

## ARTICLES

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### STILL CONFRONTING THE CONSOLIDATION CONUNDRUM

*Richard Marcus\**

“I think it unlikely that the class action will ever be taught to behave in accordance with the precepts of the traditional model of adjudication.”

—Professor Abram Chayes (1976)<sup>1</sup>

“Class actions had their day in the sun and kind of petered out.”

—Dean Paul Carrington,  
Reporter, Advisory Committee on Civil Rules (1988)<sup>2</sup>

“[The use of class actions is] transforming the litigation landscape. . . . Class actions are being certified at unprecedented rates, and they are involving a substantial [number], if not a majority, of all American citizens.”

—Judge Paul Niemeyer,  
Chair, Advisory Committee on Civil Rules (1997)<sup>3</sup>

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1 Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1291 (1976).

2 Douglas Martin, *The Rise and Fall of the Class-Action Lawsuit*, N.Y. TIMES, Jan. 8, 1988, at B7 (quoting Carrington).

3 *Senate Subcommittee Holds Hearing on Class Action Litigation Reform*, 66 U.S.L.W. 2294 (U.S. Nov. 18, 1997).

“Anyone listening to our opening statements [about class-action litigation] would think that we are talking about two different things. The wide differences of the views are astounding, but they happen regularly in the Judiciary Committee.”

—Rep. John Conyers (2012)<sup>4</sup>

## INTRODUCTION

In 1995, I reacted to then-current debates about handling the phenomenon of mass litigation, and in particular the work of the American Law Institute’s Complex Litigation project, by suggesting that we were finally confronting the consolidation conundrum.<sup>5</sup> I applauded the effort to bring consolidation of separate cases into some conformity with class-action treatment, particularly in terms of when consolidation was appropriate and policing of the handling of the aggregate litigation that would result. But I also predicted that the statutory recommendations emerging from the ALI Project were unlikely to be adopted by Congress.<sup>6</sup>

Much has happened since then. In 1996, the Advisory Committee published a set of possible amendments to Rule 23 that included some revisions to class certification standards under Rule 23(b)(3) and the introduction of a new Rule 23(b)(4) to authorize certification solely for settlement.<sup>7</sup> Those proposals produced a lot of controversy and a lot of comment; eventually Judge Niemeyer had the commentary published in four volumes that he brought with him when he testified before Congress as quoted above.<sup>8</sup> In 1997 and again in 1999, the Supreme Court made important decisions on mass tort class actions.<sup>9</sup>

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4 *Class Actions Seven Years After the Class Action Fairness Act: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 112th Cong. 37 (June 1, 2012) (opening statement of Rep. John Conyers). Rep. Conyers spoke after the chair, Rep. Trent Franks (R. Ariz.) and the ranking member of the minority, Rep. Jerome Nadel (D. N.Y.) had spoken. A video of the hearing can be found at: [http://judiciary.house.gov/hearings/Hearings%202012/hear\\_06012012.html](http://judiciary.house.gov/hearings/Hearings%202012/hear_06012012.html).

5 *See generally* Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. REV. 879, 881 (1995).

6 *See id.* at 921–23.

7 *See* Proposed Amendments to the Federal Rules of Civil Procedure, 167 F.R.D. 559, 559–66 (1996).

8 *See* WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, vol. I–IV (Admin. Off. of U.S. Courts, May 1, 1997).

9 *See* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

In 2003, Rule 23 was amended to deal with procedures attending class certification rather than the criteria for certification.<sup>10</sup> In 2005, the Class Action Fairness Act (CAFA)<sup>11</sup> expanded federal-court jurisdiction for class actions asserting claims based on state law and made them subject to federal class-action rules and decisions.<sup>12</sup>

In 2009, the ALI published its *Principles of the Law of Aggregate Litigation*,<sup>13</sup> which addresses both class actions and other forms of aggregation.

In 2010 and 2011, the Supreme Court decided an exceptional number of class-action cases,<sup>14</sup> and it seems that more are on the way.<sup>15</sup> Certainly these decisions do not reflect wholehearted enthusi-

10 See Amendments to the Federal Rules of Civil Procedure, 215 F.R.D. 159, 159–69 (2003).

11 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified at 28 U.S.C. §§ 1453, 1711–15 (2006)).

12 For discussion, see generally Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765, 1790 (2008).

13 AM. LAW INST., *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* (2009).

14 See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550–57 (2011) (overturning class certification in an employment discrimination case charging Wal-Mart with company-wide gender discrimination); *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2375–82 (2011) (holding that the Anti-Injunction Act prevented a federal judge who had already denied class certification from enjoining the submission of a similar class-certification request to the West Virginia state courts on behalf of a very similar class); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184–87 (2011) (holding that plaintiffs in a securities fraud class action did not have to establish “loss causation” to obtain class certification); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (holding that the Federal Arbitration Act preempts California case law that would invalidate as unconscionable a class action waiver in a consumer contract requiring arbitration of disputes); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1444 (2010) (holding that Fed. R. Civ. P. 23 supported class certification in a case involving claims based on New York law even though a New York statute forbade class actions for such claims); see also *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers) (granting a stay of a class-action judgment entered by a Louisiana state court in the expectation that the Supreme Court would grant certiorari and reverse).

15 See *Conn. Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1177 (9th Cir. 2011), cert. granted, 132 S. Ct. 2742 (2012) (involving defendant’s effort to defeat certification in a securities fraud case premised on “fraud on the market” by proving “truth on the market”—that there was no concealment); *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011), cert. granted, 80 U.S.L.W. 3442 (U.S. June 25, 2012) (No. 11-864) (discussed *infra* note 133); *Symczyk v. Genesis Healthcare Corp.*, 656 F.3d 189, cert. granted sub nom. *Genesis Healthcare Corp. v. Symczyk*, 80 U.S.L.W. 3512 (U.S. June 25, 2012) (No. 11-1059) (raising question whether plaintiff may defeat removal of state-court class action under Class Action Fairness Act by attempting to limit the damages sought for the unnamed class members to less than \$5 million, the cutoff for federal court jurisdiction under the Act); *Knowles v. Standard Fire Ins. Co.*, 2011 WL

asm for class action,<sup>16</sup> and some see them contributing to “the decline of class actions.”<sup>17</sup> At least one piece of legislation has already been introduced in Congress to undo the effects of the Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*<sup>18</sup> and facilitate combined litigation in employment discrimination cases.<sup>19</sup>

On June 1, 2012, as suggested by the quotation above from Rep. Conyers, the Subcommittee on the Constitution of the House Judiciary Committee held a hearing focusing on the impact of CAFA and addressing more generally a variety of issues about class-action practice.<sup>20</sup>

Finally, in early 2012 the Advisory Committee on Civil Rules created a Rule 23 Subcommittee to consider whether some further amendments to the class-action rule might warrant serious consideration.<sup>21</sup>

6013024 (W.D. Ark., Dec. 2, 2011), *cert granted* sub nom. Standard Fire Ins. Co. v. Knowles, 80 U.S.L.W. 3680 (U.S. Aug. 31, 2012) (No. 11-1450) (raising the question whether a “collective action” under the Fair Labor Standards Act can be mooted by a Rule 68 offer to the named plaintiff of the full amount claimed before the time to move for “certification” of the collective action).

16 See Mary Kay Kane, *The Supreme Court’s Recent Class Action Jurisprudence: Gazing Into a Crystal Ball*, 16 LEWIS & CLARK L. REV. 1015, 1047 (2012) (discerning no overarching theme in recent Supreme Court decisions).

17 See generally Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013).

18 131 S. Ct. 2541.

19 See Equal Employment Opportunity Restoration Act, S. 3317, 112th Cong. (2012). This bill asserts that “[c]lass actions often have been the most effective means to enforce employment discrimination laws,” and that the Supreme Court’s decision in *Wal-Mart* “made it more difficult for victims of discrimination to vindicate claims for their rights.” *Id.* at 2–3. The purpose of the bill is “to restore employees’ ability to challenge, as a group, discriminatory employment practices, including subjective employment practices.” *Id.* at 4. To that end, it authorizes “group actions” challenging employment practices under certain federal antidiscrimination statutes, and prescribes treatment in such suits similar to what Fed. R. Civ. P. 23 provides for class actions. It says that claimants must elect between class-action and “group action” treatment within the time to move for certification under Rule 23. *Id.* at 6–7.

20 For details on this hearing, including the written statements of the witnesses and a video of the hearing itself, see the website cited *supra* note 4. The monthly magazine of the American Association for Justice reports ruefully that the Association “expects the Judiciary Committee’s interest in class action litigation to continue, and it may introduce a bill that would further erode consumers’ rights.” *Justice in Motion*, TRIAL, Aug. 2012, at 48.

21 For discussion of the issues identified so far by this Subcommittee, see ADVISORY COMM. ON CIVIL RULES, MEETING OF MAR. 22–23, 2012, MEMO REGARDING RULE 23 ISSUES 449–72, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-03.pdf>.

Though much has changed, then, much remains the same—aggregation of litigation is still a hot topic. Beyond a doubt, the field is rife with issues that could be addressed. The Advisory Committee’s initial review identified well over a dozen that might call for further consideration of possible rule changes.<sup>22</sup> The articles in this federal courts issue of the *Notre Dame Law Review* focus on several of the most challenging contemporary questions about aggregate litigation, not limited to class actions. I write here to offer some ruminations about how aggregation controversies have evolved since 1995, and why we are still confronting the consolidation conundrum. I hope that these thoughts will provide a context for the other contributions to this issue. In particular, I will focus on three topics: (1) the basic challenge that underlies all litigation aggregation, not just class actions or multidistrict litigation (MDL) proceedings; (2) the distinctive role litigation has in the U.S. (often called American Exceptionalism) and how that affects our attitudes toward collective litigation here; and (3) the abiding perils that attend the decision whether to authorize combined litigation.

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22 As set forth in the Agenda Memo for the Advisory Committee’s March, 2012 meeting, the “front burner” list included five items: (1) revising criteria for review of proposed class-action settlements; (2) merits review on class certification; (3) use of “issue classes” under Rule 23(c)(4); (4) separate authorization in the rule for certification solely for purposes of settlement; and (5) the propriety of monetary relief in actions certified under Rule 23(b)(2). *Id.* at 455–64.

The agenda memo also identified “back burner” issues that might warrant further attention: (1) fundamentally revising Rule 23(b) to make it more functional; (2) revising Rule 23(a)(2)’s common question requirement (with possible implications for Rules 20(a), 24, and 42(a), as well as 28 U.S.C. § 1407); (3) restoring a requirement for court approval of “individual” settlements; (4) revisiting the “predominance” or “superiority” language in Rule 23(b)(3); (5) revising the notice requirements, particularly with reference to the possibility of notice by a means other than first-class mail; (6) addressing some of the implications of the Supreme Court’s ruling in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), particularly its indication that Rule 23(a) commands certification of a class in some circumstances; (7) addressing choice of law issues in class actions; (8) refining the attorney fee awards provisions now provided in Rule 23(h); (9) developing rule provisions to address the binding effect of class-certification or settlement-review decisions of federal courts, a topic addressed in part in *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011); (10) considering a rule provision authorizing aggregation by consent in exceptional circumstances. *Id.* at 465–72.

It should be stressed that this listing, while long, is at best preliminary. Limited work has been done to make sure that all topics warranting attention have been identified, and the separation of those currently identified into “front burner” and “back burner” categories was very preliminary.

## I. THE BASIC AGGREGATION CHALLENGE

I begin—as I did in 1995—emphasizing that aggregation can present challenges in many settings. In each of them, the key question is whether the common features justify combined litigation. In each of them, combining claims presents risks as well as advantages. The larger the combination, the larger the challenges, but perhaps also the larger the benefits. That’s the aggregation challenge.

It’s not just class actions that can cause aggregation heartburn. Class actions do, clearly, get the most press. Class actions are the one procedural tool that I know entering law students will recognize on the first day of civil procedure. I ask them whether they’ve ever heard of the work product doctrine, or interpleader, or removal, and (except for a few former paralegals) the answer is no. But when I ask them whether they have heard of class actions, all or almost all say yes. They’ve even heard about class actions in Hollywood movies.

Lawyers and the legal academy have long since learned that class actions are not the only big game in town. More than twenty years ago Professor Silver was comparing class actions and consolidations.<sup>23</sup> Indeed, with the growing challenges facing those who bring class actions, in some instances MDL or other combined treatment is more inviting.<sup>24</sup> Even the general press has gotten the hint. For example, in 2010 a *Wall Street Journal* article noted that “[i]n recent years, thousands of suits filed across the U.S. in some of the biggest product liability and personal injury cases—from harmful diet drugs to smelly Chinese drywall—each have been consolidated into ‘multidistrict litigation’ cases.”<sup>25</sup> A *National Law Journal* article reported:

The number of cases winding their way through the multidistrict litigation (MDL) process across the country has more than doubled during the past decade, inundating both the MDL panel, which decides where those cases should be consolidated, and the federal judges who ultimately end up handling discovery in such complex cases.<sup>26</sup>

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23 See generally Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495, 497 (1991).

24 See, e.g., Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2206 (2008) (discussing the resort to alternative methods in the face of growing challenges to certifying a class).

25 Dionne Searcey, *BP Suit’s Complex Legal Structure Scrutinized*, WALL ST. J. (Sept. 13, 2010), <http://online.wsj.com/article/SB10001424052748703897204575487970239591754.html>.

26 Amanda Bronstad, *Swelling Docket Challenges System*, NAT’L. L.J. (Sept. 20, 2010), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202472164256&Swelling\\_docket\\_challenges\\_system&slreturn=20120829091412](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202472164256&Swelling_docket_challenges_system&slreturn=20120829091412).

The interaction of the MDL process and class actions can further complicate the already-complicated challenges of modern mass litigation. Thus, in testimony before Congress in June 2012, both plaintiff and defendant lawyers decried the results for this interaction. A leading plaintiff lawyer urged that the combination of CAFA's increase in federal-court jurisdiction and the near certitude that the MDL panel would transfer class actions that might overlap to a single judge for centralized pretrial handling has meant that state-wide class actions that might be certified if they were handled separately in state court are denied certification by the federal MDL court because the combination of many of them causes insuperable management difficulties.<sup>27</sup> A leading defense lawyer complained at the same hearing about the refusal of some MDL transferee judges to decide class-certification issues,<sup>28</sup> perhaps leaving those for resolution later after the cases are returned to their home districts, and seemed disappointed that some judges were not doing what the plaintiff lawyer who testified protested that too many were doing. In this setting, Professor Bradt's contribution, providing a careful analysis of the choice-of-law issues that result from "direct filing" in MDL proceedings,<sup>29</sup> underscores the complexities that aggregate litigation can produce.

But MDL processes are not the only non-class action focus of concern. The Class Action Fairness Act itself included in its provisions a "mass action," which it defined as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly . . . ."<sup>30</sup> As CAFA's mass action concept suggests, the starting point for the consolidation debate is the simplest combination deci-

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27 See *Class Actions Seven Years After the Class Action Fairness Act: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 112th Cong. 4–8 (2012) (statement of Thomas M. Sobol, Managing Partner, Hagens Berman Sobol Shapiro LLP), available at <http://judiciary.house.gov/hearings/Hearings%202012/Sobol%2006012012.pdf>.

28 See *id.* at 13–14 (statement of John H. Beisner, on Behalf of the U.S. Chamber Institute for Legal Reform), available at <http://judiciary.house.gov/hearings/Hearings%202012/Beisner%2006312012.pdf>.

29 See Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759 (2012). Direct filing occurs when a new plaintiff files suit in the MDL transferee district rather than in his or her home district, from which the case would be transferred to the MDL district as a "tagalong" action. But under existing choice-of-law doctrine, direct filing can produce peculiar results, a problem Professor Bradt seeks to solve by having the direct-filing plaintiffs declare their "home forum," leading to application of the choice-of-law rules of that home forum to the claims asserted in the direct filing in the MDL court.

30 28 U.S.C. § 1332(d)(11)(B)(ii) (2006).

sion—permissive joinder of parties—what I have called the “aggregation tension.”<sup>31</sup>

The courts have been calibrating that tension for quite some time, and in general they seem to have become more exacting in their calibration. The calibration begins with the simplest of combinations—say, the joinder of two unrelated plaintiffs suing for injuries sustained in an auto crash. It is easy to find differences between them, and to elaborate on the basic situation to complicate the picture. It is easier, for example, to justify the combination if both were passengers in a vehicle hit by the defendant than if they were in separate vehicles that defendant hit a block apart. It would be easy to conclude that such a combination makes sense if both plaintiffs object to largely the same driving behavior of defendant—say, speeding, texting while driving, etc.<sup>32</sup> And that would seem to fit readily within the permissive joinder provisions of Rule 20(a), which authorizes joinder by plaintiffs who assert rights “arising out of the same transaction, occurrence, or series of transactions or occurrences.”<sup>33</sup>

The key problem even in the simple multiple collision example is to determine whether such a “series” has been alleged. In one sense, there was a series—one of the accidents happened before the other one. And Rule 20(a) adds another requirement—that there also be a “question of law or fact common to all plaintiffs.”<sup>34</sup> In the most abstract sense, there is surely a question of law common to the two crash cases—whether defendant drove negligently, for example. Does that commonality (that the issue is governed by the same legal standard that first-year law students study in torts) mean that it is common enough to justify combination? Does it depend on showing that the same actual behavior (reckless driving or speeding starting before the first crash and continuing through the second one a block away) continued throughout the episode?

The rule does not really answer this question. With “mass actions,” it can assume fairly dramatic importance; if more than 100 plaintiffs combine their claims under this rubric, one might look care-

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31 See Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2250–58 (2008).

32 Cf. Eric Morath & Erica Orden, *Commerce Head Takes Leave*, WALL ST. J. (June 12, 2012), <http://online.wsj.com/article/SB10001424052702303768104577460153165951294.html> (describing two auto accidents involving John Bryson, then Secretary of Commerce, that happened one after the other, where there was a possibility that Bryson had suffered a seizure).

33 FED. R. CIV. P. 20(a)(1)(A).

34 FED. R. CIV. P. 20(a)(1)(B).



fully at whether their individual claims really share common features sufficient to justify combined litigation. Not surprisingly, courts confronted with such situations sometimes resort to distinctive measures to winnow and streamline the litigation.<sup>35</sup> Such unusual measures are not needed in our garden-variety suit involving two or three plaintiffs injured in an auto accident. But one consequence of this sort of immediate scrutiny of the claims of individual plaintiffs is to determine whether they can properly be combined into a single case.

Determining whether there is sufficient commonality to justify combined litigation is crucial and elusive. Surely at some point, the asserted commonalities must be regarded as insufficient. One view of the Supreme Court's *Wal-Mart* decision is that it draws such a line relying on the "common questions" requirement of Rule 23(a)(2).<sup>36</sup> The Court's substantive basis for the line it drew in that case seems to be that the evidence provided did not show a violation of Title VII because Wal-Mart delegates discretion to managers to make salary and promotion decisions, and that the delegation is permitted under Title VII even though it could have contributed to reduced representation of women in higher levels of Wal-Mart management.<sup>37</sup> At some point, there must be such a line, whether or not one accepts the point at which the Court drew that line. As Professor Rutherglen points out in his contribution to this issue, this judgment must be made in light of the merits of the case.<sup>38</sup>

The point can be illustrated by referring back to *General Telephone Company of the Southwest v. Falcon*,<sup>39</sup> the Supreme Court's 1982 Title VII class-action case on which *Wal-Mart* built. There the Court rejected the Fifth Circuit's "across the board" rule on class certification in employment discrimination cases.<sup>40</sup> That rule originated in a 1969 case in which the court of appeals reversed a district judge's refusal to certify a class action in a suit by a fired African-American former employee of defendant who claimed he had been fired for com-

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35 See, e.g., *Avila v. Willits Envtl. Remediation Trust*, 633 F.3d 828, 833 (9th Cir. 2011) (detailing how in proposed suits on behalf of more than 1,000 individually-named plaintiffs, district court ordered that each plaintiff provide details on alleged exposure to toxics); *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 338, 340 (5th Cir. 2000) (detailing how district court required some of the more than 1,000 plaintiffs to specify and provide expert reports about their alleged injuries before permitting litigation to proceed).

36 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550–51, 2556–57 (2011).

37 *Id.* at 2554.

38 See George Rutherglen, *The Way Forward After Wal-Mart*, 88 NOTRE DAME L. REV. 871 (2012).

39 *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982).

40 *Id.* at 160–61.

plaining about racial discrimination by his Georgia employer. The court's opinion held that refusing class certification was an error because "it is clear from the pleadings that the scope of appellant's suit is an 'across the board' attack on unequal employment practices alleged to have been committed by the appellee pursuant to its policy of racial discrimination."<sup>41</sup> The decision was that plaintiff's challenge to this policy of racial discrimination was not properly limited to those who had suffered his exact fate—retaliatory discharge for complaining about the racially biased policy.

On its face, an "across the board" rule for joinder of every sort of employment discrimination in a single suit appears too broad. On that score, consider *Mosley v. General Motors Corp.*,<sup>42</sup> which has been described as "possibly the leading case on joinder of Title VII plaintiffs."<sup>43</sup> In that case, the district judge had severed the claims of the ten plaintiffs into individual suits on the ground they were not properly joined under Rule 20(a). Plaintiffs there were current or former employees of either the Chevrolet or Fisher Body division of defendant. Plaintiffs alleged a long catalog of bad practices by one or the other of the two divisions of GM named in the suit: (1) discriminating against African Americans regarding "promotions, terms and conditions of employment"; (2) retaliating against African Americans who protested against such violations of Title VII; (3) failing to hire African Americans due to racial bias; (4) failing to hire women due to gender discrimination; and (5) discriminating against African American and female employees "in the granting of relief time."<sup>44</sup>

Applying an "across the board" notion of commonality to *Mosley* leaves one asking "what board?" Is it all discriminatory activities of any sort? By now, there are legal prohibitions on many kinds of employment discrimination, including discrimination not only on the basis of race and gender, but also national origin, religious affiliation, age, disabilities, and others. Looking to the Fifth Circuit's 1969 case, it does not seem that plaintiff there was inclined in such an unbounded direction; in that case, the court quoted a 1963 decision that involved a claim "directed at the system wide policy of racial discrimination[, and that] sought obliteration of that policy of system-wide racial discrimination."<sup>45</sup>

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41 *Johnson v. Ga. Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969).

42 *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330 (8th Cir. 1974).

43 *Miller v. Hygrade Food Prods. Corp.*, 202 F.R.D. 142, 144 n.3 (E.D. Pa. 2001).

44 *Mosley*, 497 F.2d at 1331.

45 *See Johnson*, 417 F.2d at 1124 (quoting *Potts v. Flax*, 313 F.2d 284, 288–89 (5th Cir. 1963)).

Viewed from the 1960s South, adopting an “across the board” attitude toward racial discrimination claims had much to recommend it; the judges who endorsed this attitude were in a hurry to do a lot, because a lot needed to be done fast. But as a policy, even for interpreting Rule 20, it leaves much to be desired. At some level, it seems inconsistent with the commitment underlying Federal Rule of Evidence 403 to guard against introduction of “character” evidence.<sup>46</sup> At what point are the ten plaintiffs who joined together in *Mosley* basically trying to get before the jury episodes of alleged bad behavior by defendant that essentially are unrelated to their suit? The Supreme Court has since curtailed reliance on bad experiences of other employees to support the claim of the plaintiff before the court.<sup>47</sup> Certainly, plaintiffs in other sorts of litigation seem to have been intent on pursuing such a strategy of emphasizing defendants’ unrelated unsavory actions.<sup>48</sup>

Putting aside fairness to defendants, in the class-action context there are real risks for plaintiffs in employing too broad a brush. In the 1969 case that originated the Fifth Circuit’s “across the board” rule, Judge Godbold concurred specially with an opinion later quoted by the Supreme Court in *Falcon*:

One act, or a few acts, at one or a few places, can be charged to be part of a practice or policy quickening an injunction against all racial discrimination by the employer at all places. It is tidy, convenient for courts fearing a flood of Title VII cases, and dandy for the

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46 FED. R. EVID. 403.

47 See *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008) (upholding the district judge’s Rule 403 determination in an age discrimination case to exclude evidence proffered by plaintiff about allegedly discriminatory actions of supervisory employees of defendant other than plaintiff’s supervisor, who was alleged to have discriminated against plaintiff).

48 See, e.g., *In re Richardson-Merrell, Inc.*, 97 F.R.D. 481, 484 (S.D. Ohio 1983). Plaintiffs there sued to recover for injuries allegedly resulting from use of the drug Bendectin, which defendant manufactured. They sought discovery of defendant’s experiences with two other drugs defendant had manufactured, Thalidomide and MER-29, arguing that such information would shed light on the validity of defendant’s testing procedures and its “common plan” to withhold and falsify information about its pharmaceutical products. *Id.* The court rejected plaintiffs’ discovery requests, reasoning as follows:

Evidence of defendant’s actions relating to Thalidomide and MER-29 is not relevant to this litigation. Whatever probative value such evidence might have would be far outweighed by its potential prejudice to defendant. . . . [T]he [discovery] requests appear calculated to produce information which would portray defendant in a damaging light with regard to some of its past activities.

*Id.*

employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found leaving him afloat but sinking the class?<sup>49</sup>

Even though it is not surprising to find that courts in the South in the 1960s took an aggressive attitude toward commonality in discrimination class actions, it is also not surprising to find that the courts have become more demanding regarding the showing necessary to justify class certification.<sup>50</sup> And the variety of situations in which even party joinder may raise red flags is fairly broad.

In 2011, for example, the Legal Director of the Electronic Frontier Foundation wrote of what she called “a new litigation strategy” by copyright holders against those who copy their copyrighted materials—“mass copyright litigation.”<sup>51</sup> Reportedly, copyright holders file suit in a convenient jurisdiction against large numbers of Doe defendants, seek discovery to identify the Does before service on them, and then seek to settle for \$2,000 to \$5,000 per defendant, much less than the cost of defense, but a very substantial sum for these individual users nonetheless. This activity threatened what she called “concerns rooted in due process,” including joinder limitations. As she explained, there should not be sufficient commonality to justify joinder, because “[t]he only thing linking the defendants in these cases is the use of a computer protocol, called BitTorrent, to allegedly infringe the same movie.”<sup>52</sup> Dealing with the “mass” copyright suits, the courts have sometimes upheld and sometimes rejected joinder.<sup>53</sup>

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49 *Johnson*, 417 F.2d at 1126 (Godbold, J., specially concurring). See *Gen. Tel. Co. Sw. v. Falcon*, 457 U.S. 147, 160–61 (1982), where Justice Stevens quotes Judge Godbold in the Supreme Court’s *Falcon* decision.

50 This topic will come up again in Part III, *infra*.

51 Cindy Cohn, *Mass Copyright Litigation: New Challenge for the Federal Courts*, S.F. DAILY J., Apr. 18, 2011, at 5.

52 *Id.* In somewhat the same vein, the Leahy-Smith America Invents Act included a provision saying that in patent infringement cases joinder is not proper “based solely on allegations that [defendants] each have infringed the patent or patents in suit.” Pub. L. No. 112-29, § 19, 125 Stat. 284, 333 (2011). See 35 U.S.C. § 299(b) (Supp. V 2011) (awaiting publication by The Office of the Law Revision Council). Perhaps that was not motivated by “mass patent suits,” but it does bespeak a heightened interest in joinder in intellectual property litigation.

53 See, e.g., *Liberty Media Holdings, LLC v. BitTorrent Swarm*, 277 F.R.D. 669 (S.D. Fla. 2011) (holding that joinder of John Doe alleged users of peer-to-peer file sharing program was improper); *On the Cheap, LLC v. Does 1-5011*, 280 F.R.D. 500 (N.D. Cal. 2011) (same); *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239 (S.D.N.Y. 2012) (same); *Third Degree Films, Inc. v. Does 1-131*, 280 F.R.D. 493 (D. Ariz. 2012) (same); *Call of the Wild Movie, LLC v. Smith*, 274 F.R.D. 334 (D.D.C. 2011) (upholding joinder of putative users of peer-to-peer file-sharing with regard to distribution of

In sum, the whole question where the dividing lines should be drawn for “simple” party joinder decisions are eminently contestable. But at least those cases involve either plaintiffs who have actually signed up to sue, or defendants who have actually been sued. Class actions, particularly plaintiff class actions, present a more aggressive use of the court’s aggregation power, because it is the court’s order that makes the litigation destinies of all class members rise or fall together. MDL proceedings are somewhat in between; the plaintiffs did choose to sue, but they may well not have chosen to sue as part of the aggregate litigation. Arguably *Wal-Mart’s* strict attitude toward commonality could extend to many joinder methods beyond class actions.

Professor Effron has recently argued that the flexibility of our joinder rules has produced “shadow rules” that explain the courts’ differentiation among cases that seem to be governed by rule provisions that describe the joinder criteria using virtually identical language.<sup>54</sup> In particular, she finds that courts have developed what she calls “implied predominance,” emphasizing in simple joinder decisions concepts like the “predominance of common questions” finding necessary to justify class certification under Rule 23(b) (3).<sup>55</sup> She is uncertain whether the “common question” decision in *Wal-Mart* will radiate backwards and affect joinder decisions under these other rules,<sup>56</sup> but urges that the various rules that now use the same joinder terminology

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specific movie); *First Time Videos, LLC v. Does 1-500*, 276 F.R.D. 241 (N.D. Ill. 2011) (upholding joinder); *W. Coast Prods., Inc. v. Does 1-5829*, 275 F.R.D. 9 (D.D.C. 2011) (upholding joinder).

54 Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759, 762 (2012).

55 *See id.* at 789–94.

56 *See id.* at 803. Professor Effron states:

The *Wal-Mart* decision is most likely to bleed into Rule 20(a) or Rule 42(a) decisions when joinder or consolidation under these rules is sought as an alternative or second-best option to class certification. Evidence for this path appears in some Rule 24(b) permissive-intervention cases. Courts considering permissive intervention were far less likely to invoke implied predominance [of common issues] than courts considering permissive joinder or Rule 42(a) consolidation. The glaring exception to this pattern, however, occurs in permissive-intervention cases in which a court had first considered class certification, permissive joinder, or consolidation for the proposed intervenors. In these cases, implied predominance appears as part of the permissive-intervention reasoning. A similar migration of *Wal-Mart* concepts and analysis from Rule 23 to Rules 20(a) and 42(a) therefore seems particularly likely in cases where a judge has already conducted Rule 23 commonality analysis about a group of claimants.

*Id.*

should be revised to calibrate the decision more precisely to the issue before the court and thereby confine judges' discretion.

Frankly, the prospect of improving the handling of joinder decisions by rewriting the joinder rules is hard to embrace. The parallelism of the current rules resulted from the 1966 revision of all the joinder rules in a functional manner. The basic problem is not so much manner of expression as the difficulty of the underlying combination conundrum. That conundrum exists unless one adopts a rule (like the old common law rule) that joinder is forbidden, or says that joinder is always allowed whenever any party wants it. Whatever the frustrations of the current regime, it is superior to those two alternatives. And it means that judges have to juggle imponderables with some frequency. But the current salience of the debate—extending now into the electronic frontier—attests to its abiding importance.

## II. AMERICAN EXCEPTIONALISM AND THE VIEW FROM ABROAD

Several of the contributions to this Issue—those of Mr. Lavie,<sup>57</sup> Professor Gilles,<sup>58</sup> Mr. Noll,<sup>59</sup> and Professor Garrett<sup>60</sup>—bear generally on the distinctive law-enforcement role of some private litigation in this country, and invite comparison with attitudes of the rest of the world toward aggregation. Curiously, given the generally relatively “individualistic” cast of American society, in litigation—particularly class actions—the U.S. is prone to favor group resolution in situations in which other countries do not. In large measure, that American attitude results from our reliance on private litigation to enforce public law. Limiting aggregation could hobble law enforcement, a risk explored by several of these contributions.

Specifically, Mr. Lavie laments the risk that, in the wake of *Wal-Mart*, prospective defendants may be able to alter their conduct in ways that minimize the prospect that plaintiffs who sue them will achieve class certification.<sup>61</sup> Some might regard this sort of reaction as a way to foster law enforcement, or at least law obedience,<sup>62</sup> but

57 Shay Lavie, *The Malleability of Collective Litigation*, 88 NOTRE DAME L. REV. 697 (2012).

58 Myriam Gilles, *Killing Them with Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility vs. Concepcion*, 88 NOTRE DAME L. REV. 825 (2012).

59 David L. Noll, *Rethinking Anti-Aggregation Doctrine*, 88 NOTRE DAME L. REV. 649 (2012).

60 Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593 (2012).

61 See generally Lavie *supra* note 57.

62 See, e.g., Alice Wang, *Best Policies to Avoid Class Actions*, THE RECORDER, May 28, 2012, at 18, available at <http://www.laborlawyers.com/showarticle.aspx?Best-Policies->

surely some class-avoidance behaviors by prospective defendants would be less salutary. Professor Gilles launches another broadside at mandatory arbitration clauses favored by *Concepcion*, seeking escape from its tendrils in order to enhance the power of public courts to enforce public law.<sup>63</sup> Mr. Noll also focuses on *AT&T v. Concepcion*, offering a nuanced approach to anti-aggregation contractual provisions, focusing on whether the provision enables the defendant to engage in extensive, unremedied wrongdoing.<sup>64</sup> Finally, following up on very interesting arguments favoring aggregation in unfamiliar settings,<sup>65</sup> Professor Garrett examines the important role class actions have played in enforcing constitutional rights.<sup>66</sup>

In differing ways, these intriguing papers remind us of the 1970s era of class-action litigation. Indeed, Professor Chayes's bemused observation at the beginning of this paper came in his 1976 rumination about the growing impact of "public law" litigation in American courts.<sup>67</sup> In his view, that activity had supplanted most other litigation in American courts.<sup>68</sup> Carrying that sort of view toward its logical conclusion, Professor Fiss argued around the same time that requiring public courts to resolve private disputes was "an extravagant use of

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to-Avoid-Class-Actions&Type=36&ArticleType=3385&Show=15307. This employment lawyer offers the following general prescription: "Under some circumstances, if an employer implements and enforces lawful policies, there is a stronger argument that to determine whether a plaintiff's class action contention—that unlawful conduct occurred despite the employer's lawful policies—will require a highly individualized analysis, making certification inappropriate." This analysis reminds us of one theme of Professor Rutherglen's contribution, see *supra* note 38, that class certification can turn on merits judgments. But beyond that, the detailed set of recommendations from Ms. Wang—e.g., having clear policies, in written form and calling for immediate reporting of violations of the policies, for which punishment can and will be imposed, etc.—seem designed to cause employers to follow the law in order to *avoid* class certification. That is hard to view as a bad result.

63 See, e.g., Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012) (criticizing the Court's decision in that case for its broad validation of arbitration provisions which contain class action waivers).

64 See generally Noll *supra* note 59.

65 See Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383 (2007) (urging expanded aggregation in criminal litigation to ensure more consistency of decision).

66 See generally Garrett *supra* note 60.

67 See *supra* note 1 and accompanying text.

68 See Chayes, *supra* note 1, at 1284. Chayes suggests that "the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies." *Id.*

public resources, and thus it seems quite appropriate for those disputes to be handled not by courts, but by arbitrators . . . .”<sup>69</sup>

Of course, the question of what is a purely “private” dispute might prove hard to answer; one guesses that Professor Gilles is not as thrilled as Professor Fiss might have been to relegate “private” disputes with cell phone providers to arbitration. The Supreme Court’s enthusiasm for forcing litigants into arbitration could undermine the effectiveness of private litigation as a way of enforcing the law. Its recent decision in *AT&T Mobility LLC v. Concepcion*<sup>70</sup> could magnify that effect by requiring not only arbitration but *individual* arbitration, without the possibility of even class-wide arbitral resolution, particularly important for small-value consumer claims.

An abiding and very difficult question is how properly to determine where enthusiasm for private enforcement of public rights should stop. Some seem to come close to viewing private enforcement as worthy of unlimited resources. It may be that Professor Rosenberg comes close to this view. For nearly thirty years he has pursued a “public law” vision of the tort system that depends heavily on the use of combined proceedings.<sup>71</sup> Recently, that has led him to propose that the obstacle to aggregation resulting from the existence of conflicting tort law in different states be solved by adoption of “average” law to apply in all cases.<sup>72</sup> Putting aside the question of who can implement this solution,<sup>73</sup> this “solution” raises many knotty

69 Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979).

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

71 See, e.g., David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849 (1984) (urging the use of class-action procedures to impose liability for the “added risk” resulting from activities involving possibly toxic substances).

72 See Luke McCloud & David Rosenberg, *A Solution to the Choice of Law Problem of Differing State Laws in Class Actions: Average Law*, 79 GEO. WASH. L. REV. 374, 375 (2011).

73 It is not immediately obvious who has power to decree that “average” law apply in class actions. For a given state to do so might infringe due process or full faith and credit limits on its freedom to disregard the law of other states. For the federal rulemakers to proclaim that use of such a technique is authorized for class actions in federal court might be permissible under the Rules Enabling Act, but would arguably be a challenge for the rulemaking authority. Congress could presumably do so for cases in federal court. The ALI Complex Litigation Project made such a proposal in 1994. See AM. LAW INST., *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* 306–09 (1994) (proposing adoption of a federal choice-of-law standard for mass consolidated cases). Whether it could also do so for cases in state court would depend at least in part on the current scope of the Commerce Clause or some other power of Congress. (Unlike the Affordable Care Act situation, it does not seem likely that the tax power would serve in this instance.)



problems. Should it apply only in class actions? How does one determine what is an “average” law? How about a class action involving a class made up entirely of members from two states, with 90% of the class members from one of those states? Assuming one can find the “average” between the tort law of State A and that of State B, should we split the difference, even in the situation where the class consists 90% of class members from State A and only 10% for those from State B?<sup>74</sup> Whatever the challenges of the basic aggregation decision, discerning “average” state tort law looks far more challenging.

These daunting difficulties are worth confronting, the argument seems to be, to ensure that class actions can be certified and their law-enforcement value implemented. Mr. Noll’s measured emphasis seems to stop short of the most aggressive embrace of aggregation to enable law-enforcement through private litigation. Mr. Lavie’s contribution reflects what appears to be a more wholehearted embrace of law-enforcement objectives. A recent article by Professor Campos seems to go further yet, treating law enforcement by private litigation as similar to the commons in *The Tragedy of the Commons*,<sup>75</sup> positing that the problem of asymmetric stakes will always give the defendant an advantage over the plaintiffs, and proposing that—far from endangering due process values—aggregation is the only path to true due process.<sup>76</sup>

There is another view, and it seems to be representative of most of the rest of the world, which may be a reason for caution in pursuing the law-enforcement view too far too vigorously. A starting point is to recognize that the U.S. is not the only country with an “advanced” democratic system meriting some respect. That sounds silly, but the occasional American embrace of singular features of American civil litigation such as broad discovery seems so fervent as to deny that there could be any other virtuous attitude.<sup>77</sup> But it seems valuable in

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74 Professor Rosenberg proposes sampling as a way to deal with at least some of the challenges of administering the regime he favors, although it is not entirely clear how that method can be used to devise the “average” law. See McCloud & Rosenberg, *supra* note 72, at 401–03.

75 Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

76 Sergio J. Campos, *Mass Torts and Due Process*, 65 *VAND. L. REV.* 1059, 1064 (2012). See also David Rosenberg & Kathryn E. Spier, *On Structural Bias in the Litigation of Common Question Claims* (Harvard Public Law, Working Paper No. 11-28, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1950196](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1950196) (finding that there is a structural bias favoring defendants in dispersed litigation involving common questions).

77 Consider the title of a recent article about the current controversy about pleading standards in federal court: Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 *YALE L.J.* 2270 (2012).

this increasingly globalized world to give some respect to the attitudes of the rest of the world, or at least the other industrialized world. And the rest of the world looks at our discovery with something approaching horror.<sup>78</sup>

The rest of the world looks on American class actions with something approaching its distaste for American discovery. Until very recently, the rest of the world had no class actions at all.<sup>79</sup> To American eyes, that attitude stems in part from a misplaced concern with the “autonomy” interests of class members, and is often offered as an explanation while many European countries receptive to something like class actions nonetheless resist opt-out treatment. As Professor Stadler recently explained:

Most European jurisdictions reject opt-out group actions as it is almost impossible to guarantee that all group members receive the information that a group action including their claims is pending. If the victims do not opt out, the outcome of the litigation is binding for them. In terms of their right to be heard and the right of every claimant to decide for him- or herself whether to sue the defendant or not, this construction seems to be highly problematic.<sup>80</sup>

At least in terms of stakes, this preoccupation with the autonomy of each group member seems overstated in small claims cases, something that even Professor Stadler recognizes by posing the problem as

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The premise behind this title is that discovery is some sort of universal right, perhaps even a human right. True, in the U.S. we have come to regard access to discovery as akin to constitutionally-based. See Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1024 (1998). But Europe is different: “The [European] codes of civil procedure of the 19th century strictly adhered to the principle *nemo tenetur edere contra se*, i.e. the principle that no party has to help her opponent in her/his inquiry into the facts.” Nicolò Trocker, *Transnational Litigation, Access to Evidence, and U.S. Discovery*, in CURRENT TOPICS OF INTERNATIONAL LITIGATION 146, 156 (R. Stürner & M. Kawano eds., 2009).

78 See generally Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT’L & COMP. L. 153 (1999) (observing that “America’s ‘unique’ discovery apparatus has raised hackles abroad”). There is, of course, a counter argument. For an argument from within the civil law world endorsing adoption of American-style discovery, see KUO-CHANG HUANG, *INTRODUCING DISCOVERY INTO CIVIL LAW* (2003). For present purposes, it suffices to note that this book is an exhortation for the civil law world to do something it has not done.

79 For a trenchant comparison of American aggregate litigation to contemporary developments on the continent, see Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 3–4 (2009).

80 Astrid Stadler, *Aggregate Litigation—Group/Class Actions in Germany*, in LITIGATION IN ENGLAND AND GERMANY 79, 84–85 (Peter Gottwald ed., 2010).

“small damages—how to compensate the rational apathy of consumers?”<sup>81</sup>

But more generally, Europeans and others simply don’t have the same attitude toward permitting litigation on behalf of groupings con-fected only for the purposes of litigation. Thus, the European inclina-tion is to recognize that groups have “standing” to sue on behalf of their members or others.<sup>82</sup> Indeed, in some places there is as a result nothing to correspond to our class-certification decision because the only pertinent question is whether the group in question has authority to bring the group action.<sup>83</sup> Although English group actions began in medieval times as litigation on behalf of existing social groupings, as Professor Yeazell has shown,<sup>84</sup> the modern American reality goes far beyond. However much Facebook may have distended the notion of “friend,” it is surely too much to regard all customers of a certain bank or cell phone provider as sharing some significant social link.

This does not mean that aggregate litigation cannot generate something akin to the medieval group affiliation. To take one exam-ple, consider litigation brought on behalf of people living near a toxic waste site—they formed an organization to manage the resulting litigation:

[D]espite their lack of common ailments or history, they still had to devise a way to speak with one voice. So they wrote a full constitu-tion, complete with checks and balances. The charter is divided into six articles—only one fewer than the U.S. Constitution. Article II delimits the powers of the Steering Committee and enumerates the duties of the Business, Property, Health and Guardian ad Litem subcommittees. There are definitions of a quorum, methods for the conduct of business, and bylaws regarding the election of officers. Article VI details the proceedings for impeachment.<sup>85</sup>

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81 *Id.* at 81.

82 *See, e.g., id.* at 82 (reporting that, in Germany, “consumer organizations now have legal standing to bring actions on behalf of consumers”).

83 *See, e.g.,* Vince Morabito, *Clashing Classes Down Under—Evaluating Australia’s Competing Class Actions Through Empirical and Comparative Perspectives*, 27 CONN. J. INT’L L. 205, 217 (2012) (noting that in Australia “the Federal and Victorian [class action] regimes do not employ what are known in the US and Canada as certification regimes”).

84 *See generally* STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987).

85 Jack Hitt, *Toxic Dreams: A California Town Finds Meaning in an Acid Pit*, HARPER’S MAG., July 1995, at 57, 61, available at <http://harpers.org/archive/1995/07/0002121>.

Although there are examples of class actions that involve similar group decisionmaking,<sup>86</sup> there is certainly no requirement that there be such a collective apparatus, which one would expect to find in groups that genuinely exist independent of litigation.<sup>87</sup>

The reality is that the American group litigations are most often the creature of the lawyers, and the reason we countenance that peculiar feature is, as recognized long ago, to promote deterrence.<sup>88</sup> Thus, in his book examining evolving European attitudes towards group litigation, Professor Hodges emphasizes the “profound distinction between the U.S. and European approaches to the balance that is struck between public and private law remedies,” because “the U.S. model relies primarily on *private* enforcement, whereas the European model relies primarily on *public* enforcement.”<sup>89</sup> One can engage in vigorous debate about whether “regulation through litigation” works properly,<sup>90</sup> and it is certainly possible to imagine a very different social organization.<sup>91</sup>

86 See, e.g., Shauna I. Marshall, *Class Actions as Instruments of Change: Reflections on Davis v. City and County of San Francisco*, 29 U.S.F. L. REV. 911 (1995) (chronicling efforts to achieve unity among class members in an employment discrimination action brought on behalf of African Americans and women who were turned down for jobs with the fire department).

87 Of course, the “groups” that exist in other settings may not have much independent existence. See Jill E. Fisch, *Aggregation, Auctions, and Other Developments in the Selection of Lead Counsel Under the PSLRA*, 64 LAW & CONTEMP. PROBS. 53 (2001) (describing the creativity of counsel in gathering together “groups” that qualified as lead plaintiff under the PSLRA because they had the largest claims); 7B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1806, at 437–40 (3d ed. 2005) (discussing the controversy about aggregation of a “group” of unrelated individuals to satisfy the PSLRA requirements for a lead plaintiff group).

88 See Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 60–61 (1975) (arguing that the goal is deterrence, but cautioning also that there is a risk of over-deterrence).

89 CHRISTOPHER HODGES, *THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS* 196–97 (2008) (emphasis in original).

90 See, e.g., REGULATION THROUGH LITIGATION (W. Kip Viscusi ed., 2002) (reviewing a recent class of high stakes litigation which allowed litigants to for regulatory and policy changes).

91 See, e.g., Mark A. Geistfeld, *The Coherence of Compensation—Deterrence Theory in Tort Law*, 61 DEPAUL L. REV. 383, 417 (2012). Geistfeld states:

[O]ne can imagine a society in which tort law is largely unnecessary. All risks could be regulated administratively, and all compensable harms could be covered by insurance. These institutions would adequately protect the individual interest in physical security, eliminating this role from tort law. The unrealism of this scenario does not detract for the significance of its implications. Unlike the United States, countries in the European Union have less tort liability supplemented by more extensive administrative regula-

Professor Strong's contribution to this issue<sup>92</sup> provides a welcome antidote to a U.S.-centric attitude toward aggregation. Recognizing the general European antipathy toward U.S. class actions, it focuses on a resolution adopted by the European Parliament in February 2012<sup>93</sup> endorsing creation of methods for collective redress. In the process, she examines the differing attitudes toward regulation through litigation and considers the prospect of reconciliation. Although this resolution (which has not borne fruit in terms of actual legislation) may signal some relaxation of the European view, it is hardly a retreat. Instead, it says "that Europe must refrain from introducing a US-style class system or any system that does not respect European legal traditions,"<sup>94</sup> and disavows anything approaching American-style discovery.<sup>95</sup> It also gives priority to government regulators over private litigators.<sup>96</sup> So even though this Resolution may suggest there could be movement toward the American model, it is not only incomplete but limited and cautious. It surely stops far short of a wholesale embrace of aggressive aggregation to effect private enforcement.

Accepting our general emphasis on private enforcement through litigation does not automatically lead to the conclusion that our current handling of class actions stands on firm footing. To the contrary, Professor Redish has recently asserted in his book *Wholesale Justice*<sup>97</sup> that Rule 23's authorization of class actions is unconstitutional both because it exceeded the rulemaking power and because it transforms

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tion and government-provided insurance. The reduced role of tort liability in these liberal democracies hardly makes them less fair or less just than the United States, just like the increased role of tort liability in the United States hardly implies that Americans are litigation crazy. Tort law is but one institution of many that protects individuals from physical harm, making the functional importance of tort law contingent on the full range of complementary institutions.

*Id.*

92 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 (2012).

93 European Parliament, Resolution of 2 February 2012 on "Towards a Coherent European Approach to Collective Redress," P7\_TA-PROV (2012) 0021.

94 See Strong, *supra* note 92, at 959 (quoting Resolution).

95 See *id.* at 951, quoting the Resolution as follows:

[C]ollective claimants must not be in a better position than individual claimants with regard to access to evidence from the defendant, and each claimant must provide evidence for his claim; an obligation to disclose documents to the claimants ("discovery") is mostly unknown and must not form part of the horizontal framework.

96 See *id.* at n.385.

97 MARTIN H. REDISH, *WHOLESALE JUSTICE* (2009).

the underlying law, converting what would be a modest legislative sanction into the litigation equivalent of a nuclear weapon.<sup>98</sup> This is not the place to delve deeply into the debates invited by Redish,<sup>99</sup> but it is the place to recognize that class actions can lead to overkill in a way that might be avoided with administrative enforcement informed by something like prosecutorial discretion.

Consider as an example the Fair and Accurate Credit Transactions Act.<sup>100</sup> It required retail outlets to reset their credit card processing machinery to limit what appears on the receipt to the last four digits of the customer's credit card number, and permitted anyone who suffered a violation to sue for \$100 to \$1,000 plus attorney fees. This is a prime example of using private litigation to enforce a statutory prohibition that is, at most, *malum prohibitum*. Of course, millions of customers had emerged unscathed from having their full credit-card numbers on receipts before the Act's effective date. Even before the Act went into effect, the incidence of resulting credit card fraud or identity theft must have been fairly low; claimants under the Act need not prove any such injury to recover.

Of course, some retailers did not recalibrate their machines in time to comply with the Act by the time it went into effect. Of course, there followed a spate of class actions on behalf of the customers of such institutions. Presented with a motion to certify in one such case, a Florida district court found that class litigation was not superior within the meaning of Rule 23(b)(3) because of the "potentially annihilating" class-wide damages of \$4.6 million to \$46 million, particularly since the statute did not require proof of any economic harm.<sup>101</sup>

In *Bateman v. American Multi-Cinema, Inc.*,<sup>102</sup> the Ninth Circuit rejected similar reasoning by another district judge. That district judge refused to certify because the defendant made a good faith

98 *Id.* at 228–32.

99 For further discussion, see Richard Marcus, *Bomb-Throwing, Democratic Theory, and Basic Values—A New Path to Procedural Harmonization?*, 107 Nw. U. L. REV. (forthcoming 2013) (exploring ways in which Redish's views on various matters, including class actions, would move the U.S. toward harmonizing our procedure with that of Europe). See also Alexandra D. Lahav, *Are Class Actions Unconstitutional?*, 109 MICH. L. REV. 993, 993 (2011) (reviewing REDISH, *supra* note 97) ("For opponents of the class action, Martin Redish's book *Wholesale Justice* provides some of the most theoretically sophisticated arguments available.").

100 15 U.S.C. § 1681 (2006).

101 *Leysoto v. Mama Mia I, Inc.*, 255 F.R.D. 693, 698 (S.D. Fla. 2009).

102 *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010). A similar concern arose in Truth in Lending Act class actions, eventually leading Congress to amend that Act to place limits on defendant's exposure. See WRIGHT ET AL., *supra* note 87, § 1804, at 392.

effort to comply with the Act after the suit was filed, and faced a liability of between \$29 million and \$290 million for failure to comply sooner.<sup>103</sup> The court of appeals concluded that Congress could have limited the use of class actions under the Act,<sup>104</sup> but did not, and therefore that Rule 23 applied in full force.<sup>105</sup> Good faith efforts to comply after suit was filed would not be a reason to deny class certification for the pre-litigation victims of statutory violations, and the potential magnitude of the defendant's liability was not a legitimate factor, but simply a consequence of class treatment authorized by the rule. In any event, it added, there was no indication defendant would be bankrupted by the suit.<sup>106</sup>

Surely deterrence and enforcement are not the only values to be considered. Surely there can be cases in which the threat of class-action treatment, particularly when coupled with the attendant uniquely burdensome and intrusive American discovery apparatus, overcomes very legitimate defenses, even including "I didn't do it." Surely also, the interest in enforcement of "public law" has some limit. What, for example, should be made of the copyright enforcement by "mass copyright suits" as described above?<sup>107</sup> The complaint there was that litigation costs deterred defendants from defending. Won't litigation costs and stakes really make many cases "bet the company" cases? And even in the "true" public law arena, there is at least considerable reason for a circumspect attitude toward aggressive use of class-action relief. Contrast Professor Chayes's enthusiasm for "public law litigation" with the much more recent views of Judge Frank Easterbrook, who denounced a 1977 Seventh Circuit case 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>108</sup>

No doubt most legal academics side with Chayes rather than Easterbrook. Perhaps that is consonant with Professor Garrett's contribution about the use of collective litigation to enforce constitutional rights. Using aggregation to enforce the constitution seems consider-

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103 *Bateman*, 623 F.3d at 710.

104 Note that in *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), the Court refused to enforce in federal court a provision of state law enacted by the New York Legislature to forbid class actions in suits for "penalties" authorized by New York legislation. *Id.* at 1432. For criticism of this decision, see Stephen B. Burbank & Tobias Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 19–20 (2010).

105 *Bateman*, 623 F.3d at 720–21.

106 *Id.* at 723.

107 See *supra* notes 51–53 and accompanying text.

108 *Rahman v. Chertoff*, 530 F.3d 622, 626 (7th Cir. 2008).

ably more urgent than aggregation to enforce copyright claims,<sup>109</sup> or claims that a retailer failed to reset its credit-card machines so they would print only the last four digits of the credit-card number on the receipt.<sup>110</sup> And the general question whether law enforcement should be left to the State or depend on private litigation reminds us of other such issues.<sup>111</sup> For our purposes, the key point is that there are many debatable issues lying behind the wholesale endorsement of using private litigation to achieve deterrence or enforcement of law. Recognizing that this is an example of American exceptionalism should make us cautious about embracing a maximalist attitude toward aggregation. As a consequence, properly calibrating the handling of these issues—in gross or case by case—is a challenge we must continue to confront for some time.

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109 See *supra* notes 51–53 and accompanying text (discussing “mass copyright litigation”).

110 See *supra* notes 100–101 and accompanying text.

111 “Cultural” differences between countries can have deep historical roots. On this score, consider the sorts of antagonistic attitudes one sometimes finds in twenty-first century French discourse about the “Anglo-Saxon” version of free-wheeling capitalism, contrasted with the French inclination toward a much more prominent involvement of the government in industry. One may be inclined to envision these differences in twentieth or twenty-first century terms, but echoes of them can be found in the eighteenth century. Thus a half century ago, George Rudé contrasted England and France at the dawn of the Industrial Revolution in terms that sound peculiarly pertinent today:

England, again, was peculiar [compared to countries on the Continent] in that she alone, having embarked on an industrial “revolution,” was creating a new and independent class of private manufacturers, who were beginning to grow rich on the proceeds of industrial, rather than largely mercantile, capital. . . . In France, manufacture was conducted either in large State enterprises, such as the Royal “manufactories” of the Gobelins and Savonnerie, by master craftsmen in small workshops, or by merchant-manufacturers directing the domestic labour of peasant weavers and spinners in cottage industry. . . . In England alone, a distinct class of industrial *entrepreneurs* was arising in the wake of the technical innovations introduced by the Darbys, Hargreaves, Cort, Arkwright and Watt.

GEORGE RUDÉ, *REVOLUTIONARY EUROPE 1783–1815*, at 21–22 (1964).

This historical contrast is obviously far afield from private litigation, but is a symptom of a very different attitude one could almost describe as “cultural” about the role of individual actors compared to the role of the State. Even today, it is sometimes central to discussion of economic policy. Civil Procedure will not resolve this sort of basic conflict in orientation.



### III. HANDLING THE CHALLENGING DECISION WHETHER TO AUTHORIZE AGGREGATION

As demonstrated by Professor Effron’s chronicle of the seeming divergences among courts in deciding even relatively simple questions like whether permissive joinder is allowed or a counterclaim is compulsory,<sup>112</sup> the decision whether to aggregate can be challenging. Moving beyond those simplest situations to cases in which the court is asked to consolidate separate cases or to decree that one case is a class action on behalf of many others who have not chosen to sue compounds the challenge. And in at least some cases—sometimes denounced as “drive-by certifications”—both the content and the technique of the aggregation decision have seemed flagrantly faulty. The question whether drive-by certifications happen frequently is much contested, and cannot be resolved here. Certainly something of the sort has happened on occasion.<sup>113</sup>

All instances of combination potentially involve trade-offs. As I recognized in 1995, consolidation tends to change the litigation dynamic in ways that may not be entirely positive, such as depriving “bystander” parties (those not central to the action) of control over their cases, simultaneously prompting the court to focus on the central issues and “blend” the divergent ones together, and magnifying the court’s temptation to sever issues for separate (and likely later) consideration.<sup>114</sup> It hardly seems that these concerns have abated; given the rising frequency of MDL and other consolidation, they may have magnified.<sup>115</sup> Consolidation also may limit

112 See *supra* notes 54–56.

113 See *In re Diet Drugs*, 282 F.3d 220, 226–27 (3d Cir. 2002) (describing certification granted by a judge in Hidalgo County, Texas, one week after an amended complaint was filed and without any notice of the certification “hearing” to defendants).

114 See Marcus, *supra* note 5, at 890–97.

115 For example, consider the recent report that MDL transfer will benefit the “major players” on the defense side, but not the “small fish.” Ruth Dowling and Florence Crisp explain:

These “uncommon” defendants face unique strategic and practical challenges. It is exceedingly difficult for a single defendant to find an early exit from an MDL. The interests of the uncommon defendant will inevitably be overshadowed by those of co-defendants whose very way of doing business may be at stake. And while the industry giant whose conduct is at issue incurs lower litigation costs defending an MDL as opposed to dozens of separate cases around the country, the uncommon defendant, which likely would not have been sued but for the MDL, faces increased costs borne of the much larger litigation to which it is tagged.

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the latitude of those whose claims are deemed central to the proceeding.<sup>116</sup>

The starting point, therefore, is to acknowledge that the decision to consolidate is often very important. Sometimes it may seem to be a make-or-break point in the case. For example, consider the complaint of a plaintiff lawyer about a decision by the MDL Panel not to transfer cases involving a pharmaceutical device, seemingly leaving plaintiff's counsel in the lurch. She objected that, "[u]ntil recently, no one would have dreamed that a mass pharmaceutical or medical device tort would be denied multidistrict litigation (MDL) status. . . . [But i]n the past two years, the Judicial Panel on Multidistrict Litigation (JPML) has slowed down the rate at which it issues transfer orders."<sup>117</sup>

The significance of consolidation may often be eclipsed in importance by class certification. In the 1970s, the Supreme Court rejected the argument that immediate appeal should lie from denial of class certification because that decision was the "death knell" of the litigation.<sup>118</sup> In 1995, Judge Posner famously legitimated using mandamus to review the grant of class certification on the ground that the deci-

Having been swept into the MDL, an uncommon defendant can take steps to manage its costs and chart its own course. The uncommon defendant should consider, and periodically re-evaluate, several key issues, including whether to pursue an early exit strategy; whether to go it alone or join forces with a joint defense group encompassing all or some defendants; how to influence joint defense group decisions; and how best to manage monitoring, discovery and expert costs. The uncommon defendant is under pressure, both from MDL courts that prefer consolidated proceedings and joint defense groups, not to diverge from the larger pack of defendants. . . .

Plaintiffs' ability to control costs hinges on the defendants acting as a group, filing joint motions and consolidated sets of discovery. If the plaintiffs are required to respond to individual motions and/or discovery tailored to the particular circumstances of an uncommon defendant, their incentive to bring additional tag-along actions is reduced. In practice, the MDL process often works against the uncommon defendant's attempt to have its circumstances individually considered, with courts often insisting that defendants consolidate their motion practice.

Ruth Dowling & Florence Crisp, *Sometimes the Small Fry Get Swept up in the Net*, NAT'L L.J., Sept. 20, 2010, at 12.

116 See *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 628 F.3d 157, 163 (5th Cir. 2010). In that case, a plaintiff argued on appeal that, had he been suing separately, his motion to postpone the trial would have been granted, but that his motion to postpone was denied because his case had been selected for a bellwether trial. *Id.* at 161. The court of appeals was unsympathetic: "Bell wanted to have his cake and eat it by withdrawing from a bellwether trial and then sitting back to await the outcome of another plaintiff's experience against the appellees." *Id.* at 163.

117 Leslie O'Leary, *Out on Your Own*, TRIAL, Nov. 2010, at 36.

118 *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469-76 (1978).

sion to confer class status could convert a serious case into a “bet the company” case and leave the defendant no choice to settle even what appeared to be very dubious claims.<sup>119</sup> Whether that should be a concern could at least be debated; a few years later Justice Sotomayor (then on the Second Circuit) countered that “[t]he effect of certification on parties’ leverage in settlement negotiations is a fact of life for class action litigants. While the sheer size of the class in this case may enhance this effect, this alone cannot defeat an otherwise proper certification.”<sup>120</sup>

In the class-action arena, similarly serious consequences attend the decision to approve or disapprove a proposed class settlement. That decision is often, of course, combined with a proposal to certify the class for purposes of settlement. As the Supreme Court has recognized, the fact of settlement can affect the decision whether to certify.<sup>121</sup>

Given the importance of these various decisions, one natural response is to urge that more specific standards be developed to guide judges’ decisions. In 1995, I pointed to the desirability of clearer guidelines for consolidation<sup>122</sup> and applauded the ALI Complex Litigation project for suggesting standards for consolidation that resembled the ones used for class certification.<sup>123</sup> Professor Effron urges that clarification of joinder rules more generally would serve such purposes.<sup>124</sup> That’s the sort of reaction the disgruntled plaintiff lawyer quoted above had about denial of consolidation in her medical device case:

The [Multidistrict] [P]anel’s decisions are riddled with internal inconsistencies. Without proper appellate oversight, litigants have no legal precedent to turn to for guidance about whether an MDL petition will succeed. This leaves plaintiff lawyers out on their own. Because you have no idea how the panel will rule—and because it’s likely that you won’t be granted consolidation—you should be prepared to litigate your mass tort cases in multiple unfamiliar jurisdictions.<sup>125</sup>

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119 *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995), *cert. denied*, 516 U.S. 867 (1995).

120 *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001).

121 *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997) (ruling that “[s]ettlement is relevant to a class certification”).

122 *See Marcus*, *supra* note 5, at 897–98.

123 *See id.* at 901–13.

124 *See Effron*, *supra* note 54, at 810–14.

125 O’Leary, *supra* note 117, at 37.

At some point, however, it seems unlikely that recalibration of language will foster across-the-board improvements. Though it might be that separate aggregation standards for different kinds of cases would permit more precise guidance, the downsides of abandoning the “transsubstantive” orientation of our procedure rules<sup>126</sup> generally outweigh that possibility. Phrased for all types of cases, they must be more general.

General standards not only apply to different types of cases, but also to different types of joinder. Permissive joinder, the compulsory counterclaim rule, MDL centralization, and class certification all turn in some way on whether the various claims involve common issues. But that does not tell us much about how intensely the court should look at the exact issues and evidence likely to be presented in deciding whether they are really sufficiently common to justify the type of joinder involved. Almost inevitably, the decision whether to aggregate turns on some evaluation of the merits. Commonality sufficient to justify aggregation does not exist as an abstract concept. Instead, a key consideration is whether the issues that bear on resolution of separate claims or claims raised by separate parties overlap in ways that make joinder fair and efficient. That sort of calculation is pertinent to all aggregation decisions, and even more so with class certification or MDL centralization, but can work differently in different litigation settings.

Recognizing these starting points suggests at least three methods of responding. *First*, one might urge that rules governing the aggregation decision should be clarified. As I suggested in 1995, and Professor Effron urged more recently, revising legal standards for combination might produce improvement. In 1996, the federal rulemakers proposed some revisions for the certification standards under Rule 23(b)(3)<sup>127</sup> but these proposals were later withdrawn. In 2003, the standards for approving a class-action settlement under Rule 23(e) were substantially altered to provide more direction.<sup>128</sup> The ALI *Principles of the Law of Aggregate Litigation* makes some such propos-

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126 See Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989) (describing the ways in which trans-substantivity minimizes political pressures and what I would call “special deals” for certain types of cases).

127 See Proposed Amendments to the Federal Rules, 167 F.R.D. 523, 559–60 (1996).

128 See FED. R. CIV. P. 23(e).

als regarding the standards for certification and settlement approval.<sup>129</sup>

Besides legal standards, another important focus is the content and information base for such combination decisions. For MDL centralizations, it may be that the level of detail available to the Panel is somewhat limited. Tagalong cases,<sup>130</sup> for example, have not even been filed yet when the Panel makes its centralization decision, and the Panel mainly examines the pleadings and seems to focus more on the prospect of overlapping discovery than on the likely method of combined judicial resolution of the disputed issues in the case. For some time, class certification decisions were made in a somewhat similar vacuum, often limited to the pleadings or “non-merits discovery.” In the last decade, that focus has changed, and the former notion that certification cannot depend on “merits decisions” has faded, as I have recently written.<sup>131</sup> Professor Rutherglen’s contribution to this issue takes up similar issues,<sup>132</sup> and the Supreme Court has recently granted certiorari to consider some of them.<sup>133</sup> Further light may soon be shed on these questions. For those favoring care in making this important decision, this development could be heartening. For those who want to improve the chances of aggregation, perhaps it is less promising.

*Second*, in order to contain or constrain aggregation decisions, one might be inclined to assign the decision whether to aggregate to an expert body. That, of course, is the MDL model. The judges on the Panel, chosen from across the nation<sup>134</sup> and singularly exper-

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129 See, e.g., AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 (2009) (regarding application of the “predominance” concept under Rule 23(b)(3)); *id.* § 2.04 (regarding focusing on whether remedies sought are “indivisible” in making certification decisions under Rule 23(b)(2)); *id.* § 3.05 (specifying matters not presently included in Rule 23(e) that could serve as the focus of settlement-approval decisions).

130 These are later-filed cases sharing a common issue with cases the Panel has already transferred as part of an MDL docket. They are transferred rather automatically to the transferee court, contributing to the “direct filing” phenomenon addressed by Prof. Bradt. See Bradt, *supra* note 29, at 787 n.157.

131 See Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 339 (2011).

132 See Rutherglen, *supra* note 38.

133 See *Comcast Corp. v. Behrend*, 11-864, 2012 WL 113090 (U.S. June 25, 2012) (limiting the certiorari grant to the question of “[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis”).

134 By statute, no two judges on the Panel may be from the same circuit. See 28 U.S.C. § 1407(d) (2006).

enced in the consolidation decisions that the Panel must make, could be entrusted to make wiser decisions than randomly selected judges to whom cases were assigned by coincidence. Putting aside the objections of some lawyers that they do not do so,<sup>135</sup> one might be left with what could be called a “structural” concern about the selection and orientation of such “experts.”<sup>136</sup> So there are at least questions about whether this “expert panel” method is best. And to the extent one is inclined to rely on the experts, one might have less concern with the clarity or detail of the standards they are to use. They, after all, are the experts.

Perhaps these experts should continue to monitor the progress of the cases after they are transferred. Developments in the case may go in a different direction from what appeared likely at the outset (when the centralization decision is usually made). No matter how expert they are, these experts cannot foresee everything. But the Panel’s authority is limited to the transfer decision, and does not extend to what the assigned judge does with the cases (including making class-certification and Rule 42 consolidation decisions). Review of post-transfer decisions on the cases is to the court of appeals with appellate jurisdiction over appeals from the transferee district or, after retransfer, the transferor district.

Even though the Panel has no formal appellate authority over the decisions of the transferee judge it chose, it does have the power to retransfer cases, a decision that could take account of what the transferee judge has done with the cases. In its early operations, it seemed inclined to do that.<sup>137</sup> But as we been told, the growing caseload is “inundating . . . the MDL Panel,”<sup>138</sup> with the result that the Panel “has slowed down the rate at which it issues transfer orders.”<sup>139</sup> Given the burden it has keeping up with its growing responsibilities making initial centralization decisions,<sup>140</sup> asking the Panel to supervise post-transfer rulings does not seem workable. Thus, for both statutory and

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135 See *supra* text accompanying note 117 (reporting one lawyer’s lament that the Panel makes decisions she regards as inconsistent).

136 See Marcus, *supra* note 31, at 2283–91 (exploring the question whether the Panel setup might tend to select judges distinctly receptive to consolidation and whether the Panel’s power to select the transferee judge might often focus on judges similarly inclined and also inclined to press for “across-the-board” settlements).

137 See *id.* at 2273 (reporting on early instances of Panel oversight of transferee judges’ actions).

138 See Bronstad, *supra* note 26, at 11.

139 See O’Leary, *supra* note 117, at 36.

140 Note that the judges on the Panel are not relieved of other judicial responsibilities; these judges already have full-time jobs and heap their Panel responsibilities on top of those jobs.

practical reasons, the Panel members must rely on the transferee judges, and will usually give no thought to retransferring the cases (the only other responsibility of the Panel under the statute) unless that judge recommends doing so. So the reality is that the Panel's expert model is not a perfect fit even for MDL centralization, much less the difficult and ongoing problem of aggregation in its many forms.

For the most part, our class action law has gone in the opposite direction from the expert technique. Unlike some state courts,<sup>141</sup> for class actions (like other civil actions) the federal courts rely on a random assignment system rather than assigning them to "expert" judges. Although the MDL panel is likely to transfer all cases involving potentially overlapping classes to one court for combined proceedings,<sup>142</sup> there is no requirement that one judge decide class certification in a case pending before her in the same way another judge resolved that issue in another case. To the contrary, it has long been said that the decision whether to certify a class is a matter of the judge's discretion.<sup>143</sup> It might even be that a more "expert" judge would feel justified in certifying a class even though another had denied certification, or that a judge might conclude that changed circumstances or additional information showed that the earlier certification ruling was improvident. One might almost say that we have approached the certification decision as though we were assuming district judges are all expert, but without ensuring that they are.

*Third*, for those uneasy about untrammelled discretion in making aggregation decisions, the solution seems to be appellate review. That was the solution proposed by the plaintiff lawyer upset about the MDL Panel's refusal to aggregate in her case.<sup>144</sup> But with an "expert" body like the Panel, appellate review seems unwarranted and perhaps exactly the wrong thing because it would involve appeal from the expert judges to the generalist judges. It is not surprising that the MDL statute forbids review of the Panel's transfer decisions.<sup>145</sup>

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141 In many metropolitan Superior Courts in California, for example, class actions are assigned to a special Complex Litigation Department in which the judges are specialists in handling this sort of case.

142 See DAVID HERR, MULTIDISTRICT LITIGATION MANUAL § 5.24, at 148 (2009) ("[I]f there are conflicting or potentially conflicting class claims in the litigation, transfer is likely regardless of the presence or absence of other factors that would otherwise favor or militate against transfer.").

143 See, e.g., Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1607–08 (2003) (noting the increased invasiveness of appellate courts into a district court's discretion to certify in mass tort cases).

144 See *supra* text accompanying note 125.

145 See 28 U.S.C. § 1407(e) (2006).

Review of class certification decisions is not similarly barred, but it was initially not easy to justify. Such a decision was, by definition, not a “final decision” subject to immediate review.<sup>146</sup> Similar decisions can be reviewed immediately when the district judge certifies them to the appellate court on the ground that there is a ground for uncertainty that the ruling was right and immediate review would facilitate prompt resolution of the case in the district court.<sup>147</sup> That was how the permissive joinder decision in *Mosley v. General Motors*<sup>148</sup> got before the appellate court. But district courts with discretion to certify or not in proposed class actions would not often regard their decisions as dubious, and the Supreme Court early rejected the argument that review could be had on the ground that certification was “collateral” to the merits.<sup>149</sup> So the appellate courts were left with only mandamus as a means of intervening in the district court’s handling of these cases. In 1995, for example, the Seventh Circuit famously used that power to overturn class certification on the ground it made settlement inevitable (and review impossible) because it turned the case into “bet the company” litigation.<sup>150</sup>

In 1998, the addition of Rule 23(f), authorizing appellate courts to review class-certification decisions in their discretion, substantially changed things even though there was no change in Rule 23’s prescribed rules for class certification. Since then, a considerable body of appellate law has developed to guide lower courts, perhaps providing something like the sort of clearer standards some might endorse for Rule 23 itself.

The appellate courts still say that they are reviewing district court certification decisions for abuse of discretion. But discretion is, of course, a much used and perhaps abused concept.<sup>151</sup> There is a range of decision-making latitude conferred on American first-instance (trial court) judges that differs from the practices of most other industrialized countries, where supervision by higher-level courts is more frequent and more intrusive.<sup>152</sup> With such matters as class certification,

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146 See *id.* § 1291.

147 See *id.* § 1292(b).

148 See *supra* text accompanying notes 42–44.

149 *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468–69 (1978).

150 *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303–04 (7th Cir. 1995).

151 For the leading treatments of the general question, see Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 762–67 (1982) (arguing discretion is a matter of degree); Maurice Rosenberg, *Judicial Discretion in the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 637 (1971) (distinguishing between primary and secondary discretion).

152 See Richard Marcus, *Appellate Review in the Reactive Model: The Example of the American Federal Courts*, in APPEALS AND OTHER MEANS OF RECOURSE AGAINST JUDG-



it may be that over time the appellate courts gain familiarity and confidence and therefore can exert more control. Judge Friendly thought so: “[a]buse of discretion can be found far more readily on appeals from the denial or grant of class action status than where the issue is, for example, the curtailment of cross-examination or the grant or denial of a continuance.”<sup>153</sup>

Almost certainly, the intensity of appellate scrutiny of class certification decisions has increased; a decision to accept immediate review pursuant to Rule 23(f) implies that the appellate court sees some need to change what this district judge did, or instruct other district judges on how to handle similar problems. It is possible to argue that the urge toward appellate oversight of class-certification decisions can be overdone, however. Dean Klonoff, for example, has noted that the actual experience under Rule 23(f) has seemed to favor defendants.<sup>154</sup> The Supreme Court, moreover, seemed in *Shady Grove* to put at risk the entire notion that class certification is really a discretionary matter.<sup>155</sup>

As more precise and numerous directives about certification emanate from the courts of appeals or find their way into Rule 23, this trend toward careful scrutiny is likely to continue. For some, this may be a hopeful sign, perhaps a good substitute for clearer rules themselves. For others, it may simply shift the forum-shopping effort.

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MENTS IN THE CONTEXT OF EFFICIENCY AND FAIRNESS (Remco van Rhee & Alan Uzela eds, forthcoming 2013).

153 *Abrams v. Interco, Inc.*, 719 F.2d 23, 28 (2d Cir. 1983) (Friendly, J.).

154 See Klonoff, *supra* note 17, at 14. Dean Klonoff states:

[I]n terms of sheer numbers, Rule 23(f) has served primarily as a device to protect defendants. . . . Out of the 209 Rule 23(f) appeals accepted [from November 30, 1998 through May 31, 2012], 144 (or about 69 percent) were appeals by defendants after the grant of class certification, whereas only 65 (31 percent) were appeals by plaintiffs after the denial of class certification. Of the 144 appeals by defendants, defendants were successful in 101 cases (a 70 percent reversal rate), while plaintiffs prevailed only 30 percent of the time. Of the 65 appeals by plaintiffs, defendants prevailed in only 26 cases (or 30 percent of the time). Thus, even when plaintiffs convinced the appellate court to grant review, they lost in the majority of cases. In short, with respect to appellate court rulings pursuant to Rule 23(f), defendants have benefitted more from Rule 23(f) than have plaintiffs.

*Id.*

155 See Marcus, *supra* note 131, at 368–70. The question whether a rule change to restore trial court discretion would be advisable has been raised. See Agenda Materials, Advisory Committee on Civil Rules, Nov. 2011, at 643–45, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf> (outlining possible rule changes to restore district court discretion in regard to certification).

Thus, Federal Judicial Center researchers studying filing patterns of federal-court class actions after CAFA made it easier to file or remove such cases to federal court found that the increase seemed to be concentrated in circuits perceived by plaintiff lawyers as favorable on class certification.<sup>156</sup>

In sum, the challenges of making the aggregation decision are not likely to disappear. Clearer guidelines may be possible, but likely won't be clear enough to replace individualized judicial decision-making. That decision-making will largely be by generalist judges who—to some extent—will be operating under their own discretion. It will take account of, but perhaps not depend critically upon, some evaluation of “merits issues.” And appellate scrutiny, while occasionally crucial, will probably remain relatively rare.

### CONCLUSION

So here we are nearly twenty years later, still confronting the consolidation conundrum, even though there have been serious rulemaking efforts, enhanced appellate scrutiny, new federal legislation, and another ALI project about the subject. Given the semi-intractable challenges consolidation presents in its many forms, it is no wonder we have not put all the difficulties behind us, even though we have surmounted some. At the same time, as some of the contributions to this issue suggest, we may be replacing old challenges with new ones, such as the arbitration class-action waiver possibility. We will likely continue for further decades to do so, even though our understanding of those challenges has improved. In this Article, I suggest that key features of our ongoing efforts to confront these problems will be keeping in mind the variety of litigation contexts in which they can appear, attending to the proper role of private litigation as a law-enforcement tool in the U.S., and attending to the methods and content of judicial decisions to authorize combined litigation.

But improved understanding does not answer all questions; some important ones depend on value judgments. For example, should American exceptionalism be embraced to empower every private litigant (or lawyer) to pursue every claim on behalf of everyone who may have been harmed because that's the best way to achieve due process? At some point, this sort of enthusiasm might provoke a popular revolt along the lines recently articulated by *The Haggler* column in the *New York Times*:

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156 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).

Class-action lawsuits have been denounced by businesses for decades, and some of their arguments are compelling. We've all heard of settlements in which lawyers take home millions in fees and consumers wind up with piddling sums, often in the form of coupons. Recently, Ferrero U.S.A. settled lawsuits brought by two moms who said they were deceived by health claims made on jars of the chocolate hazelnut spread Nutella. Yes, if you brought Nutella thinking it was spinach in a jar—actually, even if you brought it because you find it delicious—you are a winner.

Is that really the most efficient way to deal with a reportedly misleading health claim? Maybe the Federal Trade Commission could have handled that one.<sup>157</sup>

I certainly do not suggest wholehearted embrace of *The Hagglers'* views. But the fact that a baleful public gaze continues to be cast in the direction of the magnifying effects of combining lawsuits is a reminder that these issues will likely remain central for some time. The other contributions to this issue will inform the handling of those issues in a more positive way. In another twenty years, however, we will probably still be confronting the consolidation conundrum. It is, in that sense, something of a full-employment act for law professors.

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157 David Segal, *A Rising Tide Against Class-Action Suits*, N.Y. TIMES (May 6, 2012), [http://www.nytimes.com/2012/05/06/your-money/class-actions-face-hurdle-in-2011-supreme-court-ruling.html?\\_r=0](http://www.nytimes.com/2012/05/06/your-money/class-actions-face-hurdle-in-2011-supreme-court-ruling.html?_r=0).

