is a certain *fin de siècle* flavor to current procedural discussions, at least among academics; it seems that several foundational principles of late twentieth century procedural ordering have come under attack in the twenty-first century. Although not alone among those principles, class actions have a prominent role. Dean Robert Klonoff has recently written of “The Decline of Class Actions,”<sup>2</sup> and Professor Linda Mullenix has written of “Ending Class

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\* Distinguished Professor of Law & Horace O. Coil Chair in Litigation, University of California Hastings College of the Law. This Article is based on comments during the 21st Annual Clifford Symposium, which took place in April 2015, and only partly takes account of subsequent developments. Since 1996, I have served as Associate Reporter on the U.S. Judicial Conference Advisory Committee on Civil Rules, including work on Federal Rule of Civil Procedure 23. In this Article, I do not speak for the Committee or for anyone else. Mary Kay Kane and Bob Klonoff both offered numerous helpful comments on a draft of this Article; though I took most of those comments to heart, I did not embrace all, and neither would likely agree with everything I say in this Article. I am indebted to Stephanie Strider for outstanding research assistance.

1. *In re Kosmos Energy Ltd. Sec. Litig.*, 299 F.R.D. 133, 139 (N.D. Tex. 2014). Others agree: “Both Congress and the federal judiciary have taken steps to make one oft-found element of modern American private enforcement regimes—class action litigation—harder to maintain.” Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 714 (2013).

2. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013).

Actions as We Know Them.”<sup>3</sup> Professor Arthur Miller—who was present at the creation of the modern class action—has suggested that we face “the death of aggregate litigation by a thousand paper cuts.”<sup>4</sup> But he, at least, sees some “rays of light that indicate it will survive.”<sup>5</sup> It is likely an overstatement to claim that any of these prominent academics foresees the imminent demise of American class actions. But as we shall see, lawyers sometimes view things in more apocalyptic terms.<sup>6</sup> At the same time, most or all would probably agree with Judge Boyle about the increasing headwinds that plaintiffs face.

Without questioning in the least the idea that proponents of the class action have suffered some reverses recently,<sup>7</sup> I intend to argue that Professor Miller’s optimism about American aggregate litigation is justified. Like Confucius’ green reed, the class action is likely to bend in the breeze and survive the current, cold climate. In significant part, this attitude stems from an appreciation of the exceptional character of American class actions in particular and the American bench and bar in general. As Professor Christopher Hodges of Oxford began his study of European techniques for affording relief in court to groups, lawmakers in Europe sought to avoid “a US-style court-based mechanism.”<sup>8</sup> And Canadian Professor Janet Walker introduced an international panel on group litigation in Moscow by noting that “everyone, at least outside the United States, seems also to agree that they do not want to adopt U.S.-style class actions in their legal systems.”<sup>9</sup>

Against this background, it does not seem that American aggregate litigation in general, and class actions in particular, are in danger of extinction. Indeed, one book published in 2014 on European group litigation worries in its title whether they—compared to American ag-

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3. Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399 (2014); see also Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 199 (2015) (forecasting a “world without class actions”).

4. Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 306 (2014).

5. *Id.*

6. See, e.g., *infra* notes 84–93 and accompanying text (regarding the possible impact of the Supreme Court’s pending ruling on the fraud-on-the-market doctrine, which plays a central role in class certification for securities fraud suits).

7. See, e.g., Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 326 (2011) (examining the momentum behind a relatively new (then) willingness of courts to make class certification turn on evaluation of the merits—or at least of the manner in which the merits would have to be resolved). This trend was likely on Judge Boyle’s mind when she ruminated on the current challenges to class actions. See *In re Kosmos Energy Ltd. Sec. Litig.*, 299 F.R.D. 133, 139 (N.D. Tex. 2014).

8. CHRISTOPHER HODGES, *THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS* 1 (2008).

9. Janet Walker, *Who’s Afraid of U.S. Style Class Actions?*, 18 SW. J. INT’L L. 509, 509 (2011).

gregate litigation—are “squeaking mice,”<sup>10</sup> and Dean Klonoff has recently explained why most nations do not have U.S.-style class actions.<sup>11</sup>

I will proceed, in Part I, by introducing the “golden age” of class actions<sup>12</sup> and then, in Part II, contrasting that time with the headwinds now facing those who pursue these cases.<sup>13</sup> I then turn to three sorts of reactions to the current situation—in Part III, the overstatement of the importance of recent changes,<sup>14</sup> in Part IV, strategies for coping with these headwinds,<sup>15</sup> and in Part V, concerns about precluding private enforcement of public law norms<sup>16</sup>—in service to a conclusion like the one reached by Professor Miller: “Aggregate litigation is not becoming a creature of purely historical import: there are some rays of light that indicate it will survive.”<sup>17</sup>

## I. THE GOLDEN AGE

As Professor Mullenix put it, “class litigation in the twenty-first century has moved a very long way from the golden age of class litigation during the 1960s.”<sup>18</sup> That golden age characterization may involve what I have recently called the “heroic model” of litigation.<sup>19</sup> In that, it may fit with other “golden ages,” such as the golden age of procedural rulemaking on which some commentators now cast an envious backward gaze.<sup>20</sup> In terms of single events, the amendment of Federal

10. See MULTI-PARTY REDRESS MECHANISMS IN EUROPE: SQUEAKING MICE? (V. Harsági & C.H. van Rhee eds., 2014).

11. See Robert H. Klonoff, *Why Most Nations Do Not Have U.S.-Style Class Actions*, 16 CLASS ACTION LITIG. REP. (BNA) 586 (May 22, 2015). Dean Klonoff offers three basic reasons for the distinctiveness of American class actions: (1) the use of “opt-out” rather than opt-in procedure; (2) the absence of a “loser pays” rule in the United States, meaning that filing a class action does not raise the risk that an unsuccessful plaintiff will be ruined due to having to pay the defendant’s litigation costs, including attorney fees; and (3) the existence of multidistrict litigation procedures, providing an alternative to class actions in some cases. *Id.* at 587.

12. See *infra* notes 18–45 and accompanying text.

13. See *infra* notes 46–93 and accompanying text.

14. See *infra* notes 94–121 and accompanying text.

15. See *infra* notes 122–43 and accompanying text.

16. See *infra* notes 144–96 and accompanying text.

17. Miller, *supra* note 4, at 306; see *infra* notes 197–213 and accompanying text.

18. Mullenix, *supra* note 3, at 404.

19. See Richard Marcus, “Looking Backward” to 1938, 162 U. PA. L. REV. 1691, 1696–98 (2014) (describing the “heroic model” in litigation).

20. See, e.g., Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 897–99 (1999) (entitling a section of the article “The Golden Age of Court Rulemaking”). That was, of course, the age of the giants of the past, to be contrasted with the hamstring and disappointing experience with the pygmies of the present. Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901 (2002) (exploring the challenges of contemporary procedural rulemaking). “For at least a generation,

Rule of Civil Procedure 23 in 1966 is about as golden as it gets; it was surely the “big bang” of modern class-action litigation.

Whether the golden age was really so golden is a topic of much current debate. As very thoughtfully reviewed by Professor David Marcus (no relation), it may be viewed as involving a still-unresolved tension between a regulatory impulse and an efficiency argument (which he calls “adjectival” after Bentham).<sup>21</sup> We will return to that tension in Part V, on the current private enforcement puzzle. But it may also be regarded as an innocent era in which relatively “apolitical” impulses toward the goals of “good government” could inspire moves toward procedural perfection that seem somewhat inconsistent with the rulemakers’ personal or political goals.<sup>22</sup>

It is relatively clear that one goal of the 1962–1966 rewriting of Rule 23 was to provide an explicit rule provision to enable injunction suits to enforce civil rights.<sup>23</sup> Whether that was absolutely necessary can, in retrospect, be debated. The vehicle for this sort of suit was to be the Rule 23(b)(2) action for injunctive or declaratory relief. But subsequent history has taught that lawyers increasingly tried to use this rule to include claims for monetary relief, sometimes perhaps camouflaging their desire for damages behind a false front requesting injunctive or declaratory relief, to avoid some of the rigors that attend certification under Rule 23(b)(3).<sup>24</sup> As Judge Posner put it: “Class action lawyers like to sue under [(b)(2)] because it is less demanding, in a variety of ways, than Rule 23(b)(3) suits, which usually are the only available alternative.”<sup>25</sup> A particular favorite in this regard was the employment discrimination class action seeking back pay and front pay as “equitable relief” under Rule 23(b)(2), something that the Supreme Court put to an end in 2011.<sup>26</sup>

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commentary on federal judicial rulemaking has been gloomy.” Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 473 (2013).

21. See David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 591–98 (2013).

22. See Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993), for an examination of the course of federal procedural rulemaking from a “neutralist” perspective that strives to treat achieving advantage for clients as at most a secondary consequence not an objective.

23. 7AA CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1776 (3d ed. 2005). “[S]ubdivision (b)(2) was added to Rule 23 in 1966 in part to make it clear that civil-rights suits for injunctive or declaratory relief can be brought as class actions.” *Id.*

24. Two hurdles for (b)(3) class actions that do not apply to (b)(2) class actions are the requirement that common questions “predominate” in (b)(3) class actions and the requirement (in Rule 23(c)(2)(b)) that individual notice be sent to all class members in (b)(3) actions who can be identified with “reasonable effort.” FED. R. CIV. P. 23(b)(2), (b)(3), (c)(2)(b).

25. *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 825 (7th Cir. 2011).

26. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2560 (2011).

But a fair argument might be made that class certification, with its attendant binding effect on all class members, was not necessary (or even beneficial) to class members who did not want monetary relief. As time went by, it emerged that class certification was sometimes necessary for class-wide injunctive relief.<sup>27</sup> To the extent that the true thrust of the suit was to obtain an injunction requiring defendant to treat all members of the class in the same (and legal) manner, Rule 23(b)(1)(A) (also added to the rule in 1966) seemed to do the job because it authorizes certification when separate litigation creates a significant risk that the defendant will face “incompatible standards of conduct” if separate suits for injunctive relief proceed independently.<sup>28</sup>

Moreover, it might be asked whether a new rule provision was really necessary to further the civil rights cause. The skeptical could point to the NAACP’s relatively successful litigation campaign to dismantle segregation in several areas of American life without relying on the modern class-action rule (although the pre-1966 class action was invoked in that litigation). It was surely true that, after 1966, there was an outburst of class-action litigation for social justice purposes, laying the groundwork for Professor Abram Chayes’s 1976 landmark article on public interest litigation.<sup>29</sup> But it is difficult to regard the current class action rule as essential to that activity or sufficient to support continuing that activity. At least Judge Easterbrook regards such activity as “a relic of a time when the federal judiciary thought that structural injunctions taking control of executive functions were sensible. That time is past.”<sup>30</sup>

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27. See, e.g., *Meyer v. CUNA Mut. Ins. Soc’y.*, 648 F.3d 154, 171 (3d Cir. 2011) (vacating an injunction prescribing procedures for defendant to use to process disability claims because it “amounted to class-wide relief and no class was certified”); *Everhart v. Bowen*, 853 F.2d 1532, 1538 (10th Cir. 1988), *rev’d on other grounds sub nom.* *Sullivan v. Everhart*, 494 U.S. 83, 95 (1990) (reasoning that the district court improperly granted a statewide injunction because that was “tantamount to a grant of class-wide relief”); see 18 U.S.C. § 3626(a)(1) (2012) (“Prospective relief in any civil action . . . shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff . . .”).

A contrasting line of authority supported the notion that certification is not necessary if an injunction in an individual suit would operate to protect the entire class without the need for class certification. See 7AA WRIGHT ET AL., *supra* note 23, § 1785.2, for a discussion of this issue. But for a variety of reasons, such as avoiding mootness and making clear that class members can seek contempt sanctions if defendants violate the decree, this notion can be challenged. See Daniel Tenny, Note, *There Is Always a Need: The “Necessity Doctrine” and Class Certification Against Government Agencies*, 103 MICH. L. REV. 1018, 1026 n.47, 1032 (2005).

28. FED. R. CIV. P. 23(b)(1)(A).

29. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

30. *Rahman v. Chertoff*, 530 F.3d 622, 626 (7th Cir. 2008). But it is clear that some such litigation continues to occur, whether or not in the Seventh Circuit. See, e.g., *Brown v. Plata*, 131

One need not agree with Judge Easterbrook to recognize that the framers of the amended class-action rule probably did not foresee the main uses to which it is put nowadays. At least one was partly foreseen—the “mass accident”—and the framers tried to guard against that sort of class action by saying in the Committee Note that individual issues would usually predominate and, as a result, that class certification under the new Rule 23(b)(3) provision should not be allowed.<sup>31</sup> But as the Supreme Court recognized in 1997, despite the Committee Note “the text of the Rule does not categorically exclude mass tort cases from class certification, and District Courts, since the late 1970’s, have been certifying such cases in increasing number.”<sup>32</sup>

All in all, then, it is difficult to disagree with Professor Miller when he recalls that the framers of the current rule could not foresee many of the ways lawyers and judges would ultimately use it:

Those were relatively simple days in the world of litigation. The Committee obviously could not predict the great growth in complicated federal and state substantive law that would take place in such fields as race, gender, disability, and age discrimination; consumer protection; fraud; products liability; environmental safety; and pension litigation, let alone the exponential increase in class action and multiparty/multi-claim practice that would flow from the expansion of those legal subjects.<sup>33</sup>

As Professor Sean Farhang has pointed out, much of the legislation cited by Professor Miller deputized private litigants to enforce public law.<sup>34</sup> Because one may take Congress (and state legislatures) as acting with the existing procedural system in mind when they create new

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S. Ct. 1910 (2011) (imposing crowding limitations on the overcrowded California prison system on constitutional grounds). Professor Samuel Issacharoff has described *Brown* as “the most significant class action litigation of the past decade.” Samuel Issacharoff, *Class Actions and State Authority*, 44 *LOY. U. CHI. L.J.* 369, 375 (2012). Perhaps that shows that these cases are very unusual, but that does not seem to be Professor Issacharoff’s point; certainly this case shows that Rule 23(b)(2) class actions can continue to pack a punch.

31.

A “mass accident” resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but also of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

FED. R. CIV. P. 23 advisory committee’s note (1966 Amendments).

32. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

33. See Miller, *supra* note 4, at 295. At the same time, it is clear that much of the debate within the Committee between 1962 and 1966 had a distinctly modern flavor to it, particularly regarding the possibility of mass tort class actions. See John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 *MISS. C. L. REV.* 323, 335–36 (2005) (describing the objections of John Frank to such a use of the class action).

34. See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 4 (2010).

causes of action, it is possible to argue that the modern class action was assumed to be available for that enforcement purpose. But that idea is not entirely persuasive. As Justice Scalia pointed out in dealing with the argument that class action waivers should not be enforced in antitrust suits because Congress intended to enable private enforcement, Congress authorized private suits alleging antitrust violations long before the modern class action came into existence.<sup>35</sup> Similarly, Title VII of the Civil Rights Act of 1964, which left primary enforcement responsibility to private litigants rather than the Equal Employment Opportunity Commission (EEOC), was adopted before the 1966 amendment to Rule 23.<sup>36</sup> Surely that is not a reason to refuse to use amended Rule 23 in antitrust or Title VII cases.

For our purposes, it is important to remember that the golden age was quite short, even if it was golden. By the mid-1970s, as Professor Miller chronicled in 1979, “class action practice had been given a very black eye,”<sup>37</sup> in part because district courts sometimes seemed to adopt a “certify now, reconsider later” attitude, focusing in part on then-existing permission in Rule 23 for “conditional” certification.<sup>38</sup> In addition, as he put it, decisions of the U.S. Supreme Court had dealt “shocking” body blows to the use of Rule 23.<sup>39</sup> Professor Miller was speaking of the U.S. Supreme Court holdings about the cost of giving notice in Rule 23(b)(3) class actions<sup>40</sup> and the application of the amount-in-controversy requirement in class actions making state-law claims.<sup>41</sup> For a time it seemed that class actions might fade away; in

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35. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013).

36. See FARHANG, *supra* note 34, at 94–101, for a description of the legislative development of the statute. In brief, Senate Republican votes were essential to passage, and the business establishment was adamantly opposed to giving the EEOC enforcement power because they feared it would be adverse to their interests in the same way they took the National Labor Relations Board (NLRB) to be adverse to their interests. Whether they would like to take that choice back, in light of the way public life has evolved over the last half century, is impossible to know.

37. Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 678 (1979).

38. The 2003 amendments removed the prior authority for conditional certification. The committee note accompanying this change explained: “A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.” FED. R. CIV. P. 23 advisory committee’s note (2003 Amendment).

39. Miller, *supra* note 37, at 679–80.

40. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178–79 (1974) (holding that individual first-class mail notice of class certification had to be given to more than two million class members and that plaintiffs had to pay for it).

41. *See, e.g., Zahn v. Int’l Paper Co.*, 414 U.S. 291, 301 (1973) (holding that even if the class representative had a large enough claim to satisfy the jurisdictional minimum individually every other class member had to satisfy it also); *Snyder v. Harris*, 394 U.S. 332, 336–39 (1969) (holding that the claims of the putative class members could not be cumulated to satisfy the jurisdictional minimum).



1988 the *New York Times* ran an article quoting Professor Miller's successor as Reporter of the Advisory Committee saying that "class actions had their day in the sun and kind of petered out."<sup>42</sup> Around the same time, it was reported that class actions had declined significantly as a device for employment discrimination suits.<sup>43</sup>

As with other forms of nostalgia, then, it seems that the durable impact of the class action golden age is not entirely impressive and that it may have been waning by the late 1980s. But the worm did begin to turn in the 1990s. By 1997, the Chair of the Advisory Committee on Civil Rules was able to tell a Senate Committee that the class action was "transforming the litigation landscape," and that "[c]lass actions are being certified at unprecedented rates, and they are involving a substantial [number], if not a majority, of all American citizens."<sup>44</sup> By 2002, it was reported that "the class action device has changed from the more or less rare case fought out by titans of the bar in the top financial centers of the nation to the veritable bread and butter of firms of all shapes and sizes across the country."<sup>45</sup> Around this point, the headwinds began to pick up.

## II. TWENTY-FIRST CENTURY CLASS-ACTION HEADWINDS

Since 2002, a number of things have changed for class actions. In 2003, revisions were made to Rule 23—the first significant amendments to the body of the rule since 1966.<sup>46</sup> The 2003 amendments did not directly address the criteria for class certification, but they did focus on the process of certification and settlement approval, including changes to existing Rules 23(c) and (e) and the addition of Rules 23(g) and (h), dealing with appointment of class counsel and attorney fee awards to class counsel. In 2005, Congress adopted the Class Action Fairness Act (CAFA), which broadened the subject matter juris-

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42. Douglas Martin, *The Rise and Fall of the Class-Action Lawsuit*, N.Y. TIMES, Jan. 8, 1988, <http://www.nytimes.com/1988/01/08/us/the-law-the-rise-and-fall-of-the-class-action-lawsuit.html> (quoting Professor Paul Carrington).

43. See, e.g., John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1019–21, 1020 figs. 8 & 9 (1991).

44. *Senate Subcommittee Holds Hearing on Class Action Litigation Reform*, 66 U.S.L.W. 2294 (U.S. Nov. 18, 1997) (second alteration in original) (quoting Judge Paul Niemyer).

45. Benjamine Reid & Chris S. Coutroulis, *Checkmate in Class Actions: Defensive Strategy in the Initial Moves*, LITIGATION, Winter 2002, at 21, 21.

46. In 1996, a preliminary draft of possible changes to the certification standards was published for comment. See Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure, 167 F.R.D. 523, 559–60 (1996). But they did not proceed further after very vigorous public commentary; the only change to the rule at that time was the adoption of Rule 23(f), authorizing discretionary appellate review of class-certification decisions. FED. R. CIV. P. 23(f).

diction of the federal courts in state-law class actions.<sup>47</sup> Although some predicted that this legislation would eliminate the state-court class action, that did not happen. In California, there was a modest decline in the number of state-court class actions, but they remained more numerous in 2005 than they had been in 2002.<sup>48</sup> In 2011, the U.S. Supreme Court held that state-court class actions could continue even after a federal court had held that a substantially similar class should not be certified.<sup>49</sup>

In general, these developments were greeted more enthusiastically by the defense bar than the plaintiff bar.<sup>50</sup> Indeed, plaintiffs' lawyers even made some energetic arguments about CAFA being unconstitutional. But if there is presently an attitude of gloom within the plaintiff bar, it is probably much more the result of Supreme Court decisions than of statutory or rule changes. One would expect that a Supreme Court that ruefully observed in a 2010 securities law decision that "some fear that [the United States] has become the Shangri-La of class-action litigation"<sup>51</sup> might create a headwind for plaintiffs in class actions.

There is much to show that this has happened, as Judge Boyle observed.<sup>52</sup> This Article does not provide an in-depth analysis of these cases,<sup>53</sup> but surely the defense side had more to cheer about than the plaintiff bar.

In *Wal-Mart Stores, Inc. v. Dukes*,<sup>54</sup> the Court held, 5-4, that the Rule 23(a)(2) commonality requirement was not satisfied with regard to a giant class of female employees of Wal-Mart because the company gave individual managers discretion to make promotion and sal-

47. See Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765 (2008), for a review of this expansion of federal court jurisdiction.

48. ADMIN. OFFICE OF THE COURTS, OFFICE OF COURT RESEARCH, FINDINGS OF THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION, 2000–2006: FIRST INTERIM REPORT 3 fig.1 (2009).

49. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011).

50. That was surely not true of all the Court's decisions. *Smith v. Bayer* made it possible for plaintiffs' lawyers defeated on class certification in federal court to seek certification of a similar class in state court despite the adverse federal court ruling. See 131 S. Ct. 2368. The expanded federal court jurisdiction available under CAFA could curtail those opportunities, however. *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, held that a state law forbidding class actions with regard to certain claims created by state law did not apply in federal court to preclude class certification because Rule 23 governed certification. 130 S. Ct. 1431, 1442 (2010). Though this situation would not often reappear, it was an ironic consequence of CAFA, which opened the federal courts to more class actions. See *infra* notes 81–93 and accompanying text, for a further discussion of this case.

51. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2886 (2010).

52. See *supra* note 1 and accompanying text.

53. See Mary Kay Kane, *The Supreme Court's Recent Class Action Jurisprudence: Gazing into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015 (2012), for an early effort.

54. 131 S. Ct. 2541 (2011).

ary decisions. One may characterize this decision as turning more on Title VII law than on class-action principles. Plaintiffs emphasized the seemingly striking disparity in the promotion rate of men and women, but the Court ruled that statistical proof was not sufficient to satisfy the commonality requirement in light of the company's delegation of discretion to managers to make these decisions:

The only corporate policy that the plaintiffs' evidence convincing establishes is Wal-Mart's "policy" of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have said "should itself raise no inference of discriminatory conduct."<sup>55</sup>

From this perspective, then, each supervisor's decision making presented a distinct question under Title VII. Given the size and geographical range of Wal-Mart stores, it becomes difficult to articulate a legal question that binds together female Wal-Mart employees from Alaska to Florida in a wide variety of types of retail outlets and different employment positions with Wal-Mart.

In dissent, Justice Ginsburg seemed to view employment discrimination law very differently:

The District Court's identification of a common question, whether Wal-Mart's pay and promotions policies gave rise to unlawful discrimination, was hardly infirm. The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware. The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.<sup>56</sup>

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55. *Id.* at 2554 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988)).

56. *Id.* at 2564 (Ginsburg, J., dissenting) (footnote omitted).

Justice Ginsburg's view of employment discrimination law can be contrasted with Professor Richard Nagareda's description of the case, which was written before the U.S. Supreme Court's decision:

The crux of the contested class certification in *Dukes*, however, has very little to do with dueling expert statisticians, ambiguous facts properly for the jury, or factual aspects of class certification requirements to be reviewed on appeal only for abuse of discretion. Rather, the conflict over class certification is, at bottom, one over the meaning of governing law eminently suited for de novo appellate review—over whether Title VII, properly read, embraces the discrimination-by-conduit notion advanced by the *Dukes* plaintiffs and elaborated by scholars under the rubric of structural discrimination.

From her perspective, then, Title VII law should command measures to banish the possibility that decisions could be made by people who are “prey to biases of which they are unaware” if discretionary decision making seemed to lead to disparate results.<sup>57</sup> Whether or not that is a common question that “predominates,”<sup>58</sup> that would seem sufficient to satisfy the common question requirement of Rule 23(a)(2).

Thus, it can be debated whether *Wal-Mart* has major significance for class actions outside the employment discrimination sphere or even for the commonality issue presented in most employment discrimination class actions. In *Wal-Mart*, the Court also unanimously rejected the plaintiffs’ attempt to certify the class under Rule 23(b)(2) on the ground that Title VII back-pay awards could be included in such a case as “equitable” relief and said instead that only “incidental” monetary relief for the class could be included under Rule 23(b)(2).<sup>59</sup> There may be a temptation for plaintiffs’ lawyers to “shoehorn” their cases into Rule 23(b)(2) to ease the path to class certification.<sup>60</sup> But one could at least ask—given the size and complexity of the Wal-Mart operation—what injunction would adequately address the supposedly recurrent differential treatment of women employees. Surely there are examples of federal courts taking over public institutions, such as prisons, and “running” them, immersing the courts in the complexity of such a task. But it is worth noting that doing so with a private enterprise might seem a stretch too far.

Beyond a doubt, *Wal-Mart* has had an impact. On remand, the district court refused to certify a less ambitious class making similar claims against Wal-Mart.<sup>61</sup> At much the same time, however, a gender discrimination class action against Costco proceeded.<sup>62</sup> In another

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Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 159 (2009). The majority quoted this article with apparent favor. See *Wal-Mart*, 131 S. Ct. at 2551.

57. *Wal-Mart*, 131 S. Ct. at 2564 (Ginsburg, J., dissenting).

58. This is the standard for certification under Rule 23(b)(3), not Rule 23(b)(2), on which plaintiffs relied in *Wal-Mart*. *Id.* at 2559.

59. *Id.* at 2557.

60. *E.g.*, *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 825 (7th Cir. 2011) (“Class action lawyers like to sue under [(b)(2)] because it is less demanding, in a variety of ways, than Rule 23(b)(3) suits . . . .”); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000) (“[P]laintiffs may attempt to shoehorn damages actions into the Rule 23(b)(2) framework . . . .”).

61. *Dukes v. Wal-Mart Stores, Inc.*, 964 F. Supp. 2d 1115, 1127 (N.D. Cal. 2013). But other less ambitious suits continue. See, *e.g.*, *Phipps v. Wal-Mart Stores, Inc.*, No. 13–6194, 2015 WL 4079441 (6th Cir. July 7, 2015) (proposing a class action on behalf of present and former employees in Wal-Mart Region 43).

62. See *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012). It has been reported that the class action settled for \$8 million, including “an unusually tailor-made system for

case, the Second Circuit Court of Appeals recognized that the “specter of decertification” in the wake of *Wal-Mart* supported the district court’s conclusion that the “significant risk of decertification” provided a reason for approving a proposed settlement.<sup>63</sup> Whether employment discrimination class actions will in the future be the big deal in discrimination litigation that they once were might be debated as well. But as we have seen,<sup>64</sup> the heyday of employment discrimination class actions was really some time ago.

Another headwind comes from the increasing insistence of federal courts on detailed support for class certification.<sup>65</sup> Actually, the Court had insisted on “rigorous” scrutiny of the evidentiary support for class certification since 1982.<sup>66</sup> *Comcast Corp. v. Behrend*<sup>67</sup> appeared to present the Court with an opportunity to emphasize the need for a full *Daubert* review of expert submissions in support of class certification, something *Wal-Mart* suggested should be required.<sup>68</sup> The Court’s grant of certiorari in *Comcast* indicated that this was its goal,<sup>69</sup> but it eventually turned out that the issue had not been preserved and the Court therefore could not decide it.<sup>70</sup> Nonetheless, it did reverse on the ground that plaintiff’s expert evidence only supported one of four theories for antitrust impact and damages, making individual questions predominate.<sup>71</sup>

This decision also cast something of a pall over class certification efforts. But it was not a tsunami. Consider what happened with the cases in which the Court vacated earlier certifications and remanded for reconsideration consistent with the *Comcast* analysis. On remand,

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awarding damages to individual class members.” Laura Hautala, *Women Win \$8M from Costco*, S.F. DAILY J., Dec. 19, 2013, at 3.

63. *Charron v. Wiener*, 731 F.3d 241, 248–49 (2d Cir. 2013) (“[T]he heightened legal uncertainty necessarily injected by significant recent Supreme Court authority [is] relevant to the propriety of class certification.”).

64. See *supra* note 43 and accompanying text.

65. See Marcus, *supra* note 7, for an examination of this trend.

66. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).

67. 133 S. Ct. 1426 (2013).

68. “The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so . . . .” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553–54 (2011).

69. As framed by the U.S. Supreme Court, the question presented in *Comcast* was: “Whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.” *Comcast*, 133 S. Ct. at 1431 n.4. See Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 GEO. WASH. L. REV. 606 (2014), for a discussion of the general question of application at the certification stage of evidentiary standards that apply at trial.

70. *Id.* at 1435–36 (Ginsburg, J. & Breyer, J., dissenting).

71. *Id.* at 1433–35.

both the Sixth<sup>72</sup> and Seventh Circuit Courts of Appeals<sup>73</sup> held that predominance could be satisfied even if damages required some individual treatment. Speaking for the Seventh Circuit, Judge Posner was particularly pointed in rejecting defense arguments:

It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits.<sup>74</sup>

The Supreme Court's cavalcade of rulings enforcing arbitration clauses seems to create a more serious headwind than the above decisions. This headwind goes beyond class actions and has been building for three decades. A number of state courts, such as California's, have attempted a rearguard action to impede the move toward noncourt resolution. *AT&T Mobility LLC v. Concepcion*<sup>75</sup> and *American Express Co. v. Italian Colors Restaurant*<sup>76</sup> expanded the impact on class actions by rejecting arguments that class actions should be allowed to proceed even in instances when individual arbitration does not seem to be a viable opportunity. The National Labor Relations Board's effort to declare requiring class action waivers an unfair labor practice was rejected by the Fifth Circuit Court of Appeals,<sup>77</sup> but the California Supreme Court held that representative actions under California's Private Attorneys' General Act (PAGA) could survive.<sup>78</sup> And the Supreme Court itself held that an arbitrator's decision that class arbitration is allowed under the parties' contract cannot be overturned by a court.<sup>79</sup> So the headwind from arbitration clauses and class action

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72. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 854 (6th Cir. 2013).

73. *See* *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013).

74. *Id.* at 801. As suggested by Judge Posner, the possibility of issue certification under Rule 23(c)(4) may become more important due to *Comcast*. Defense lawyers have reported that "some courts have moved increasingly toward the certification of liability-only classes." Scott Elder & Jenny Mendelsohn, *Class Action Certification Got Tougher in 2014*, 37 NAT. L.J. 15, 24 (2014).

75. 563 U.S. 333 (2011).

76. 133 S. Ct. 2304 (2013).

77. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 364 (5th Cir. 2013).

78. *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 154–55 (Cal. 2014).

79. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).

waivers has been particularly strong, even though there may be pockets protected from the wind.<sup>80</sup>

But the Supreme Court's class-action decisions have not been entirely to defendants' liking. In *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,<sup>81</sup> the Court held that CAFA—legislation widely supported by defense interests desiring to get cases into federal court—prevented application of a New York statute forbidding class actions for statutory penalties, and Justice Scalia wrote the Court's decision. There are certainly grounds to criticize the decision,<sup>82</sup> but it surely was not the outcome favored by the defense bar. Much closer to the heart of the defense bar, at least in securities litigation, was the possibility that the Court would abandon its 4-2 decision in 1988, adopting the fraud-on-the-market theory,<sup>83</sup> which was critical to class certification in securities fraud suits, a type of litigation that some regard as “the 800-pound gorilla that dominates and overshadows other forms of class actions.”<sup>84</sup> But the Court refused, although it did rule that defendants could try to defeat certification by showing that the theory should not apply in this case.<sup>85</sup> This defeat for defense arguments followed on the heels of earlier failures to persuade the Court that “loss causation” had to be proved to obtain certification<sup>86</sup> and that plaintiffs must prove “materiality” of statements to invoke the fraud-on-the-market theory.<sup>87</sup> Sometimes the wind from the Court's decisions blew the plaintiffs' way.

It may be, as Dean Mary Kay Kane foresaw, that defendants hoped that the U.S. Supreme Court would “clos[e] the door on class actions,”<sup>88</sup> but that has not happened. The breeze is not a hurricane.

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80. On this score, note that the Supreme Court granted certiorari in *DIRECTV, Inc. v. Imburgia*, in which the California courts had held a class-action waiver provision in a contract unenforceable. 135 S. Ct. 1547, 1547 (2015). The provision said: “If, however, the law of your state would find this agreement to dispense with class action procedures unenforceable, then this entire Section 9 is unenforceable.” *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 193 (Ct. App. 2014). It appears that the issue before the Court was whether this language permitted an escape from its interpretation of the Federal Arbitration Act (FAA), or that such a clause should be interpreted to invoke any federal law (such as the FAA) that preempts state law. *Id.* at 194.

81. 130 S. Ct. 1431 (2010).

82. See Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17 (2010), for a careful dissection of the decision.

83. *Basic Inc. v. Levinson*, 485 U.S. 224, 250 (1988).

84. John C. Coffee Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1539 (2006).

85. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2404 (2014).

86. *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2183 (2011).

87. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1204 (2013).

88. Mary Kay Kane, Emeritus Dean & Chancellor, Univ. of Cal., Hastings Coll. of the Law, *Remarks at 2014 Randal Thrower Symposium: In a Class by Itself Has the Roberts Court*

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Moreover, at least some on the defense side might not entirely welcome a hurricane if they could conjure one up. For example, in 2014 a roundtable discussion about securities litigation organized by the *California Lawyer* included forecasts about whether the Court would abandon the fraud-on-the-market theory.<sup>89</sup> One defense lawyer predicted (incorrectly as things worked out) that the Court would abandon the theory, but he added:

What happens next, if I'm right? I don't think it's necessarily good for defendants. There's a pretty strong possibility Congress will step in, and what Congress eventually does could be worse for defendants or for plaintiffs; no one can say. Assuming *Basic* [the 1988 case adopting the fraud-on-the-market theory] is reversed and Congress doesn't step in, you'll still have derivative suits. That would be the most logical place for the plaintiffs to go and file state court derivative actions.<sup>90</sup>

Another defense attorney offered additional thoughts about the real consequences of a complete defense knockout of the theory:

You cannot settle a claim against 5 or 10 or 15 or 20 institutional investors and foreclose anybody but those same investors from pursuing new claims. And heaven knows what would happen if Congress increased the budget for the SEC for this purpose by 30 or 40 percent. Why is that better for defendants?<sup>91</sup>

After the Supreme Court spoke on fraud-on-the-market, defense lawyers explained that the Court had adopted a “middle ground” approach: “Now that the Court has given the green light to defendants to challenge price inflation claims at class certification, we can expect more protracted *Daubert* style evidentiary hearings at class certification with battling financial economists and events studies.”<sup>92</sup> It should be no surprise that obtaining class certification will involve more work and more expense.<sup>93</sup>

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*Slammed the Courthouse Door on Class Actions?*, YOUTUBE (Feb. 6, 2014), [https://www.youtube.com/watch?v=Edpzj\\_1QGWg](https://www.youtube.com/watch?v=Edpzj_1QGWg) (quote at 10:48).

89. *2014 Roundtable Series: Securities*, CAL. LAWYER, Jan. 2014, at 47. See *infra* notes 116–18 and accompanying text, for a discussion of the fraud-on-the-market theory.

90. *2014 Roundtable Series: Securities*, *supra* note 89, at 49 (quoting Peter Stone, a partner at Paul Hastings).

91. *Id.* at 48 (quoting Matthew Larrabee, a partner at Dechert).

92. Miranda Schiller & David Schwartz, Halliburton II: *The Securities Fraud-on-the-Market Presumption Is Here To Stay*, METRO. CORP. COUNS., July/Aug. 2014, at 29, 29, <http://www.metrocorpounsel.com/pdf/2014/July/29.pdf>.

93. Marcus, *supra* note 7, at 355–59 (predicting that greater attention to the merits would mean more work for lawyers and judges).

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## III. COMCAST BOMBAST

Although the wind has shifted against class certification, that shift may not be as complete as some would prefer. But it seems that lawyers who seek to defeat certification are inclined to claim that the Court's decisions have dealt their opponents a knockout punch. Perhaps major Supreme Court decisions invite aggressive overstatement of what the Court actually ruled. In this context, I call this tendency "Comcast bombast," invoking the name of a recent case.<sup>94</sup> That behavior may be good for business or at least in generating fees for vigorously litigating issues that would not previously have seemed worth litigating.

First take *Wal-Mart*. True, that was a "significant legal development," as Judge Fletcher of the Ninth Circuit noted.<sup>95</sup> But even the Court's opinion in *Wal-Mart* bore indications that it viewed the case (like *Amchem*) as extraordinary, and not a "normal" class action. Yet it appears that a considerable number of defense counsel have advanced *Wal-Mart* challenges to certification in cases that differ greatly from the one before the Court. For example, a district judge in New York reacted to a defense motion to decertify a class by saying: "If the reader wonders exactly what [*Wal-Mart*'s] commonality analysis has to do with this case, s/he is likely not alone."<sup>96</sup> In 2012, Judge Posner rejected a defense effort to apply the Court's analysis in the case before the Seventh Circuit because it did not present the problems that were present in *Wal-Mart*.<sup>97</sup> More recently, Judge Easterbrook has rejected a defense argument based on *Wal-Mart* and *Comcast* concerning common proof of damages on the ground that "*Wal-Mart* has nothing to do with commonality of damages."<sup>98</sup>

Even in cases dramatically different from *Wal-Mart*, there were defense efforts to invoke the case. For example, in a case involving the D.C. school district's alleged failure to provide individually tailored education plans for disabled children, Judge Harry Edwards chastised defense counsel for trying to invoke *Wal-Mart* in support of their challenge:

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94. See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

95. See *Wang v. Chinese Daily News, Inc.*, 709 F.3d 829, 833 (9th Cir.), *withdrawn, superseded by* 737 F.3d 538 (9th Cir. 2013) (noting that "the Court's decision in *Wal-Mart* presents a sufficiently significant legal development" to excuse defendant's failure to discuss commonality under Rule 23(a)(2) in its opening brief).

96. *Jermyn v. Best Buy Stores, L.P.*, 276 F.R.D. 167, 171 (S.D.N.Y. 2011).

97. *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 369 (7th Cir. 2012).

98. *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 602 (7th Cir. 2014).

The argument raised by the District is astonishing because it is patently wrong. *Wal-Mart* surely does not foreclose a class action to challenge a city policy that effectively precludes protected parties from even being considered for benefits that would otherwise be available. And all claimants who are similarly blocked by the policy may join a class action to challenge it. Such a class action would easily satisfy the commonality requirement . . . even after *Wal-Mart*.<sup>99</sup>

Not only for alliterative reasons, *Comcast* appears to have released more bombast. For one thing, the dissent by Justices Ginsburg and Breyer seemed to belittle the decision as insignificant, asserting that the decision “breaks no new ground on the standard for certifying a class action,” and that it “is good for this day and case only.”<sup>100</sup> Almost from the outset, there was vigorous public disagreement about whether the Court had really done anything. The plaintiff-side view, if it can be called that, was that Justices Ginsburg and Breyer were right, particularly because plaintiffs in the case conceded that they had to show that they would offer class-wide damages proof to obtain certification, so the Court was not presented with the question of whether they had to make such a showing in that case or whether it was always necessary that there be a class-wide method of proof.

From the defense side, one senses that the view was something more like: “Yes *Comcast* did matter! Things are really, really different!”<sup>101</sup> Some even claimed that the Court had actually decided whether *Daubert* applied at the certification stage, something the certiorari grant suggested would be decided but that turned out not to be ripe for decision in the case.<sup>102</sup> More recent analyses by lawyers iden-

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99. *DL v. District of Columbia*, 713 F.3d 120, 130 (D.C. Cir. 2013) (Edwards, J., concurring). The majority had vacated certification on other grounds. *Id.* at 121.

100. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1436–37 (2013) (Ginsburg, J. & Breyer, J., dissenting). Tongue in cheek, one might argue that the fact that Justices Ginsburg and Breyer chose to deliver their dissents orally showed that the Court’s ruling was important. In a story about Justice Scalia, the *New York Times* said that Scalia would present an oral dissent only in cases in which he regarded the Court’s decision as particularly important, adding: “By that standard, the dissenters thought the *Comcast* decision was very bad indeed. It gave rise to two oral dissents, from the two senior members of the court’s liberal wing, Justices Ruth Bader Ginsburg and Stephen G. Breyer.” Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES, May 4, 2013, [http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?\\_r=0](http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?_r=0).

101. James Speyer & Kelly Welchans, *A Class Action Game Changer*, S.F. DAILY J., Apr. 29, 2013 (arguing that *Comcast* was in fact a “game changer”). See also David E. Kouba & Carolyn A. Pearce, *Comcast in Review: Courts in 2015 Continue To Require Evidence of Class-Wide Damages Before Granting Class Certification*, 17 CLASS ACTION LITIG. REP. (BNA) 1 (2016).

102. See Jessie Kokrda Kamens, *What Comes Next After Comcast? SCOTUS May Wade into Issue Certification*, 14 CLASS ACTION LITIG. REP. (BNA) 1537, 1537 (2013) (citing “several class action practitioners” who spoke at an event put on by the International Association of Defense

tified with the defense side have been more measured, such as: “whether *Comcast* changed the law is largely a side issue for now, because it undeniably has broadly affected how courts *apply* the law.”<sup>103</sup>

In court, it appears that *Comcast* was used frequently and aggressively. In the words of one district court judge: “*Comcast* explicitly extended to Rule 23(b)(3) the Rule 23(a) requirement that courts must conduct a ‘rigorous’ analysis to determine that Rule 23 has been satisfied at the class certification stage.”<sup>104</sup> But that had already seemed true to many.<sup>105</sup> Since the Supreme Court’s decision, interpreting *Comcast* seems to have divided the lower courts.<sup>106</sup>

Taking a step back, one can regard a fair amount of the post-*Comcast* activity as resulting from or relying on overstatement of the Court’s holding. Indeed, even in *Comcast* itself, it appears that on remand the district court was receptive to recertifying, albeit for a narrower class.<sup>107</sup> After deciding *Comcast*, the Supreme Court vacated and remanded in two other cases for reconsideration in light of its ruling, but on remand the Sixth and Seventh Circuit Courts of Appeals recertified.<sup>108</sup> A defendant in the Sixth Circuit case petitioned the Court for review, and the *Wall Street Journal* published an op-ed piece by the President of the Business Roundtable saying that “American manufacturers could soon face an onslaught of lawsuits unless the Supreme Court intervenes.”<sup>109</sup> But the Court denied certiorari.<sup>110</sup>

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Counsel as saying that “[t]he question of whether *Daubert* applies at the class certification stage has been put to rest by the U.S. Supreme Court’s decision in *Comcast*”).

103. Joel S. Feldman & Daniel R. Thies, *Comcast’s Lasting Impact: Crystallization and Affirmation of the Rule 23(b)(3) Predominance Requirement*, 15 CLASS ACTION LITIG. REP. (BNA) 574, 574 (2014).

104. *Nieberding v. Barrette Outdoor Living, Inc.*, 302 F.R.D. 600, 617 (D. Kan. 2014) (quoting *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013)).

105. See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309–10 (3d Cir. 2008) (enumerating the demanding “finding” requirements district courts must satisfy to certify a class under Rule 23(b)(3)). See Marcus, *supra* note 7, at 326–27, for a discussion of the case.

106. As summed up by the district court in *Jacob v. Duane Reade, Inc.*:

Broadly, the class-certification decisions applying *Comcast* can be divided into three, distinct groups: (1) courts distinguishing *Comcast*, and finding a common formula at the class certification stage, and thus, predominance, satisfied; (2) courts applying *Comcast* and rejecting class certification on the ground that no common formula exists for the determination of damages; and (3) courts embracing a middle approach whereby they employ Rule 23(c)(4) and maintain class certification as to liability only, leaving damages for a separate, individualized determination.

293 F.R.D. 578, 581 (S.D.N.Y. 2013) (citations omitted).

107. *Glaberson v. Comcast Corp.*, 295 F.R.D. 95, 103 (E.D. Pa. 2013) (rejecting defendants’ motion to strike plaintiffs’ motion to certify).

108. See *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 802 (7th Cir. 2013); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 861 (6th Cir. 2013).

109. John Engler, Opinion, *Trial Lawyers Put Whirlpool Through the Wringer*, WALL ST. J., Dec. 30, 2013, at A15.

Beyond that, lower courts have repeatedly faced (and often rejected) arguments that *Comcast* permits certification only in cases in which there is class-wide proof of the amount of damages.<sup>111</sup> Some courts of appeals found the argument persuasive in analogous anti-trust settings,<sup>112</sup> but others found otherwise. For example, in early 2015, the Second Circuit confronted “the question whether the Supreme Court’s decision in *Comcast Corp. v. Behrend* overruled the law in this Circuit that class certification pursuant to Rule 23(b)(3) . . . cannot be denied merely because damages have to be ascertained on an individual basis,” and it answered: no.<sup>113</sup> Other courts have agreed.<sup>114</sup> Speaking for the Seventh Circuit, Judge Easterbrook rejected defense arguments that prior decisions of that court were no longer good law, adding that if the defense arguments were correct “then class actions about consumer products are impossible.”<sup>115</sup>

It is not surprising that, when the Supreme Court declares that there should be a significant change in a legal rule or practice, the lower courts have to grapple with the implementation and ramifications of the change. It is also unsurprising that lawyers may be tempted to overstate (to courts) and oversell (to clients) the importance of the changes announced by the Court. But it sometimes seems

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110. *Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014) (mem.).

111. See, e.g., Robert Rachal et al., *Labor and Employment and ERISA Class Actions After Wal-Mart and Comcast—Practice Points for Defendants (Part I—Commonality)*, DAILY LAB. REP. (BNA), Nov. 25, 2013, at I-1, I-1 to I-2.

After *Wal-Mart*, the Supreme Court again altered the landscape of class action litigation when in *Comcast Corp. v. Behrend* the Court applied what it called the “straight-forward application of class certification principles” to issues of class damages. Though *Comcast* is not a labor and employment case, its import is clear: plaintiffs’ damages theory must (i) match their class liability theory and (ii) be able to prove damages on a [class-wide] basis, free from taint from individualized harms.

*Id.*

112. See, e.g., *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013):

As we see it, *Behrend* sharpens the defendants’ critique of the damages model as prone to false positives. It is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so “requires inquiry into the merits of the claim.” [quoting *Comcast*] If the damages model cannot withstand this scrutiny then, that is not just a merits issue. [Plaintiffs’ expert’s] models are essential to the plaintiffs’ claim they can offer common evidence of [class-wide] injury. No damages model, no predominance, no class certification.

113. *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 402, 405 (2d Cir. 2015).

114. See, e.g., *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015) (recognizing the “well-established” principle that individualized damages do not automatically defeat certification); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255 (10th Cir. 2014) (“Class-wide proof is not required for all issues.”); *In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir. 2014) (rejecting the notion that *Comcast* requires a common methodology for measuring class-wide damages).

115. *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 602 (7th Cir. 2014).

that this “sales job” strays into bombast. To take the fraud-on-the-market rule,<sup>116</sup> a defense view was that the impending Supreme Court decision meant that securities fraud class actions were “on the chopping block” because they depended on this rule.<sup>117</sup> From the plaintiff’s perspective, things evidently looked much the same; one pessimistic plaintiffs’ lawyer predicted, before the Supreme Court’s decision, that the fraud-on-the-market theory “is basically finished,” and he added that “the noose around securities class actions has been tightening ever since 1995.”<sup>118</sup> But at the same time, it was also reported that the number of securities class actions was increasing.<sup>119</sup> And when the Supreme Court refused to abandon the fraud-on-the-market doctrine, a plaintiff-side firm boasted that the Court’s decision was “the most significant securities case in decades” and “an important victory for investors’ rights.”<sup>120</sup>

So doomsday and triumphal assertions must be scrutinized with care. That caution goes beyond securities fraud cases. Consider the effect of *Wal-Mart* on employment class actions. Some said that the decision would have an almost paralyzing effect on employment class actions. But at least one leading defense-side firm opined in 2014 that “[e]mployment discrimination class litigation will remain ‘white hot’ in 2014 but class plaintiffs will have to continue to ‘reboot’ their class liability theories because of recent U.S. Supreme Court decisions.”<sup>121</sup> So although the wind has been blowing against class actions, creative plaintiffs’ lawyers continue to make headway.

#### IV. TACKLING AGAINST THE WIND: STRATEGIES FOR COPING WITH THE BREEZE

*Reforming procedural rules once they are subject to widespread exploitation can often be characterized by the carnival game “Whac-A-Mole.”*<sup>122</sup>

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116. See *supra* notes 83–87 and accompanying text.

117. See Christina Lincoln, *Day of Reckoning for Securities Class Actions*, L.A. DAILY J., Dec. 19, 2013, [http://www.newmeyeranddillion.com/lwdcms/doc-view.php?module=news&module\\_id=892&doc\\_name=doc](http://www.newmeyeranddillion.com/lwdcms/doc-view.php?module=news&module_id=892&doc_name=doc).

118. Ramzi Abadou, *‘Fraud on the Market’ Is Basically over*, S.F. DAILY J., Jan 27, 2014.

119. See Todd Scott & Alex Talarides, *Securities Class Actions on the Rise . . . for Now*, S.F. DAILY J., Jan. 27, 2014.

120. *Inside Look*, ADVOCATE, Summer 2014, at 3, 5.

121. Jessie Kokrda Kamens, *Employment Class Action Filings Hold Steady as Plaintiffs Adapt to Supreme Court Decisions*, 15 CLASS ACTION LITIG. REP. (BNA) 34, 34 (2014). This story reports on Seyfarth Shaw LLP’s Annual Workplace Class Action Report. The report added that: “Plaintiffs have started to prune class definitions by size, geography, unit, and policy, and have also relied on a little-used provision of Rule 23—Rule 23(c)(4).” *Id.*

122. Marc S. Werner, *The Viability and Strategic Significance of Class Action Alternatives Under CAFA’s Mass Action Provisions*, 103 GEO. L.J. 465, 466 (2015).

American lawyers and judges are probably the most creative and inventive in the world. In the face of breezes making one sort of collective litigation difficult, they have found other routes—they have bent in the breeze rather than breaking. Put differently, playing whac-a-mole does not entirely defeat them. Several obvious examples exist.

#### A. *Changing Substantive Focus*

A decade and a half ago, wage and hour collective actions were not a major consideration. How things have changed. “The recent boom of wage and hour litigation is one of the most striking developments [of] modern legal history.”<sup>123</sup> True, the Supreme Court has recently confirmed that defendants in such cases may sometimes moot them by making Rule 68 offers to the original plaintiff before others opt in.<sup>124</sup> But the lower courts resist this notion, and the Eleventh Circuit has even declared that it agrees with the dissent in the Supreme Court.<sup>125</sup> It may be, of course, that the behavior of employers has, in the last decade or two, undergone a sea change in terms of obeying wage and hour laws. But it seems more likely that the growth in such class actions is a result of a shift in direction by class action lawyers. That is certainly the explanation offered by an experienced defense lawyer in 2014:

The FLSA [Fair Labor Standards Act] was enacted in 1938, but there wasn’t much litigation until about 15 years ago, after which the number of class action cases just exploded. In fact, 91 percent of today’s labor and employment class action suits are wage and hour related, for a few reasons. The standard for class certification in an FLSA matter is much lower compared to other employment law issues, and the pool of potential class members is significantly larger. In harassment cases, for instance, the class is limited to employees who claim to have been harassed, generally by a particular supervisor. Wage and hour class actions challenge a broad pay practice and can include all employees subject to that practice.<sup>126</sup>

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123. Daniel C. Lopez, Note, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61 *HAST. L.J.* 275, 276 (2009–2010).

124. See, e.g., *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1527 (2013). But the Court was careful to distinguish class actions from collective actions asserting claims under the Fair Labor Standards Act:

[R]espondent relies almost entirely upon cases that arose in the context of Federal Rule of Civil Procedure 23 class actions . . . . But these cases are inapposite . . . because Rule 23 actions are fundamentally different from collective actions under the FLSA . . . .

*Id.* at 1529.

125. *Stein v. Buccaneers Ltd. P’ship.*, 772 F.3d 698, 703 (11th Cir. 2014) (“We agree with the *Symczyk* dissent.”).

126. Interview by Editor with Angelo Spinola, Shareholder, Littler Mendelson P.C., in *Wage and Hour Class Actions in the Healthcare Industry: Legal Challenges and E-Discovery Solutions*, METRO. CORP. COUNS., Nov. 2014, at 12, 12 (quoting Angelo Spinola).

In somewhat the same vein, but a different substantive area, we are told that “[i]n the wake of the PSLRA, many professional plaintiffs simply moved into other types of corporate lawsuits. In shareholder derivative suits and acquisition class actions across the country, professional plaintiffs are back.”<sup>127</sup>

### B. Going to State Court

Although CAFA expanded federal court jurisdiction, it did not put an end to state-court class actions.<sup>128</sup> Indeed, the Supreme Court’s holding that the Anti-Injunction Act forbade a federal court injunction against a class action in a West Virginia state court<sup>129</sup> demonstrates that state courts remain an alternative venue. In late 2013, for example, an article appeared in the legal press in California entitled “Wage and Hour Class Actions Are Alive and Well in California.”<sup>130</sup> The California courts may even offer a partial refuge from the Supreme Court’s pro-arbitration decisions; the state supreme court has declared that arbitration agreements do not foreclose class actions under PAGA.<sup>131</sup> A defense side lawyer reported that PAGA suits increased by more than 400% between 2005 and 2013 and predicted that the increase would continue in light of the ruling on arbitration.<sup>132</sup>

### C. Switching to Multidistrict Combination

Class actions are hardly the only method of aggregating litigation in the United States. As Professor Sherman observed before *Wal-Mart* and *Comcast*, “increasingly stringent requirements for class certification” have “made the MDL model more attractive as a central device for resolving complex litigation.”<sup>133</sup> As Professor Jamie Dodge has recently reported: “[T]oday, fully one-third of all federal cases are MDL matters.”<sup>134</sup> Creative federal judges have even come to regard multidistrict litigation as producing what they call a “quasi class ac-

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127. Jessica Erickson, *The New Professional Plaintiffs in Shareholder Litigation*, 65 FLA. L. REV. 1089, 1089 (2013) (abstract).

128. See, e.g., *supra* note 48 and accompanying text.

129. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2373 (2011).

130. John Zaimis & Noah Stensapir, *Wage and Hour Class Actions Are Alive and Well in California*, S.F. DAILY J., Dec. 17, 2013.

131. *Iskanian v. CLS Transp. L.A. LLC*, 327 P.3d 129, 133 (Cal. 2014).

132. Katherine Bleyker, *Courts Use Common Sense To Manage PAGA*, S.F. DAILY J., July 16, 2014.

133. Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2206 (2008).

134. Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 331 (2014).

tion.”<sup>135</sup> As Professor Mullenix has pointed out, the whole idea of a “quasi-class action” is dubious,<sup>136</sup> but for a lawyer seeking a route to aggregate litigation, it may seem a godsend.

#### D. Moving Abroad

As mentioned *supra*,<sup>137</sup> much of the world deplores and fears the American class action. But that is not universally true. Class actions in Canada and Australia seem not to present some of the challenges that exist under recent decisions of our Supreme Court.<sup>138</sup> And because Canada is our “near abroad,” it should not be surprising to find that some American lawyers have begun experimenting with filing cases in Canada instead of the United States.<sup>139</sup>

#### E. Mass Actions

Finally, simple joinder can produce something like a class action, as CAFA recognized with its introduction of the concept of “mass actions.”<sup>140</sup> These cases can present challenges very similar to class actions. For example, a 2011 Ninth Circuit case involved a suit by approximately 1,000 plaintiffs arising out of the operation of a chrome plating facility in a California town from 1945 until 1995.<sup>141</sup> Faced with this mass, the district court was persuaded to enter what is called a *Lone Pine* order,<sup>142</sup> requiring all plaintiffs to submit information about their alleged exposure to toxic materials and make a prima facie showing of causation as a condition for continuing with the case. The

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135. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 611–12 (E.D. La. 2008) (citing *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006)).

136. Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 389–90 (2011).

137. See *supra* notes 8–9 and accompanying text.

138. See Vince Morabito, *Clashing Classes Down Under—Evaluating Australia’s Competing Class Actions Through Empirical and Comparative Perspectives*, 27 CONN. J. INT’L L. 245, 257 (2012) (“[T]he Federal and Victorian regimes do not employ what are known in the US and Canada as certification regime.”).

139. Ashby Jones, *Lawyers Looking to Canada for Shareholder Litigation*, WALL ST. J., Feb. 27, 2012, at B4 (“Unfavorable court rulings and legislation helped damp filings of securities class-action lawsuits in the U.S., but these suits are starting to gain traction in Canada, prompting some U.S. lawyers to increasingly look for opportunities up north.”).

140. 28 U.S.C. § 1332(d)(11)(A) (2012) (“[A] mass action shall be deemed to be a class action . . .”). The statute defines “mass action” as a case in which “monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact.” *Id.* § 1332(d)(11)(B)(i).

141. *Avila v. Willits Envtl. Remediation Trust*, 633 F.3d 828, 831–32 (9th Cir. 2011).

142. This sort of requirement was seemingly invented originally in *Lore v. Lone Pine Corp.*, and has been named after that case. No. L-33606-85, 1986 WL 637507, at \*1–2 (N.J. Super. Ct. Nov. 18, 1986).



Ninth Circuit upheld the practice in the case before it, but other courts have questioned it.<sup>143</sup>

In sum, the advent of a “public interest bar” over the last forty years, the flexibility of a variety of procedural measures, and the existence of multiple forums and forms for aggregate litigation suggest that it will continue to appear in U.S. courts. That should not lead one to minimize the importance of recent decisions curtailing use of the class action—particularly the mandatory arbitration decisions—but it does emphasize the relevance of Confucius’ saying that was quoted at the outset.

#### V. THE PRIVATE ENFORCEMENT PUZZLE

For American procedure, there is another dimension in addition to the impact of the headwinds faced by class-action lawyers—the extent to which class actions provide valuable private enforcement of public legal norms. From a European perspective, this sort of enforcement consequence may seem alien, although something of the sort may now be emerging.<sup>144</sup> One thing on which both plaintiffs’ and defense lawyers seem to agree is that the prospect of private class actions does affect the behavior of potential defendants. But they disagree fervently on whether that is a desirable thing; from the perspective of many defendants, as a RAND report noted in 2000, class action practice “enables large numbers of lawsuits about trivial or nonexistent violations of statutes and regulations that govern advertising, marketing, pricing and other business practices, and about trivial losses to individual consumers.”<sup>145</sup>

A recent discussion of current issues in class actions involving California lawyers from both sides of the aisle illustrates the debate. The

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143. See, e.g., *In re Digitek Prod. Liab. Litig.*, 264 F.R.D. 249, 259 (S.D.W. Va. 2010).

Given [the] choice between a “*Lone Pine* order” created under the court’s inherent case management authority and available procedural devices such as summary judgment, motions to dismiss, motions for sanctions and similar rules, I believe it more prudent to yield to the consistency and safeguards of the mandated rules especially at this stage of this litigation. Claims of efficiency, elimination of frivolous claims and fairness are effectively being addressed using the existing and standard means. Resorting to crafting and applying a *Lone Pine* order should only occur where existing procedural devices explicitly at the disposal of the parties by statute and federal rule have been exhausted or where they cannot accommodate the unique issues of this litigation. We have not reached that point.

*Id.*

144. S.I. Strong, *Regulatory Litigation in the European Union: Does the U.S. Class Action Have a New Analogue?*, 88 NOTRE DAME L. REV. 899, 953–68 (2012) (discussing European policies that may encourage something like group litigation enforcement of regulatory norms).

145. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 50 (2000).

discussion focused in part on what the defense bar often calls “no injury” data breach cases—cases in which there may be a large number of consumers affected by a data breach but few (if any) who actually were harmed as a result. A plaintiff’s lawyer emphasized the enforcement aspect of class actions:

[I]t’s a system where, if there’s not government oversight in a particular area, plaintiffs lawyers can step in. I think it’s an important aspect of what class actions mechanisms are there for, which is to take something that might otherwise go unchecked and correct it. The statutory violation cases are a response to the world that we’re living in, and what technologies have enabled big companies to do with people’s private information.<sup>146</sup>

A defense lawyer responded:

Point well taken . . . . [But where] the statutory remedy isn’t tethered to actual damage, a class action is not the answer. This is where government enforcement plays an important role. The attorney general’s or district attorney’s office, through its consumer enforcement division, can intercede to enforce the law in a way that is fair.<sup>147</sup>

So the problem is: How much private enforcement via class actions is enough? The almost cartoonish defense reaction sometimes encountered is that less is always better, and the competing somewhat cartoonish plaintiff perspective is that more is always better. At least sometimes, legislatures may create private enforcement schemes and try to calibrate the use of class actions. The New York legislature, for example, apparently tried to do that in regard to statutory penalties only to have the Supreme Court conclude that Rule 23 could not be so easily abrogated by state law.<sup>148</sup> And sometimes private class actions may seem somewhat to cripple public enforcement. Recently, for example, the Ninth Circuit Courts of Appeals held that the prior settlement of a class action on behalf of California consumers barred the

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146. 2015 *Roundtable Series: Class Action*, CAL. LAWYER, June 2015, at 41, 43 (quoting attorney Graham LippSmith of Kasdan LippSmith Weber Turner).

147. *Id.* at 48–49 (quoting Layne Melzer of Rutan & Tucker).

148. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437–38 (2010) (holding that a New York provision forbidding class actions for suits seeking to recover a statutory penalty could not prevent class certification under Rule 23). But Congress can limit the use of class actions in relation to claims it creates as it sees fit. A good example is the Truth in Lending Act, which prompted judges to bridle “ruinous” potential liability in class actions for small or technical failures to comply with the statute’s disclosure requirements. Congress eventually set a cap for liability in such cases. See 7B CHARLES WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE* § 1804 (3d ed. 2005), for a discussion of this history.

California Attorney General from pursuing compensation on a *parens patriae* basis (although other remedies remained available).<sup>149</sup>

The general question as to whether private enforcement should be encouraged or relied upon has generated an immense amount of literature.<sup>150</sup> Professors Burbank, Farhang, and Kreitzer have recently enumerated the considerations:

On the positive side of the ledger, relative to administrative implementation, private enforcement regimes can: (1) multiply resources devoted to prosecuting enforcement actions; (2) shift the costs of regulation off of governmental budgets and onto the private sector; (3) take advantage of private information to detect violations; (4) encourage legal and policy innovation; (5) emit a clear and consistent signal that violations will be prosecuted, providing insurance against the risk that a system of administrative implementation will be subverted; (6) limit the need for direct and visible intervention by the bureaucracy in the economy and society; and (7) facilitate participatory and democratic governance.<sup>151</sup>

But as they caution, there is also negative potential:

[P]rivate enforcement regimes (1) empower judges, who lack policy expertise, to make policy; (2) tend to produce inconsistent and contradictory doctrine from courts; (3) weaken the administrative state's capacity to articulate a coherent regulatory scheme by preempting administrative rulemaking; (4) usurp prosecutorial discretion; (5) discourage cooperation with regulators and voluntary compliance; (6) weaken oversight of policy implementation by the legislative and executive branches; and (7) lack democratic legitimacy and accountability.<sup>152</sup>

American public enforcement is surely more empowered than private enforcement, even if private lawyers have the class action available to them. Class actions can be dismissed or settled only with the court's approval,<sup>153</sup> and the proponents of a settlement bear the burden of showing that judicial approval is warranted by establishing that it is "fair, reasonable and adequate."<sup>154</sup>

But public authorities can act without judicial oversight comparable to that required in class actions. For example, the EEOC may seek class-wide relief without satisfying Rule 23.<sup>155</sup> More to the present

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149. *California v. IntelliGender, LLC*, 771 F.3d 1169 (9th Cir. 2014).

150. Margaret H. Lemos, *Special Incentives To Sue*, 95 MINN. L. REV. 782, 782 n.1 (2011) (referring to the "vast literature" on the choice between public and private enforcement).

151. Burbank et al., *supra* note 1, at 662.

152. *Id.* at 667.

153. FED. R. CIV. P. 23(e).

154. *Id.* at 23(e)(2).

155. *See, e.g., EEOC v. CRST Van Expedited, Inc.* 774 F.3d 1169, 1179 (8th Cir. 2014) (holding that Rule 23 does not limit or control the agency's suit seeking class-wide relief).

point, however, the general role of public authorities in enforcement actions differs very significantly from that which applies to private class actions brought for “enforcement” purposes. The public authorities can decide to dismiss without getting a judge’s approval like that required for dismissal of a class action.<sup>156</sup> They can similarly agree to settle their cases for sums not subject to judicial review.

Even if the settlement calls for entry of a judicial decree with injunctive provisions, the proper judicial attitude toward this arrangement differs greatly from settled class actions, for the court is to approve the decree unless it affirmatively finds that entering the decree would harm the public interest. A proposed Securities and Exchange Commission (SEC) settlement of claims against Citigroup provides an illustration. The consent decree called for disgorgement of \$160 million plus prejudgment interest of \$30 million, a civil penalty of \$95 million, and entry of an injunction permanently enjoining Citigroup from violating § 17 of the 1933 Securities Act.<sup>157</sup> But the district judge refused to approve it on the ground that the SEC and Citigroup did not offer sufficient evidence that the settlement served the public interest.<sup>158</sup>

The Second Circuit Court of Appeals held that the district court’s refusal constituted an abuse of discretion because the decision misperceived the court’s role in regard to a government enforcement action.<sup>159</sup> It quoted the Ninth Circuit Court of Appeals for the proposition that “[u]nless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved”<sup>160</sup> and ruled that “[a]bsent a substantial basis in the record for concluding that the proposed consent decree does not meet these requirements, the district court is required to enter the order.”<sup>161</sup> Besides emphasizing that the burden rests on the opponents of the proposed SEC settlement rather than on its proponents, the court held that the entire notion of judicial review of adequacy was out of place:

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156. An example is provided by an antitrust suit the government filed against IBM. After a change in administrations, the U.S. Department of Justice reached a settlement calling for voluntary dismissal of the suit. The district judge, however, refused to approve the dismissal. The Second Circuit Court of Appeals then granted a writ of mandamus on the ground that the district judge had exceeded his jurisdiction. *See In re Int’l Bus. Mach. Corp.*, 687 F.2d 591, 596–97 (2d Cir. 1982).

157. *SEC v. Citigroup Global Mkts., Inc.*, 752 F.3d 285, 289 (2d Cir. 2014).

158. *SEC v. Citigroup Global Mkts., Inc.*, 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011), *vacated*, 752 F.3d 285.

159. *Citigroup*, 752 F.3d at 297.

160. *Id.* at 294 (first alteration in original) (quoting *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984)).

161. *Id.*

We omit “adequacy” from the standard. Scrutinizing a proposed consent decree for “adequacy” appears borrowed from the review applied to class action settlements, and strikes us as particularly inapt in the context of a proposed S.E.C. consent decree. The adequacy requirement makes perfect sense in the context of a class action settlement—a class action settlement typically precludes future claims, and a court is rightly concerned that the settlement achieved be adequate. By the same token, a consent decree does not pose the same concerns regarding adequacy—if there are potential plaintiffs with a private right of action, those plaintiffs are free to bring their own actions. If there is no private right of action, then the S.E.C. is the entity charged with representing the victims, and is politically liable if it fails to adequately perform its duties.<sup>162</sup>

The judge’s evaluation of the public interest, similarly, did not support the court’s refusal to approve the decree. “The job of determining whether the proposed S.E.C. consent decree best serves the public interest, however, rests squarely with the S.E.C., and its decision merits significant deference.”<sup>163</sup> Accordingly, “[o]n remand, the district court should consider whether the public interest would be disserved by entry of the consent decree.”<sup>164</sup>

One could argue that private attorneys who seek to justify their class actions as achieving public enforcement in addition to private compensation should be required to show that public enforcement is somehow “inadequate.”<sup>165</sup> But that is likely not a requirement the regulators would favor. And it is worth noting, as Professor Farhang (and many others) point out, that the orientation of public enforcers may shift dramatically with the outcome of elections. Just now, at least some urge that the public enforcers are overdoing it. In its August 30, 2014 issue, the *Economist* made its cover story “Criminalising the American Company,” beginning with the observation that “[i]t is a rare month that goes by without announcements of big legal settlements by large companies doing business in America.”<sup>166</sup> A few weeks earlier, the same magazine reported that big banks have embraced “derisking”—retreating from markets and lines of business—in “a pre-emptive cringe in the face of American regulation.”<sup>167</sup> From this perspective, the private class action really seems to be piling on.

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162. *Id.* (citations omitted).

163. *Id.* at 296.

164. *Id.* at 297.

165. It might be noted that there have been suggestions that “deterrent effect” be added to Rule 23(b)(3) as an additional factor to consider in regard to class certification.

166. *Criminalising the American Company: A Mammoth Guilt Trip*, *ECONOMIST*, Aug. 30–Sept. 4, 2014, at 21, 21.

167. *Poor Correspondents*, *ECONOMIST*, June 14, 2014, at 65, 65.

But other stories in the press remind us of the concerns that cause people to be uneasy about relying entirely on public enforcement. In January 2014, the *New York Times* ran a story entitled “Wall Street Chips Away at Dodd-Frank Rules,” with a subtitle referring to “A Swarm of Lobbyists.”<sup>168</sup> Perhaps closer to the point, the former Commissioner of the New Jersey Department of Environmental Protection, in a *New York Times* op-ed piece published in March 2015, denounced Governor Chris Christie’s decision to settle a longstanding environmental clean-up action against Exxon for what he described as “roughly three cents on the dollar.”<sup>169</sup> He noted that the Governor had been Chairman of the Republican Governors Association in 2014 when Exxon donated \$500,000 to that group.<sup>170</sup>

The private enforcement consequences of class-action treatment therefore present a puzzle—how to decide when to authorize that treatment, and when not to authorize it. At least sometimes, it really seems that class actions create serious risks of overenforcement. Possible examples are proposed class actions seeking statutory damages from merchants under the Fair and Accurate Credit Transactions Act for failure to recalibrate the machines by which they generate receipts so only the last four numbers of a credit card number appear on the receipt. In a number of cases, judges presented with class claims for potentially millions of dollars refused to certify them on the ground that it would not be “superior” to individual litigation (with statutory recovery of attorney fees). But the Ninth Circuit Court of Appeals overturned a similar decision by a district judge who found that the defendant acted in good faith and should not, therefore, face a liability between \$29 million and \$290 million.<sup>171</sup> Rule 23 was in the rulebook when Congress acted, the court reasoned, and the district judge should not insist on more than the rule required.<sup>172</sup>

Notwithstanding, another California district judge later refused to certify a class in a similar suit against the City of Laguna Beach for a similar alleged deficiency in the machines at the municipal parking lot. The judge pointed out that the plaintiff did not claim anyone had been harmed by the inclusion of additional credit card numbers and noted

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168. Jonathan Weisman & Eric Lipton, *Wall Street Chips Away at Dodd-Frank Rules*, N.Y. TIMES, Jan. 14, 2014, at A1.

169. Bradley M. Campbell, Opinion, *Shortchanging New Jersey by Billions*, N.Y. TIMES, Mar. 5, 2015, at A27. The settlement was later approved. See Benjamin Weiser, *New Jersey’s \$225 Million Settlement with Exxon Mobil Is Approved*, N.Y. TIMES, Aug. 26, 2015, at A15.

170. Campbell, *supra* note 169.

171. *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 710 (9th Cir. 2010); cf. 7B WRIGHT ET AL., *supra* note 148, § 1776.

172. *Bateman*, 623 F.3d at 724.

that the potential \$15 million liability was more than the city's entire budget for the police department so that the suit could "severely limit Laguna Beach's ability to protect the health, safety, and welfare of the city."<sup>173</sup> On appeal, a panel of the Ninth Circuit Court of Appeals judges upheld the district judge's decision but on the ground that membership in the class was not ascertainable because the class did not include business users of the lot, but there was no way to determine how many of those there were, and there was also no way to determine which customers actually got receipts with additional numbers on them.<sup>174</sup> Plaintiffs' lawyers then petitioned for certiorari, but that was denied.<sup>175</sup> Frankly, this case sounds like a poster child example of overkill by class action.

At present, at least in San Francisco, the most prominent sort of consumer class action relates to claims made against manufacturers of food products. Some (including some judges) even call the federal court here "Food Court."<sup>176</sup> Given the preponderance of "foodies" hereabouts, that makes sense; with a "universal venue" class action that could be filed anywhere, wouldn't it make sense to file it in San Francisco where a local jury would likely be comprised of people attuned to concerns about food purity and safety? Add to that the broad consumer protection laws that exist in California, and the lure must be almost irresistible.

The general theme of these suits is that a producer of food products says things in advertising that the plaintiff claims are misleading or false. A favorite target is the assertion that the product is "all natural."<sup>177</sup> But as a recent article about bringing such cases in the monthly magazine published by the largest plaintiffs' lawyer association warns, "class certification may be hampered by the U.S. Supreme Court's decision in *Comcast Corp. v. Behrend*."<sup>178</sup> Perhaps this is just

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173. *Rowden v. Pac. Parking Sys., Inc.*, 282 F.R.D. 581, 587 (C.D. Cal. 2012).

174. *Martin v. Pac. Parking Sys., Inc.*, 583 F. App'x. 803, 804 (9th Cir. 2014).

175. *Martin v. Pac. Parking Sys., Inc.* 135 S. Ct. 962 (2015) (mem.).

176. See, e.g., Anthony J. Anscombe & Mary Elizabeth Buckley, *BNA Insight: Is the 'Food Court' Losing Steam? An Update on Food and Beverage Consumer Class Actions in the Northern District of California*, 15 CLASS ACTION LITIG. REP. (BNA) 776, 776 (2014); Vanessa Bloom, *Welcome to the Food Court*, S.F. RECORDER, Mar. 1, 2013.

177. See Douglas McNamara & Liela Aminpour, *When 'All Natural' Is Anything But*, TRIAL, Nov. 2014, at 22, for a discussion. This article begins as follows:

Food-mislabeling lawsuits have become more common over the past several years.

Consumers concerned with eating healthy are looking for nutritious products made with natural ingredients. Food manufacturers are trying to cash in on this sentiment and advertise their products as "all natural"—sometimes even when they are not.

*Id.* at 23. See also *Label Litigation*, CAL. LAW., Jan. 2015 (referring to "food court").

178. *Id.*

another instance of Supreme Court impediments to private enforcement of legal protections for the public.

Or perhaps there is more to it. Consider whether misstatements on food advertisements never existed before the last few years. I recall being bombarded with television advertisements when I was a kid that said something like: “Wonder Bread helps build strong bodies 12 ways.” Maybe that was really true. I wonder whether overstatements or misstatements to sell food products just started a few years ago or got much worse a few years ago. It seems to me that the burst of litigation of this sort can be explained more easily by Confucius’ saying—lawyers looking to file class actions typically hit on this category. And then they hit on San Francisco as the place to file them.

False advertising is surely a legitimate target of legal action. Indeed, the Federal Trade Commission (FTC) seems to be equipped to deal with this problem. Like other enforcement agencies, however, it may be unable to do as much enforcing as would be desirable. So having class actions pick up the slack could be beneficial to all (except the purveyors of mislabeled food products).

But there are some valid reasons to pause on the way to class certification. A prime example would seem to be defining the class. Consider a Seventh Circuit Court of Appeals decision involving the claim that although the Coca Cola Company advertised that all Diet Coke was made with aspartame, some Diet Coke sold in soda fountains (as opposed to grocery stores) was partly sweetened with saccharin.<sup>179</sup> Plaintiffs filed a class action asserting a claim under the Illinois Consumer Fraud and Deceptive Practices Act (ICFA).<sup>180</sup> One serious problem with the case was determining who had bought Diet Coke in soda fountains. Even if that could be solved, other questions remained:

Membership in Oshana’s proposed class required only the purchase of a fountain Diet Coke from March 12, 1999, forward. Such a class could include millions who were not deceived and thus have no grievance under the ICFA. Some people may have bought fountain Diet Coke *because* it contained saccharin, and some people may have bought fountain Diet Coke *even though* it had saccharin.<sup>181</sup>

To put it mildly, a class action on behalf of all purchasers of the product is a blunt instrument for enforcing public norms against mis-

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179. *Oshana v. Coca-Cola Co.* 472 F.3d 506, 509 (7th Cir. 2006).

180. *Id.* The statute is now called the Illinois Consumer Fraud and Deceptive Business Practices Act. 815 ILL. COMP. STAT. 505/1–505/12 (2007).

181. *Oshana*, 472 F.3d at 514.



leading advertisements, and these cases might more easily be characterized as extracting tribute (and attorney fee awards) from producers for what many would likely call minor misconduct. For an example, consider a recent case involving Kellogg's Frosted Mini-Wheats. At some point, Kellogg began to claim in advertisements that the product was scientifically proven to improve children's cognitive functions for several hours after breakfast.<sup>182</sup> The message seemed to be: As a good parent, you should load little Johnny up on sugar before he goes to school so he will get into the Ivy League. This led to a class action on behalf of purchasers. But presumably the product had existed before the advertising campaign; how does one determine which purchasers bought the cereal because they were persuaded by the campaign?

One way of looking at this issue is to compare it to the fraud-on-the-market theory that was recently retained by the Supreme Court.<sup>183</sup> That doctrine makes proof of individual reliance unimportant in securities fraud class actions. Maybe the same thing should be true with the Mini-Wheats. Perhaps if there were a big spike in purchases of the product after the advertisements appeared, such a conclusion could be supported (although it would seem that at least some purchasers were repeat customers). And the nature of the compensable harm might also be debated: assuming many would buy sugar coated breakfast food for kids (recall Tony the Tiger and Kellogg's Frosted Flakes), it would seem that purchasers got *some* value for their purchases even if the food did not ease the way for Johnny to get into the Ivy League.

In the Kellogg's case, the eventual outcome seems not to have been a major success for private enforcement of public norms against deceptive advertisements. In a settlement approved by the district court, Kellogg agreed to establish a \$2.75 million fund to compensate purchasers with \$5.00 per box purchased, to a maximum of three (i.e., \$15.00). It also agreed to distribute \$5.5 million worth of specified Kellogg's food items to "charities that feed the indigent"<sup>184</sup> and to refrain for three years from claiming that "eating a bowl of . . . Frosted Mini-Wheats cereal for breakfast is clinically shown to improve attentiveness by nearly 20%."<sup>185</sup> But it would be able to claim that "[c]linical studies have shown that kids who eat a filling breakfast like

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182. *Dennis v. Kellogg Co.*, 697 F.3d 858, 861–62 (9th Cir. 2012).

183. *See supra* notes 116–18 and accompanying text.

184. *Dennis*, 697 F.3d at 863.

185. *Id.* (quoting *Dennis v. Kellogg Co.*, No. 09-CV-1786-IEG(WMc), 2010 WL 4285011, at \*1 (S.D. Cal. Oct. 14, 2010)).

Frosted Mini-Wheats have an 11% better attentiveness in school than kids who skip breakfast.”<sup>186</sup> Last, but not least, Kellogg agreed to pay class counsel up to \$2 million for bringing the suit.<sup>187</sup>

This is not to say that all class actions claiming food products have been misleadingly advertised are similar to the Kellogg’s suit. And the Ninth Circuit Court of Appeals overturned approval of the settlement in that case on the ground that the *cy pres* feature involving feeding the indigent could not be justified in a suit on behalf of parents seeking to get their kids into the Ivy League.<sup>188</sup> But it does underscore grounds for uneasiness with a wholehearted embrace of the idea that class actions are a critical, or perhaps desirable, way to achieve private enforcement. And cases like the Kellogg’s suit could easily support arguments that class actions actually do nothing more than the critics claim—enrich the lawyers.

If one looks around for legal doctrine that might express the uneasiness that attends such criticisms, one need not look to the Supreme Court. Instead, one could look to the American Law Institute (ALI). ALI’s Principles of Aggregate Litigation directly address concerns about misuse of *cy pres* arrangements and argue that these arrangements should only be used as a last resort.<sup>189</sup> Courts have begun to cite and adopt the ALI’s formulation.<sup>190</sup> Another topic on which seemingly responsive doctrine has emerged is “ascertainability.” In *Carrera v. Bayer Corp.*,<sup>191</sup> the Third Circuit Court of Appeals rejected a class action based on the claimed health benefits of an inexpensive over-the-counter product on the ground that members in the class were not “ascertainable.” It also suggested that it would not suffice to credit a class member’s affidavit as sufficient proof of purchase of the product (putting the question of being misled somewhat to the side).<sup>192</sup>

*Carrera* prompted an aggressive response from a district judge in California:

*Carrera* eviscerates low purchase price consumer class actions in the Third Circuit. It appears that pursuant to *Carrera* in any case where the consumer does not have a verifiable record of its purchase, such as a receipt, and the manufacturer or seller does not keep a record of buyers, *Carrera* prohibits certification of the class. While this

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186. *Id.* (alteration in original) (quoting *Dennis*, 2010 WL 4285011, at \*1).

187. *Id.* (quoting *Dennis*, 2010 WL 4285011, at \*1).

188. *Id.* at 861.

189. PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 3.07 (AM. LAW INST. 2010).

190. *See, e.g., In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1063 (8th Cir. 2015).

191. 727 F.3d 300 (3d Cir. 2013).

192. *See id.* at 304–10.

may be the law of the Third Circuit, it is not currently the law of the Ninth Circuit.<sup>193</sup>

Judge Posner, meanwhile, has demurred to the idea that a sworn statement should not be sufficient,<sup>194</sup> and the Seventh Circuit has rejected a “heightened” ascertainability requirement<sup>195</sup>

So ascertainability may also be a blunt instrument. But it may also be an understandable method for constraining private overenforcement. Consider, for example, the class action about a decade and a half ago against McDonald’s on behalf of Hindu purchasers of french fries that McDonald’s claimed were made only from vegetable products but actually contained beef flavoring. It may be difficult to regard those who eat McDonald’s french fries as seeking healthy food, but the offense to Hindus could hardly be overstated.<sup>196</sup> Perhaps a public authority would not properly pursue this “minority” concern, but fashioning a class definition and a class-wide remedy surely presented great challenges for the courts. And it is difficult to conceive that those who embrace the Golden Age vision of class actions had quite this use of the device in mind, much less that the framers of the modern class action conceived of it in 1962–1964 when Rule 23 was being rewritten.

So the private enforcement consideration—while surely important—is also something of a puzzle in fashioning class-action doctrine.

## VI. CONCLUSION: WILL THE WIND SHIFT?

I began by recognizing that proponents of class actions were facing something of a headwind due to some recent Supreme Court decisions. But since 1966, most of the legal development that has shaped class actions has come not from the Supreme Court but from the lower federal courts. And the attitudes of those courts can change.

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193. *McCray v. Elations Co.*, No. EDCV 13–00242 JGB (OPx), 2014 WL 1779243, at \*8 (C.D. Cal. Jan. 13, 2014). It might be worth noting that California has a special statute authorizing, *cy pres* treatment of residual funds left over after claims are satisfied in a class action. CAL. CIV. P. CODE § 384 (West 2004). In addition, the California state courts pioneered the concept of providing such remedies in class actions. *See, e.g., Daar v. Yellow Cab Co.*, 433 P.2d 732 (Cal. 1967) (upholding a class-action remedy involving the requirement that the cab company lower its fares in a future period as a remedy for overcharges in a past period).

194. “One would have thought, given the low ceiling on the amount of money that a member of the class could claim, that a sworn statement would be sufficient documentation, without requiring receipts or other business records likely to have been discarded.” *Pearson v. NBTY, Inc.*, 772 F.3d 778, 783 (7th Cir. 2014).

195. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015) (addressing the question of “whether Rule 23(b)(3) imposes a heightened ‘ascertainability’ requirement as the Third Circuit and some district courts have held recently” and rejecting that idea).

196. *See Laurie Goodsetin, For Hindus and Vegetarians, Surprise in McDonald’s Fries*, N.Y. TIMES, May 20, 2001, at 1.

Judge Posner might be an illustration. For some time, he was probably regarded as antagonistic to class actions. Indeed, in the wake of CAFA, Federal Judicial Center researchers found that plaintiffs' lawyers had seemingly flocked to the Ninth Circuit Court of Appeals and avoided the Seventh Circuit Court of Appeals, due perhaps to its then-perceived resistance to class actions.<sup>197</sup> Yet more recently Judge Posner has recognized that the class action "is an ingenious procedural innovation,"<sup>198</sup> and the Seventh Circuit Court of Appeals seems to have become considerably more receptive to class certification.<sup>199</sup> At least some winds can shift.

At the same time, winds originally perceived as helpful only to one side may turn out to have more bipartisan effects. Recall the question of "merits scrutiny" at the class certification stage.<sup>200</sup> That was initially regarded as an entirely defense-friendly development. But it has not turned out to be. Again a decision by Judge Posner can be an example. In a proposed class action on behalf of those who faced suits for consumer billings filed after the limitations period had expired, the defense argued that, because there was a debate about whether the limitations period was four years or five years, the class representative (who was sued after five years) was inadequate and atypical because she had no personal stake in proving the limitations period was really four years rather than five in order to press the claims of other class members.<sup>201</sup> The defendant persuaded the district judge to deny certification on the ground that the limitations issue went to the merits and was therefore off limits at the certification stage.<sup>202</sup> But the court of appeals ruled that the limitations question was nevertheless open for decision because it was pertinent to class certification and further held

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197. See Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1759 fig.6 (2008).

198. *Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014).

199. For example, in *Suchanek v. Sturm Foods, Inc.*, the court overturned denial of certification in a suit brought on behalf of a class of purchasers of defendant's coffee pods. 764 F.3d 750, 752 (7th Cir. 2014). Though defendant's advertisements suggested that the pods contained ground coffee, in fact they were filled with 95% instant coffee. *Id.* at 753. Consumer surveys showed that purchasers did not realize the pods actually contained instant coffee. *Id.* Defendant resisted class certification on the ground that there was no way to define the class of purchasers who were misled, and the district judge was persuaded. But the Seventh Circuit Court of Appeals was not. "If the court thought that no class can be certified until proof exists that every member has been harmed, it was wrong." *Id.* at 757. Moreover, commonality was satisfied, the appellate court ruled, by the dominant issue of whether the product was misrepresented: "a rule requiring 100% commonality would eviscerate consumer-fraud class actions." *Id.* at 759.

200. See *supra* notes 93–112 and accompanying text.

201. *Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1080 (7th Cir. 2013).

202. *Id.* at 1081.

that the proper limitations period was four years, leading to reversal of the district judge's denial of certification.<sup>203</sup>

And the class action is not a device that only individual plaintiffs can use, or one that can only be used against alleged corporate wrongdoers. Consider a report about nine class actions filed by Farmers Insurance Group “against nearly 200 communities in the Chicago area,” arguing that these local governments should have done more to “fortify their sewers and stormwater drains” against increased rainfall accompanying climate change (thereby, presumably, avoiding or limiting harm to the homes of Farmers’ insureds in the area).<sup>204</sup> A climate change specialist at Columbia Law School was quoted as predicting that: “[W]e will see more and more cases.”<sup>205</sup>

So change continues to happen, and the wind may shift again. One might ask: From what quarter would we like the change to come? One source would be Congress; as the PSLRA and CAFA show, Congress can make changes that bear importantly on class certification, at least on specific subjects. Another would be the Supreme Court; as indicated above, the wind from that quarter has probably been a headwind more frequently than a tailwind for proponents of class-action litigation, although the direction likely has a good deal to do with the merits of individual cases. And the Court continues to take class-action cases that could have important effects.<sup>206</sup> Yet another might be the lower courts, who decide far more class-certification cases than the Supreme Court and have probably been the main source of class-action law since 1966. On that score, we might take heed of something Judge Posner said more than twenty-five years ago in another class-action case:

The ease and speed with which the Federal Rules of Civil Procedure can be amended by those whom Congress entrusted with the re-

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203. *Id.* at 1081–82. Along the way, the district court judge displayed a clear appreciation of the actual dynamics of class-action litigation. Thus, he questioned arguments that the named plaintiff might not be an adequate representative due to the limitations issue because that argument is “unrealistic about the role of the class representative in a class action suit.” *Id.* at 1080. Instead, he observed, class counsel are the real principals in such cases. *Id.* (quoting 1 WILLIAM RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 3:52 (5th ed. 2011)).

204. See Mica Rosenberg, *Insurer’s Climate Change Class Actions: More To Come?*, *INS. J.*, May 19, 2014, <http://www.insurancejournal.com/news/national/2014/05/19/329506.htm>.

205. *Id.* (quoting Michael Gerrard, Director of the Center for Climate Change Law, Columbia Law School, New York).

206. *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014) (holding that plaintiffs’ collective action adequately showed that common questions applied to their claims for extra pay for the time spent donning and doffing protective clothing), *aff’d*, No. 14-1146, 2016 WL 1092414 (Mar. 22, 2016); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014) (holding that the failure of a proposed class representative to accept an offer of judgment made pursuant to Federal Rule of Civil Procedure 68 did not moot his case), *aff’d*, 136 S. Ct. 663 (2016).

sponsibility for doing so should make federal judges hesitate to create new forms of judicial proceeding in the teeth of the existing rules.<sup>207</sup>

So that leaves the rules process. As Professors Burbank and Farhang have noted, the rules process has become “sticky” and less likely to produce dramatic changes in rules.<sup>208</sup> But the Advisory Committee has again turned its attention to Rule 23 and formed a Rule 23 Subcommittee, which has identified several topics as initial subjects of discussion.<sup>209</sup> The Subcommittee remains open to input on the issues it has identified and to suggestions about additional topics for possible rule change.<sup>210</sup> Whether the rules process will produce rule changes is presently a very open question, and the question what changes might emerge is even more open. But there is one prediction that seems justified—class action lawyers and federal judges will continue to bend in the breeze. Thus, the April 2015 issue of *Trial Magazine* reports that “dozens” of class actions have recently been filed due to allegedly toxic wood flooring and that plaintiffs’ lawyers who filed those cases have petitioned the Judicial Panel on Multidistrict Litigation for centralization of the cases.<sup>211</sup> And, a March 2016 CLI International program on “Food Law” in Washington, D.C., featured two panels on class actions.<sup>212</sup> In predicting aggregate litigation would continue, Arthur Miller was right.<sup>213</sup>

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207. *Henson v. E. Lincoln Twp.*, 814 F.2d 410, 414 (7th Cir. 1987).

208. See Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach* 15 NEV. L.J. 1559, 1590 (2015).

209. Those interested in these topics could review the agenda memo for the November 2015 meeting of the Advisory Committee on Civil Rules, which can be found through the Administrative Office’s website, [www.uscourts.gov](http://www.uscourts.gov). The memo is at pp. 87–133 of the agenda book.

210. On that score, one might consult the Civil Rules Advisory Committee “inbox,” the suggestions for rule change sent to the Committee. In 2015, quite a few proposals have been made, and they are posted online at [www.uscourts.gov](http://www.uscourts.gov).

211. Alyssa E. Lambert, *Dozens of Class Actions Filed over Potentially Toxic Wood Flooring*, AM. ASSOC. FOR JUST. (Apr. 2, 2015), <http://www.justice.org/news/law-reporter-and-trial-news/april-2-2015-trial-news>.

212. See CLE Int’l, *Food Law: Understanding This Rapidly Evolving Area of the Law* (2016). See *Label Litigation*, *supra* note 177, for a report that food labeling cases had “usher[ed] in a new practice area.”

213. Miller, *supra* note 4, at 306.

