

2013

Living in CAFA's World

Jay Tidmarsh

Notre Dame Law School, jay.h.tidmarsh.1@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Litigation Commons](#)

Recommended Citation

Jay Tidmarsh, *Living in CAFA's World*, 32 Rev. Litig. 691 (2013).

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/285

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

LIVING IN CAFA'S WORLD

Jay Tidmarsh*

I. INTRODUCTION.....	691
II. CAFA'S INFLUENCE ON CLASS ACTION DOCTRINE	699
III. CHALLENGING CAFA'S PARADIGM: SOME FIRST EFFORTS	704
IV. A WAY FORWARD: TREATING SUPERIORITY SERIOUSLY	713
V. CONCLUSION	719

I. INTRODUCTION

It is fashionable these days to talk about the death of class actions.¹ The steps along the path to the cemetery are easy enough to describe. In 1995, the Seventh Circuit significantly reined in the emerging mass tort class action,² and Congress imposed constricting requirements on the securities-fraud class action.³ During the next

* Diane & M.O. Miller, II Research Professor of Law, Notre Dame Law School. A version of this essay was delivered at a joint program of the Sections on Litigation and Federal Courts at the AALS Annual Meeting. I thank the participants in that program, as well as Mark McKenna, Rich Freer, and participants in a faculty colloquium at Notre Dame Law School for helpful comments on drafts of this article. I also thank Tony Carucci and Eric Hinz for research assistance.

1. See, e.g., Myriam Gilles, *Opting out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) (“[C]lass actions will soon be virtually extinct.”); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012) (discussing “the *coup de grace* administered to consumer class actions ... in *AT&T Mobility LLC v. Concepcion*”); Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 813 (2004) (noting “the increasing skepticism—particularly among members of the federal judiciary—toward the class action as an effective dispute-resolution mechanism in the employment context”).

2. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (Posner, J.) (ordering that the district court decertify a class of persons with hemophilia whose HIV infections had been caused by the defendants’ tainted blood products). Other circuits soon followed with comparable opinions. See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (decertifying and dismissing a class of tobacco smokers); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996) (ordering the decertification of a class of patients whose implanted medical devices were allegedly defective).

3. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101, 109 Stat. 737, 737–49 (1995) (codified as amended at 15 U.S.C. §§ 77z-1, 78u-4 (2006)); see also Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 101, 112 Stat. 3227, 3227–33 (1998) (codified as amended at 15

four years, a pair of Supreme Court decisions took a jaundiced view toward both mass tort and settlement class actions.⁴ The effect of these developments—and of the judicial decisions that followed in their wake—was to make multistate state-law class actions,⁵ as well as positive-value class actions⁶ and class actions involving significant individualized proof of causation or damages,⁷ very difficult to maintain in federal court.

According to this story, the death spiral really kicked in when Congress passed the Class Action Fairness Act of 2005 (CAFA),⁸ which relaxed federal subject matter jurisdiction over state-law class actions.⁹ That move swept more state-law class actions out of state

U.S.C. §§ 77p(b)–(d), 78bb(f) (2006)) (preempting many state-law fraud claims brought on a class action basis when a federal securities-fraud remedy also exists).

4. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (holding that a mandatory asbestos settlement class could not be certified under Federal Rule of Civil Procedure 23(b)(1)(B)); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (holding that an asbestos settlement class could not be certified due to defects under Federal Rules of Civil Procedure 23(a)(4) and (b)(3)).

5. See, e.g., *Castano*, 84 F.3d at 741–44 (arguing that class actions that involve variations in state law may fail to meet Rule 23(b)(3)’s predominance requirement); *id.* at 747 (citing variations in state law as one reason that the class action failed to meet Rule 23(b)(3)’s superiority requirement).

6. “Positive-value” or “large-stakes” class actions are class actions in which the value of the claims of individual class members is large enough that they are economically viable to pursue. They are distinguishable from “negative-value” or “small-stakes” class actions, in which individual recoveries would be so small that class members would not pursue them. The Supreme Court, as well as many lower courts, has suggested that the argument for using class actions has particular salience in the negative-value context. See *Amchem*, 521 U.S. at 617 (noting that Rule 23(b)(3) “does not exclude from certification cases in which individual damages run high,” but stating that such claims are not the core reason for using class actions); *Castano*, 84 F.3d at 748 (arguing that small-stakes cases present “[t]he most compelling rationale for finding superiority in a class action”); *Rhone-Poulenc*, 51 F.3d at 1299 (“In most class actions—and those the ones in which the rationale for the procedure is most compelling—individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation.”).

7. See, e.g., *Lienhart v. Dryvit Sys. Inc.*, 255 F.3d 138, 147 (4th Cir. 2001) (stating that “individualized proof of damages may defeat predominance where proof of damages is essential to liability”).

8. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

9. Among other things, CAFA employed a rule of minimum diversity and a global amount-in-controversy requirement of more than \$5 million—both of which

courts¹⁰—especially state courts that had shown a willingness to interpret their class action rules more loosely than federal courts had interpreted Rule 23 after 1995.¹¹

CAFA's effect has been magnified by three developments subsequent to its passage. The first was *Shady Grove v. Allstate Insurance*.¹² Although the Court's fractured reasoning left the opinion without a majority for a critical aspect of the case, the

expanded the number of class actions subject to federal jurisdiction. 28 U.S.C. § 1332(d)(2) (2006); see THOMAS D. ROWE, JR. ET AL., CIVIL PROCEDURE 686–88 (3d ed. 2012) (comparing pre-CAFA and post-CAFA rules for subject matter jurisdiction in class actions). In addition, CAFA relaxed a number of rules in order to make removal of qualifying class actions from state court easier. 28 U.S.C. § 1453 (2006); see ROWE, JR. ET AL., *supra*, at 697–98 (discussing CAFA's changes to removal provisions).

10. Some state-law class actions escape CAFA's gravitational pull. For instance, a state-court class action may not meet CAFA's diversity or the amount-in-controversy requirements. In addition, CAFA contains complex provisions under which courts either may or must decline to exercise jurisdiction. 28 U.S.C. § 1332(d)(3)–(4) (2006). Nonetheless, the effect of CAFA, at least initially, was exactly what Congress intended: federal courts saw a significant uptick in the number of class actions either filed in or removed to federal court. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES 1 (2008) [hereinafter LEE & WILLGING, FOURTH INTERIM REPORT] (noting a seventy-two percent increase in class action activity, after the passage of CAFA, in the eighty-eight federal district courts studied). Cf. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: PRELIMINARY FINDINGS FROM PHASE TWO'S PRE-CAFA SAMPLE OF DIVERSITY CASES 2 (2008) [hereinafter LEE & WILLGING, PRELIMINARY FINDINGS] (noting that, due to the limited judicial activity in the federal post-CAFA class actions under study, “in diversity class actions, there is less to class allegations than one would expect”).

11. For a description of the generous state-court interpretations of state class action rules laws and usages that motivated Congress to pass CAFA, see S. REP. NO. 109-14, at 11–27 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 12–27. The Senate Report specifically noted that “[s]ome state courts with this permissive [‘I never met a class action I didn’t like’] attitude have even certified classes that federal courts had already found uncertifiable.” *Id.* at 22, *reprinted in* 2005 U.S.C.C.A.N. at 23. For an examination of some of the differences between Rule 23 and state-law counterparts, see Thomas D. Rowe, Jr., *State and Foreign Class-Action Rules and Statutes: Differences from—and Lessons for?—Federal Rule 23*, 35 W. ST. U. L. REV. 147 (2007).

12. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010).

present upshot of *Shady Grove* is that federal courts are free to apply Rule 23 (the federal class action rule) in diversity cases—even when a state court in the state in which the federal court sat would apply a less (or more) restrictive class action rule.¹³

The second development was *Wal-Mart v. Dukes*.¹⁴ In *Wal-Mart*, a bare majority of the Court interpreted the commonality requirement of Rule 23(a)(2) narrowly,¹⁵ and a unanimous Court construed the injunctive-relief requirement of Rule 23(b)(2) narrowly.¹⁶ Along the way, the Court also settled—or at least strongly intimated its views on—a number of other issues that had been percolating in the lower courts: whether courts should engage in a rigorous analysis of the merits of a claim when deciding class certification (yes);¹⁷ whether class members must be afforded an opt-out right whenever the class asserts claims for monetary relief (yes);¹⁸ and whether a court may use a trial-by-statistics approach to ease potentially class-destroying difficulties of trying individual claims for damages (no).¹⁹ For each of these questions, the Court

13. Justice Scalia's opinion enjoyed five votes for some portions, four votes for others, and three votes for others. A majority of the Court agreed that Rule 23 conflicted with a more restrictive New York class action rule, thus squarely raising the issue whether the federal court should choose Rule 23 or the New York rule. *Id.* at 1437–42. The answer to that issue wound the Court through the language of portions of the Rules Enabling Act, see 28 U.S.C. § 2072 (2006), with four Justices upholding the use of Rule 23 under the Enabling Act by way of a broad rationale that would almost always lead a federal court to apply Rule 23. *Shady Grove*, 130 S. Ct. at 1442–47; see also *id.* at 1450–55 (Stevens, J., concurring) (upholding the use of Rule 23 under a narrower rationale that might, in some cases, require a federal court to adopt the state class action rule). Although she joined the bulk of Justice Scalia's opinion, Justice Sotomayor declined to join one part of Justice Scalia's opinion criticizing Justice Stevens' approach. *Id.* at 1444–47. The four dissenters all joined an opinion written by Justice Ginsburg; they would have held that the lack of a conflict between Rule 23 and the New York class action rule required the federal court to adopt the New York rule to avoid the outcome-determinative effects that would flow from choosing Rule 23. *Id.* at 1460–73. Justice Stevens' departure from the Court leaves the effect of *Shady Grove* somewhat up in the air.

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

15. *Id.* at 2550–57.

16. *Id.* at 2557–61.

17. *Id.* at 2551–52.

18. *Id.* at 2559.

19. *Id.* at 2561.

settled on an interpretation of Rule 23 that constrained a potentially broader use of class actions.

Third, the Court shut off the spigot for what was becoming a burgeoning class action practice in arbitration. In *Stolt-Nielsen v. AnimalFeeds*, the Court held that an arbitrator could not certify a class action in arbitration against a party's wishes unless the arbitration clause provided for class arbitration.²⁰ Then, in *AT&T Mobility v. Concepcion*, the Court held that an arbitration clause in which a company refused to consent to class arbitration with its customers was enforceable under the Federal Arbitration Act—even though the small amount at stake made the customers' pursuit of individual arbitration so unlikely that the arbitration clause was unconscionable under state law.²¹

Despite these developments, to describe class actions as either "dead" or in their death throes is to overstate the case. Many class actions still proceed in state courts,²² and others are taken to arbitration.²³ Even federal courts still certify class actions with

20. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

21. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Even though the consumers' claim in *Concepcion* was classically a negative-value claim, AT&T created certain incentives that might have induced some consumers to pursue their individual claims. *Id.* at 1744–45. Whether these incentives were significant in the Court's ruling remains to be seen.

22. *See, e.g., In re Hannaford Bros. Customer Data Sec. Breach Litig.*, 564 F.3d 75 (1st Cir. 2009) (remanding to state court a class action involving Florida citizens suing a corporation headquartered in Florida but incorporated in Delaware, even though related class actions were pending in federal court).

23. *See, e.g., In re Craig*, Case No. 74 115 Y 00419 11 (Am. Arbitration Ass'n Nov. 30, 2011) (Zimmerman, Arb.) (preliminarily approving a \$4.6 million class settlement). Both of the major arbitration organizations in the United States, the AAA and JAMS, have adopted rules for class action arbitrations. The AAA's Supplementary Rules on Class Arbitrations were promulgated in 2003, and the JAMS Class Action Procedures in 2009. Both sets of rules responded to the holding in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), in which the Court held that an arbitrator, not a court, should determine whether the parties to an arbitration clause contemplated the use of an arbitral class action. Although the AAA and JAMS class action rules differ from each other to some degree (notably, the JAMS Class Action Procedures allow certification of an arbitral class actions on the grounds stated in Rules 23(b)(1) and (b)(2), not just that stated in Rule 23(b)(3)), both mirror, in significant ways, protections that Rule 23 of the Federal Rules of Civil Procedure affords class members in federal court. In particular, both adopt the Rule 23(a) protections designed to ensure adequate representation of absent class members.

regularity.²⁴ CAFA, along with the Supreme Court's Rule 23 and arbitration cases, has woven a leash that bites deeply into their throat, but class actions are definitely still breathing; and I see no evidence that they are going to be choked to death any time soon.

The reason that the "death of class actions" trope remains powerful, however, is its broad explanatory power. Four distinct phenomena concerning class actions have been bubbling up at more or less the same time: the expansion of federal subject matter jurisdiction (CAFA), the tightening of Rule 23 (*Amchem*, *Ortiz*, and *Wal-Mart*), the constriction on non-consensual arbitral class actions (*Stolt-Nielsen* and *Concepcion*), and a new riff on the age-old Rules Enabling Act and *Erie* problem (*Shady Grove*). Each of the four phenomena raises distinct issues and brings distinct intellectual antecedents to the table; the *Shady Grove* problem, for instance, has roots in separation-of-power and federalism issues far removed from the particular workings of Federal Rule 23.²⁵ But there is an understandable desire to find linkages among these events, at least in part because they all concern class actions. As inaccurate as it may be, the "death of class actions" provides a storyline that makes for a compelling read—with some people rooting for the final demise and others for resuscitation.

Even though it is less compelling, a fairer portrayal of recent events is that federal courts exercise a greater gravitational pull on class actions than they ever have—even if they are not (at least not yet) the center of the class action universe. After CAFA, state courts have a reduced role in adjudicating class actions;²⁶ after *Stolt-Nielsen* and *Concepcion*, arbitrators are unlikely to handle many class actions.²⁷ It is also fair to characterize the federal courts—and the Supreme Court in particular—as being skeptical or even inhospitable

24. See, e.g., *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532 (6th Cir. 2012) (affirming certification of a class of insurance policyholders).

25. For the classic description of the constitutional and statutory issues at play in this context, see John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

26. See LEE & WILLGING, FOURTH INTERIM REPORT, *supra* note 10 (noting the increased role of federal courts in adjudicating class actions after CAFA).

27. Terry F. Moritz & Brandon J. Fitch, *The Future of Consumer Arbitration in Light of Stolt-Nielsen*, 23 LOY. CONSUMER L. REV. 265, 270 (2011).

to broad uses of the federal courts' class action authority.²⁸ Mass torts and other large-value cases, in which pre-existing arbitration agreements are least likely, often fail to pass through the filters of Rules 23(a) and (b).²⁹ Small-value cases like consumer claims, antitrust cases, and even employment disputes may fall within the terms of Rule 23; but they are increasingly subject to arbitration, thus moving them into a system in which class-wide resolution is unlikely.³⁰ Small-value securities-fraud class actions are often not subject to arbitration and therefore remain in federal court,³¹ but they bear their own class action and substantive limitations.³²

The Supreme Court's circumscribing of class action practice shows no sign of abating. In this past Term, the Court decided five cases that, in combination, broadly construed CAFA's removal jurisdiction, virtually sealed the fate of class arbitration, and continued the narrowing of Rule 23.³³ It is difficult to find another

28. See *supra* notes 2, 4–7, 14–19 and accompanying text; *infra* note 33 and accompanying text.

29. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (affirming denial of class certification and emphasizing that class treatment is “ordinarily not appropriate” in mass tort cases “when individual stakes are high and disparities among class members great”).

30. See, e.g., *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500 (2012) (employment); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747–53 (2011) (consumer); *Stolt Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) (antitrust).

31. See Barbara Black, *Arbitration of Investors' Claims Against Issuers: An Idea Whose Time Has Come?*, 75 LAW & CONTEMP. PROBS., no. 1, 2012, at 107, 107–18 (reviewing difficulties with the arbitration of securities-fraud claims against issuers of securities).

32. See 15 U.S.C. § 78u-4(a), (b)(1)–(2) (2006)r (imposing heightened standards for pleading and for conducting class litigation in securities-fraud cases); see also *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324–25 (2007) (discussing heightened pleading requirements in securities-fraud cases); Cornerstone Research, *Securities Class Action Filings: 2011 Year in Review 1* (undated), available at http://securities.stanford.edu/clearinghouse_research/2012_YIR/Cornerstone_Research_Securities_Class_Action_Filings_2012_MYR.pdf (last visited Nov. 28, 2012) (noting that 188 securities-fraud cases had been filed in 2011, slightly less than the average of 194 cases filed from 1997 to 2010 and noting that ninety-four of these cases were class actions).

33. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (holding that an arbitration clause requiring individual arbitration was enforceable even though a class action was the only cost-effective way to enforce federal law); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013) (holding that an

issue for which the Court has shown as much sustained appetite over the past four or five years as delimiting the scope of class actions.³⁴

The merits of Congress's and the Court's handiwork can be debated. Whatever the outcome of that debate, however, the present state of affairs in American class action law is likely to continue for some time because the unambitious and unflattering vision of class actions that Congress set out in CAFA has become the regnant view among legislative and judicial policymakers. Although this vision can be criticized, present critiques fail to develop a role for American class actions that is more compelling than CAFA's largely negative portrayal. Until policymakers adopt a vision for class actions different from CAFA's world of federalized, constrained class actions, we are likely to continue along our present path. The

arbitrator did not exceed his powers in construing the parties' arbitration agreement to permit class arbitration); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (holding that the plaintiffs failed to satisfy Rule 23(b)(3)'s predominance requirement when they did not show that damages were susceptible to class-wide measurement); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013) (holding that proof of materiality of alleged misrepresentations is not a prerequisite to class certification in a securities-fraud action based on a fraud-on-the-market theory); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013) (holding that a plaintiff could not stipulate to less than the \$5 million threshold amount and bind absent class members by that stipulation).

34. In addition to *Stolt-Nielsen*, *Shady Grove*, *Concepcion*, and *Wal-Mart*, see *supra* notes 11–20 and accompanying text, the Court has also decided two other cases that resolved issues of concern to class action practice during the past two years. See *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011) (holding that, due to the Anti-Injunction Act, a federal court cannot enjoin a state court from certifying a class under the state's class action rule after the federal court declined to certify a Rule 23 class involving the same conduct); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011) (holding that securities-fraud plaintiffs do not need to prove loss causation to obtain class certification under Rule 23). Although the case is outside of the relevant period, the list could also include *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), which held that 28 U.S.C. § 1367(b) overturned the restrictive rule of subject matter jurisdiction forged in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). Except in rare cases, however, the even more capacious jurisdictional rules of CAFA, which was enacted while *Allapattah* was pending in the Supreme Court, makes the jurisdictional expansion of § 1367(b) a moot point. See JAY TIDMARSH & ROGER H. TRANGSRUD, *MODERN COMPLEX LITIGATION* 331 (2d ed. 2010) (discussing the limited circumstances in which § 1367(b) may provide federal subject matter jurisdiction when CAFA does not).

remainder of this Article develops this argument and suggests an alternative vision that might set a new course for class actions.

II. CAFA'S INFLUENCE ON CLASS ACTION DOCTRINE

By its terms, CAFA had two main effects.³⁵ First, it expanded federal jurisdiction over diversity class actions; its minimal-diversity and aggregate amount-in-controversy approach to original jurisdiction built a wider door for plaintiffs who want to enter federal court.³⁶ It also changed several long-standing rules on removal jurisdiction to make removal easier for defendants in state-court class actions in which plaintiffs prefer to be in state court.³⁷ The second statutory change was to regulate federal class action settlements, especially in-kind or coupon class actions in which class members were typically compensated by discounts on future products purchased from the defendant.³⁸

35. CAFA also had a third aim: it required the Judicial Conference of the United States to study class action settlements and attorneys' fees, with an eye toward creating recommendations to ensure fair limits on the fees of class counsel. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 6, 119 Stat. 4, 13 (2006).

36. See 28 U.S.C. § 1332(d)(2) (2006) (granting district courts original jurisdiction of any civil action brought as a class action in which any class member is diverse from any defendant and the amount of controversy exceeds \$5 million).

37. Under the usual jurisdictional rules, removal must occur within thirty days after the case first becomes removable, and all defendants must join in the removal notice. In addition, diversity-based cases cannot ordinarily be removed more than one year after they are filed, nor can they be removed if the suit was brought in the defendant's home state. Finally, the decision of a federal court to remand a removed case is not ordinarily appealable, and the decision to deny remand is appealable only after the case is over. 28 U.S.C.A. §§ 1292, 1441(a), 1441(b)(2), 1446(b)(2)(A), 1446(c)(1), 1447(d) (Supp. 2012). CAFA does not change the thirty-day rule for seeking removal, but it changes the remaining removal requirements to make removal of class actions easier: only one defendant needs to request removal, there is no one-year limit on removal, defendants can remove a case from a state court that is the home to one or more defendants, and the court of appeals may accept an immediate appeal of a decision to remand (or to deny remand). 28 U.S.C. § 1453(b)–(c) (2006).

38. CAFA pegged attorneys' fees to the actual value of the coupons used by class members, not the potential value of the coupons on the assumption that every class member would use them. See 28 U.S.C. § 1712(a). In addition, CAFA required both notice to the relevant state or federal officials of the pendency of the

But CAFA's influence on class actions was much broader than these doctrinal changes. In enacting CAFA, Congress fashioned a comprehensive narrative about the nature of American class actions:³⁹ Class actions were being abused, particularly in certain state courts. Some state judges were running amok, with plaintiffs' lawyers jerry-rigging the selection of class representatives and defendants to eliminate diversity of citizenship (and hence, to thwart removal). A single county judge might be asked to resolve a ragtag collection of disparate claims from citizens of many states. As class counsel knew, some of these judges enjoyed reputations for using looser class action rules—or at least looser interpretations of rules akin to Rule 23—to certify class actions that would never have been certified in federal court. In the process, the state judges applied local law to the claims of non-local class members, which frustrated the policies and laws of other states. Once certified, these class actions created the potential for catastrophic liability—a threat that forced defendants to settle meritless claims at extortionate prices. But plaintiffs rarely benefitted from these settlements. Class counsel often agreed to coupon settlements or other arrangements—with inflated potential value but little practical value to many class members—in return for large fees that were calculated by using the

settlement and an opportunity for that official to provide input on the settlement before its final approval. 28 U.S.C. § 1715 (2006).

39. I draw the following narrative from the opening pages of the Senate Report on CAFA. *See* S. REP. NO. 109-14, at 4–5, 20 (2005). In the context of CAFA, reliance on legislative history is fraught with more than the usual interpretive dangers. CAFA proceeded on such a fast track through Congress that there was no House Report and the Senate Report was not finalized until February 28, 2005—ten days after President Bush had signed CAFA into law. *See* 1 WILLIAM H. MANZ, *THE CLASS ACTION FAIRNESS ACT OF 2005: A LEGISLATIVE HISTORY* vii (2006) (providing a legislative chronology); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) (“[T]he Senate Report was issued ten days after the enactment of the CAFA statute”). On the other hand, a draft version of the Senate Report was available before the Senate voted on CAFA. *See* *Estate of Pew v. Cardarelli*, 527 F.3d 25, 32–33 (2d Cir. 2008) (noting “some skepticism as to the ‘probative value’ of the Senate Report because it was issued after CAFA’s enactment (by ten days)” but still relying on the Senate Report, in part because “the Report ‘was submitted to the Senate on February 3, 200[5]—while that body was [still] considering the bill.’” (citing *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1206 n.50 (11th Cir. 2007))). In any event, I am not proposing to use the legislative history to interpret any provisions of CAFA, but only to describe the narrative that impelled the legislation forward.

inflated value. Competition among state-court class actions led to inefficiencies and collusive behavior. Simply put, victims and corporate defendants were losers in the class action world; the only winners were class counsel.

This description of class action practice in state courts provides, at best, a caricature of reality that is driven mostly by anecdote and largely unsupported by data.⁴⁰ But it is important to note that this negative story about class actions went only so far. Although class actions may have been subject to abuse by unscrupulous counsel or overreaching state judges, in small-stakes cases they were also “a valuable tool in our jurisprudential system” that were “beneficial when the class members are kept a priority throughout the process.”⁴¹ Abuse of class actions needed to be controlled; left to run in their proper channels, however, class actions did not merit the death penalty.

Given such a vision, CAFA's reforms made great sense. But its doctrinal changes alone were insufficient. In addition, once a class action was in federal court, Rule 23 would need to apply to the case; otherwise, an unduly broad state class action rule would wreak the same havoc (only in a federal forum). Rule 23 would need to have its wings clipped. It could not be used in large-scale cases, and even in small-stakes cases, it could not be construed in adventurous ways that would replicate the problems found in state court. Avenues other than state courts into which class actions might escape—in particular, into arbitration, which the Supreme Court had held just two years before CAFA's passage was a permissible forum for resolving disputes on a class-wide basis⁴²—needed to be cut off, lest they become a new breeding ground for abusive practices. Simply put, class actions belonged in federal court subject to tight federal control.

40. See THOMAS E. WILLGING & SHANNON R. WHEATMAN, FED. JUDICIAL CTR., ATTORNEY REPORTS ON THE IMPACT OF *AMCHEM* AND *ORTIZ* ON CHOICE OF FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION 34, 38 (2004), available at www.fjc.gov/public/pdf.nsf/lookup/amort02.pdf/ (compiling data on state and federal class actions that were resolved before CAFA's passage; finding that “[i]n both state and federal courts, cases were almost equally likely to be certified as class actions” and that per-claimant recoveries in state court were lower).

41. S. REP. NO. 109-14, at 4 (2005), reprinted in 2005 U.S.C.A.N. 3, 5; see also *supra* note 6 (discussing the meaning of small-stakes class actions).

42. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

The recent developments in class action practice that I have described—*Shady Grove*, *Wal-Mart*, *Stolt-Nielsen*, and *Concepcion*—are all essential components for implementing CAFA's vision of a well-functioning class action system. To be clear, I am not suggesting a cause-and-effect relationship between CAFA's passage and these other developments. Some developments, like the reluctance to use class actions in large-stakes cases, occurred before CAFA and helped to shape the Senate Report's narrative.⁴³ Moreover, the doctrinal questions in each of the post-CAFA cases that the Court decided were distinct and the intellectual antecedents for each question were laid down far before CAFA. The "procedural *Erie*" issue in *Shady Grove* is nearly as old as *Erie* itself.⁴⁴ Several of the issues resolved in *Wal-Mart* had been kicked around since Supreme Court decisions in the 1970s and 1980s,⁴⁵ and *Concepcion* was the next chapter in the long-running debate about the extent to which state law can undermine the broad import of the Federal Arbitration Act.⁴⁶ Finally, there is little evidence of cross-pollination among the cases. For instance, *Wal-Mart* (the last of the Court's decisions) did not rely either on CAFA's legislative history or on its earlier decisions in *Shady Grove*, *Stolt-Nielsen*, and *Concepcion*. Similarly, in *Shady Grove*,

43. See *supra* note 6 (describing "large stakes" class actions).

44. Compare *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (applying Rule 35 even though an Indiana state court would arguably not have permitted a physical examination in comparable circumstances), with *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99 (1945) (applying New York's statute of limitations rather than a federal defense of laches to a state-law claim because federal courts should not apply federal rules that might determine the outcome of a litigation).

45. Among the prior decisions that influenced the Court's decision in *Wal-Mart* were *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (stating that a court should not engage in a preliminary determination of the merits when deciding whether to certify a class), *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 155–60 (1982) (describing the proper approach to Rule 23(a) commonality), and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812–13 (1986) (holding that providing class members with notice and an opt-out right satisfies due process requirements). See *Wal-Mart*, 131 S. Ct. at 2550–57, 2552 n.6, 2559 (citing and discussing these cases).

46. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (stating that, in passing the Federal Arbitration Act, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.").

the plurality refused to take account of the costs of applying Rule 23 despite state legislation specifically banning the class action at issue in order to avoid these costs.⁴⁷ But in *Stolt-Nielsen*, decided just four weeks later, the Court relied heavily on the costs of class actions as a reason to require the consent of all parties as a prerequisite to class arbitration.⁴⁸

My claim is more modest—but also broader. In life and in law, and especially in a system of common law reasoning, we look for storylines that simultaneously explain observed events and establish a path for future actions.⁴⁹ Although the reality of the events is often more ragged than the theory that seeks to locate them in a larger narrative, a good descriptive theory often becomes normative: it selects certain propositions as the baseline for future

47. See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion) (stating that Rule 23 may have “some practical effect on the parties’ rights,” but it did not “alter[] the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either”). In his concurrence, Justice Stevens acknowledged these costs more forthrightly, but did not believe that they required application of the state law barring class actions under the facts of the case. *Id.* at 1459–60 (Stevens, J., concurring). In her dissent, Justice Ginsburg raised the potential for a class action to skew the outcome as a principal argument that Rule 23 was not intended to apply to the case. *Id.* at 1460 (Ginsburg, J., dissenting) (stating that the application of Rule 23 “transform[s] a \$500 case into a \$5,000,000 award, although the State creating the right to recover has proscribed this alchemy”).

48. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1776 (2011) (describing the “fundamental changes” created by class arbitration, such as adjudicating the rights of absent parties and increasing the size of the recovery). In her dissent, Justice Ginsburg noted the irony that a plurality of the Court had just argued in *Shady Grove* that class actions “neither change plaintiffs’ separate entitlements to relief nor abridge defendants’ rights; they alter only how the claims are processed.” *Id.* at 1781–82 (Ginsburg, J., dissenting) (quoting *Shady Grove*, 130 S. Ct. at 1443 (plurality opinion)).

49. See, e.g., NATE SILVER, *THE SIGNAL AND THE NOISE* 12 (2012) (“We are wired to detect patterns and to respond to opportunities and threats without much hesitation.”); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 158–62 (1985) (analogizing common law reasoning to a chain novel in which a later judge is constrained in decision-making by the “chapters” of the story that prior judges have written); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572–73 (1987) (“An argument from precedent seems at first to look backward. . . . But in an equally if not more important way, an argument from precedent looks forward as well, asking us to view today’s decision as a precedent for tomorrow’s decisionmakers.”).

legal decisions. Thus, even if the Supreme Court did not consciously press its doctrine into CAFA's mold, CAFA's essentially negative portrait of class actions provides a narrative that makes sense of recent developments in class action practice. This narrative may begin to exercise an influence as the Court continues to work out the proper role of class actions in the American litigation landscape. In other words, CAFA's major influence may not be its doctrinal effects on jurisdiction and settlement. On a range of issues beyond federal jurisdiction and settlement, we are living in CAFA's world: a world of wary and grudging acceptance of class actions in which truly deserving class members can be rescued from the avarice of counsel only through the vigorous exercise of federal oversight.

III. CHALLENGING CAFA'S PARADIGM: SOME FIRST EFFORTS

It is, of course, fair to contest CAFA's regnant narrative, either by arguing that class actions should be restricted even more than they are under CAFA's vision or by arguing that class actions should be more widely available in state or federal court. In this section, I examine three such criticisms. For reasons discussed below, I am skeptical that any of the criticisms will have much effect on changing CAFA's narrative or shaping class action policy in the near term.

The first criticism is that, even as reined in by CAFA and the other doctrinal developments, state and federal courts permit too many class actions: class actions should never—or almost never—be certified. A leading proponent of this theory is Professor Martin Redish.⁵⁰ Under his view, class actions are inconsistent with liberal democratic theory and are in most circumstances unconstitutional; because class actions infringe on rights of autonomy and freedom of association, the government can force class members into class actions only by showing a compelling interest.⁵¹ In a few cases, such

50. For a capstone treatment of Professor Redish's many years of scholarship on class actions, see MARTIN H. REDISH, *WHOLESALE JUSTICE* (2009).

51. *Id.* at 229–31.

a compelling interest may exist; otherwise, no class actions should be allowed.⁵²

An absolutist view against class actions is a coherent intellectual position. Most legal systems around the globe have never employed class actions or similar devices.⁵³ The tide has begun to turn in recent years, but a country with a strong regulatory culture that prefers not to use private litigation to achieve public regulatory goals might well look askance at American-style class actions,⁵⁴ as would a system absolutely committed to individual autonomy (although I know of no such system in the world today).

In the United States, which relies on private litigation to augment its public regulatory responses,⁵⁵ the former objection to class actions is not available. Nor is the latter: granting that American procedure takes individual autonomy as far as any modern legal system,⁵⁶ it makes exceptions that deny some litigants their “day in court.”⁵⁷ Even Professor Redish—whose argument is as

52. *Id.* at 230–31. In boiling down a sophisticated analysis to a couple of sentences, I have failed to capture the nuance of Professor Redish’s argument. See Jay Tidmarsh, *Superiority as Unity*, 107 NW. U. L. REV. 565 (2013) (providing a more detailed analysis of Professor Redish’s positions).

53. See, e.g., Deborah R. Hensler, *Goldilocks and the Class Action*, 126 HARV. L. REV. FORUM 56 (2012), available at http://www.harvardlawreview.org/issues/126/december12/forum_984.php (noting that only “twenty-odd countries outside the United States” have adopted class actions and that, among this number, most have imposed significant limits on the mechanism).

54. See *id.* (discussing “vigorous debate in the European Union, where advocates for private enforcement of antitrust and consumer protection law have struggled against those who champion traditional European reliance on public enforcement and deride proposals for ‘American-style class actions.’”).

55. See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 489–91 (2012) (discussing both proponents and critics of this approach); Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603 (2008) (examining the interplay between class actions and the administrative state).

56. See Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1672–76 (1998) (describing the American procedural approach as “aberrant” and discussing differences between the legal systems of the United States and other countries).

57. See *Taylor v. Sturgell*, 553 U.S. 880, 892–95 (2008) (describing class actions as one of six categories of exceptions to the “‘deep-rooted historic tradition that everyone should have his own day in court’”) (quoting *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996)).

absolutist as any—admits that some class actions can be maintained.⁵⁸ Therefore, although the “no class action” narrative is coherent, it requires substantial change in the law—not the least of which is the abolition of Rule 23 and comparable state counterparts.

Aside from its political infeasibility, the narrative suffers from two other defects that probably doom it as a story worth telling. First, as an absolutist position in a country that has never staked out such an absolutist view, it fails a basic test of pragmatism. The view that every lawsuit deserves individual attention—with lawyers, a judge, and a jury dedicated to its resolution—may represent our ideal of justice, but sensible people know that it is unachievable and unrealistic in a large swath of cases, especially small-stakes disputes. At some level, legal process is about cost and the efficient processing of legal claims.⁵⁹ Although Congress was critical of expansive uses of class actions, it recognized their benefits within boundaries.⁶⁰ To take an absolutist position against class actions is either to reject the notion that these benefits should matter—that a principle such as autonomy is so inviolable that it must be vindicated, whatever the cost—or to value this principle so highly that the countervailing benefits of class actions never measure up. In a litigation-oriented—as opposed to regulation-oriented—country such as the United States, neither argument is compelling.

The second, and related, problem with this absolutist criticism is that the values that class actions supposedly threaten—such as autonomy or the structure of the regulatory state—are abstractions. They are arguments about the importance of process; they are not result-oriented. A narrative that utterly ignores outcomes is unlikely to resonate with policymakers.⁶¹ All of us want

58. See REDISH, *supra* note 50, at 159–73, 231 (arguing that class actions may be maintained when a defendant is facing the prospect of inconsistent obligations arising from individual lawsuits and in negative-value cases, as long as class members receive an opt-out right and certain other conditions are met).

59. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1168 (2001) (“Most analysts . . . recognize a need to trade off the right to bring suit and legal costs.”).

60. S. REP. NO. 109-14, at 5–6 (2005).

61. On the floor of the Senate during the CAFA debate, Senator Boxer told a series of stories about people who benefitted from class actions. She concluded by saying: “[M]ake sure there is fairness for victims. . . . Do not close the courthouse door to firefighters, moms and dads, who are working for justice in their lives.”

to know not only that the process is fair, but also that the process leads to a fair result.⁶² In short, a narrative arguing that class actions threaten our democratic way of life is unlikely to emerge as the dominant storyline that replaces CAFA's narrative and shapes the future of class actions.

A different group of critics approaches the problem from the other side—they argue that Congress and the Court have given too narrow a berth to state and federal class actions. The most tightly focused of these criticisms is structural in nature: federalism.⁶³ Under this argument, state legislatures and courts should have a broad say in shaping class action rules when state law provides the substantive rule of decision.⁶⁴ This position maintains that CAFA is a step in the wrong direction; *Shady Grove* is incorrect; and *Concepcion* strikes a faulty balance between federal interests in enforcing arbitration and state interests in prohibiting unconscionable contracts.

As an adequate story about the present and future shape of American class action law, however, the federalism critique is lacking. It focuses on process concerns instead of fair outcomes. The federalism story is also incomplete; it has little to say about *Stolt-Nielsen* (i.e., whether and under what circumstances arbitration

151 CONG. REC. 1552–53 (2005) (statement of Sen. Barbara Boxer); see also Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1539–40 (1998) (“[W]e fear that absent plaintiffs’ due process rights will be used to their detriment . . . denying them access to the benefits that make group litigation worthwhile.”).

62. See generally AMARTYA SEN, *THE IDEA OF JUSTICE* 20–23, 208–17 (2009) (arguing that justice requires consideration of both the process by which an outcome is reached and the outcome itself).

63. For two generally positive analyses of CAFA and the recent Court decisions that involve, to some extent, consideration of federalism, see Richard A. Nagareda, *The Litigation-Arbitration Divide Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1122–23, 1128–29 (2011) (finding connections among the Court’s *Erie* jurisprudence, its arbitration decisions, and CAFA); John C. Massaro, *The Emerging Federal Class Action Brand*, 59 CLEV. ST. L. REV. 645, 666 (2011) (arguing that these cases, as well as other developments in class action law, represent a nationalization trend that “is a girder in an overall structure designed to protect individual participatory rights”); see also Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006) (providing an analysis that evaluates CAFA and establishes a federalism framework through which the Court’s more recent cases can be evaluated).

64. Massaro, *supra* note 63, at 657–59.

should be hospitable to class-wide claims). More significantly, the federalism critique says nothing about the breadth of Rule 23 for cases that are properly in federal court. Indeed, some of those who level the federalism critique do so to point out the irony that the politicians and Justices who have presided over the nationalization of class action practice were members of or were appointed by a political party that nominally supports states' rights—not because the critics themselves believe strongly in federalism or a constrained use of Rule 23.⁶⁵ A federalism story may help to determine who should be making decisions about the breadth of American class actions, but it says almost nothing about what that breadth of class actions should be.

A second way to critique and make sense of the emerging law of class actions is to see the disparate threads as attempts to regulate access to justice. By “justice” I do not mean a fair determination of contested legal rights by a court. Rather, I use justice to refer to any process that commences with aggrieved persons laying their complaints of legal wrongdoing before a neutral party. In terms of access to justice, individual judicial determinations of legal right are the gold standard—the form of access to justice that, in a world without costs, society would ideally make available to all. But cases individually litigated to judgment are costly,⁶⁶ and society cannot afford to provide this level of dispute resolution for each individual claim.⁶⁷ Every society regulates

65. See Linda Mullenix, *Federal Class Actions: A Near-Death Experience in a Shady Grove*, 79 GEO. WASH. L. REV. 448, 451–52 (2011) (recounting some of the odd political bedfellows in the *Shady Grove* litigation); Mark P. Gaber, *Maintaining Uniform Federal Rules: Why the Shady Grove Plurality Was Right*, 44 AKRON L. REV. 979, 995–97 (2011) (noting the ironic relationship between CAFA and *Shady Grove* while defending the result in *Shady Grove*).

66. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.1 (7th ed. 2007) (discussing the costs of litigation); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 58–59 (1982) (discussing the likelihood of an individual plaintiff bringing suit under different systems of allocating costs).

67. The commitment of legal resources required to provide individual adjudication of claims would be substantial. Only about 10% of people with viable tort claims seek a lawyer's assistance. See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 135–36 (2002) (estimating that only 11.2% of perceived litigable claims resulted in filing a lawsuit); Michael J. Saks, *Do We Really Know Anything About the Behavior of the*

access to courts—most significantly by requiring parties to bear a significant portion of the expense of dispute resolution,⁶⁸ but also by imposing gatekeeping rules that limit the claims that can be pursued to judgment.⁶⁹

Arguably, one of the revolutions in American legal thought during the twentieth century was the belief in open access to courts for all litigants.⁷⁰ The same period saw a concentration of power in governmental and private institutions with the ability to cause broad harm, an expansion of substantive law more likely to hold such defendants accountable, and a cultural willingness to challenge them.⁷¹ This constellation of events led to the perception, if not always the reality, that courts could hear all claims. By the end of

Tort Litigation System—And Why Not?, 140 U. PA. L. REV. 1149, 1183–89 (1992) (reporting on studies showing that the rates for seeking legal assistance and filing tort and other claims is ten percent or less). Even among cases that enter court, many end up settling without an adjudication of rights—although estimating the percentage of cases that settle is a difficult business. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 281 (2004) (citing studies showing that over 96 percent of civil cases were settled without trial); Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 132 (2009) (finding an aggregate settlement rate of 66.9 percent of civil cases in two federal district courts); Kevin M. Clermont & Theodore Eisenberg, *supra*, at 136 (estimating a settlement rate to be at least 66.7 percent in federal civil cases terminated in 2000).

68. One of the principal expenses is attorneys' fees, which one or the other of the private litigants typically bears regardless of whether a jurisdiction employs the American rule or the "loser pays" rule.

69. Among the doctrines employed in American federal courts are standing, mootness, ripeness, and some of the Rule 12(b) defenses. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§ 2.1–.6 (5th ed. 2007) (discussing justiciability limits on federal jurisdiction); RICHARD D. FREER, CIVIL PROCEDURE §§ 6.2, 7.1–.3, 12.6.1 (2d ed. 2009) (discussing certain Rule 12(b) motions). Courts can also limit access to courts by narrowly construing the substantive law. See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 54 ("[N]o judge is likely to decree more than he thinks he has the power to accomplish.").

70. See Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 88 (2011) ("[T]he development of egalitarian norms during the twentieth century transformed the obligations of courts in democracies.").

71. See generally Geoffrey C. Hazard, Jr., *Authority in the Dock*, 69 B.U. L. REV. 469 (1989) (discussing the increased cultural acceptance of using litigation to challenge traditional modes of authority).

the century, however, the difficulties and costs of realizing that ideal became evident. Not surprisingly, therefore, a central question for the American legal system in the twenty-first century will be the extent to which we allow wide-scale access to courts, as opposed to allocating claims to other dispute-resolution processes or to none.⁷²

At a fairly high level of generality, CAFA and the Supreme Court's cases can be bundled under an "access to justice" rubric. Of course, CAFA and *Shady Grove* fit into an "access to justice" story only weakly. CAFA is less about access to justice per se than about creating access to federal courts for cases that already enjoyed access to state courts. Likewise, *Shady Grove*'s outcome provided alleged victims in small-stakes litigation access to courts when they would have been unlikely to enforce their rights in individual litigation. But as *Wal-Mart* showed, *Shady Grove*'s holding—that Rule 23 applies in federal court regardless of the content of the state class action rule—could equally work to restrict access to courts when Rule 23 is narrowly constrained.⁷³

Of course, described at a high level of generality, many of the Court's cases, such as its recent forays into pleading⁷⁴ and summary judgment,⁷⁵ involve questions of access to justice. The problem with an "access to justice" narrative is that it is less of a conclusion than it is a question. Congress and the Court have set about defining the boundaries of access to the courts and to the class action device. Is the access too little? Too much? To stitch CAFA and the Court's cases into a narrative, there must be a sense of how much access to the judicial system is proper. Once that baseline narrative of a properly functioning dispute-resolution system is told, then it is possible to evaluate CAFA and the Court's class action decisions.

72. See Resnik, *supra* note 70, at 170 ("AT&T, Wal-Mart, and Turner comprise the agenda for the twenty-first century, during which decisions will be made about what courts are for, who pays the price for process, and what remains of relevance in the phrase 'equal justice under law.'").

73. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011) (applying Rule 23 to deny employees' Title VII claim).

74. See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009) (requiring that a plaintiff plead a plausible claim in the complaint); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–58 (2007) (outlining the requirements of a plausible claim sufficient to survive a Rule 12(b)(6) motion to dismiss).

75. See *Scott v. Harris*, 550 U.S. 372, 386 (2007) (holding that summary judgment was proper in a civil rights case).

Put differently, critics may attack CAFA or the Court by arguing that more access to justice is necessary, but that critique does not answer how much access is appropriate. Are class actions, which few would argue are the ideal form for accessing justice,⁷⁶ a part of the solution to “access to justice” concerns or part of the problem? Is a second-class form of access to which significant costs attach better than none? CAFA’s narrative provides an answer of sorts to these concerns; it sets out a baseline of individual justice—whether in court or in alternative dispute resolution—that is reluctantly compromised in multistate small-stakes cases as long as justice demands cohesive class-wide treatment and a federal judge is available to protect victims from the rapacity of their own counsel.⁷⁷ Simply attacking CAFA and the Court’s class action jurisprudence for failing to provide access to justice is too negative. Instead, a contrast to the CAFA narrative that extols a positive vision of the role of class actions in the delivery of justice is needed.

Such storylines exist. For instance, there is the old, pre-CAFA story that class actions are necessary to ensure full enforcement of the law and to achieve full deterrence of wrongdoing.⁷⁸ In his recent critique of the present state of class action law, Robert Klonoff has attempted to revive this story, suitably burnished to counteract CAFA’s generally negative portrayal of class actions.⁷⁹

76. *But see* David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 567 (1987) (“[B]ureaucratic justice implemented through class actions provides better opportunities for achieving individual justice than does the tort system’s private law, disaggregative processes.”).

77. *See* Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L. J. 545, 549 (2012) (discussing tradition as an argument “driving a preference for individual litigation”).

78. *See* Rosenberg, *supra* note 76, at 562–67; David Rosenberg, *Mandatory-Litigation Class Actions: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 832 (2002) (“Ex ante, everyone . . . understands that for mass tort liability to achieve optimal deterrence and insurance, individuals must act collectively . . .”).

79. *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038985 (arguing that courts have cut back sharply on the ability to bring class actions during recent years, undermining the compensation, deterrence, and efficiency functions of the class action device).

This story has resonance. The class action device, when used responsibly by capable counsel under the watchful eye of the court, provides a powerful remedy for achieving mass justice. For small-claim cases, it provides the only vehicle for recovery, absent a public enforcement action. The threat of a class action also provides deterrence against wrongdoing. For wrongdoing that inflicts harm sufficient to warrant individual lawsuits, a class action avoids the need to resolve the common issues over and over. In adjudicating class action issues, courts should return to basic principles and not lose sight of the fact that the class action can be a useful and efficient device. And they should not allow an abstract concern about blackmail settlements or the possibility of abuse by class counsel to raise the overall bar for certification.

This story goes a long way toward changing the course of class action law. It establishes a vision of class actions as a useful, and in some cases the only, way to resolve disputes. This narrative also assures the reader that rapacious counsel will be kept under control. In the end, however, it comes up short as a competing narrative that might displace CAFA's story for five related reasons. First, it fails to address adequately the deep-seated objection to all class actions: that individual control of legal claims is preferable. Granting that class actions can be useful, at what point must their utility give way to the demands of individual control? This vision fails to answer that question. Second, the vision remains vague on exactly how class counsel's purported greed is to be kept in check. Third, it fails to speak about the outcome that class members can expect from the class action; it speaks of enforcement and deterrence, and to some extent of recovery—but never states that the recovery is a fair one. Fourth, it fails to specify the respective roles that state and federal courts—as well as state class action rules and Rule 23—should play in the development of class action practice.

Finally, Dean Klonoff's narrative is in one regard too positive. Class actions have costs; it is feckless to pretend that they do not (nor do I suggest that Dean Klonoff is unaware of these costs).⁸⁰ These costs raise a fundamental question: even if class

80. Indeed, Dean Klonoff is a coauthor of a significant casebook on the subject of class actions, as well as an associate reporter on the American Law Institute's recently completed study of aggregate litigation. ROBERT H. KLONOFF

actions provide enforcement and deterrence, is the class action game worth the candle? One of the brilliant aspects in the construction of CAFA's narrative is its apparent pragmatism—its willingness to give credit where credit is due, and to stake out the places where the benefits of class actions sufficiently outweigh their costs to make them worthwhile. As Dean Klonoff's vision suggests, CAFA may give too little credit to the capacity of class actions to achieve beneficial results for class members.⁸¹ But his vision does not demarcate those areas in which class actions should be used from those areas in which they should not.

Unless it solves these problems, the old "class action as a useful enforcement tool" narrative is unlikely to unseat, or even compete seriously, with CAFA's vision for the role of class actions in American law. We will continue to live in CAFA's world.

IV. A WAY FORWARD: TREATING SUPERIORITY SERIOUSLY

Consider, instead, the following vision for class actions: A class action should be available if, and only if, it yields greater net social utility than any other litigation or arbitration form. If multiple class actions meet this criterion of superiority, the class action that yields the greatest net social utility—the optimal class action—should be used, and other class actions should not be permitted to proceed. Every class member is guaranteed representation that will at every moment yield a net expected value that equals or exceeds the recovery that the class member would have received in individual litigation. Any recovery that the class members receive will be spread equitably within the class. The fees for class counsel are structured to align counsel's incentives with maximizing the class's recovery.

Such a vision presents a clear way forward for class actions. The point is not simply that the class action is a useful tool for enforcing rights; rather, the class action is used only when it is the

ET AL., CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION (2d ed. 2006); AM. L. INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION iv (2010).

81. See Klonoff, *supra* note **Error! Bookmark not defined.**, at 17 (discussing the adoption of CAFA as "not without foundation," but adding that it was passed on the basis of "exaggerated concerns").

best tool—after taking into consideration all the costs and benefits of the class action and its alternatives. Most of us, I expect, would enjoy living in a legal world that employed class actions in this fashion. At a minimum, if it were possible to construct class action doctrine along these lines, this approach would give the CAFA approach to class action doctrine a serious run for its money.

Indeed, this “superiority narrative” has clear advantages over other narratives that have tried to compete with CAFA in recent years. First, the narrative focuses on outcome more than on process. Under this vision for class actions, society as a whole ends up better off from their use. As for the individual class members, they can expect to end up no worse off, and at least some will end up better off, when compared to a world in which they controlled their own claims. Put differently, the class representatives and class counsel will conduct the representation to “do no harm” to their individual interests. Second, CAFA’s parade of horrors is avoided. Should the class action yield a recovery, class members will share in the recovery equitably. Meanwhile, CAFA’s bogeyman—the greedy class counsel who takes all the spoils and leaves nothing for the class members—is banished. Third, this narrative provides an answer to the “how much access to justice” question. Courts are a social resource, and a government is within its rights to insist that litigants access the judicial system through the most efficient forms.⁸² Therefore, we employ class actions when they are more socially beneficial than other forms for resolving a dispute, provided that the class action does no harm to each individual class member’s interests. When they fail to provide such benefits, individuals are still able to pursue other available forms of redress.

82. I recognize this statement may be controversial. Some scholars argue that access to justice is an individual right. See, e.g., Alan Boyle, *Human Rights and the Environment: Where Next?*, 23 EUR. J. INT’L L. 613, 621–23 (2012) (noting the “long-established human right of access to justice,” as evidenced by the Aarhus Convention, decisions of the European Court of Human Rights, and academic writing); Francesco Francioni, *The Rights of Access to Justice Under Customary International Law* 1, in ACCESS TO JUSTICE AS A HUMAN RIGHT (Francesco Francioni ed., 2007) (arguing that access to justice is a part of customary international law). My argument is not necessarily to the contrary; rather, my point is that a government can provide different forms of access to its courts. Further, it can limit or deny access to some forms when other forms are more efficient.

Of course, the devil is in the details of this vision. Over the past few years, I have assayed pieces of this vision, suggesting how superiority, optimality, and “do no harm” adequate representation should play into a class action rule, and how they might be roughly achieved through the use of certain presumptions.⁸³ Rather than repeating or engaging in a lengthy development of these points here, I briefly examine a few of the points of convergence and divergence between this vision for the role of class actions in American life and CAFA’s vision.

First, both CAFA’s narrative and the superiority narrative recognize necessary limits on the scope of class actions. The principal difference between them is where the class action boundary lies. The basic and most important boundary under the superiority narrative is simple: use class actions when they are more socially useful than alternatives; do not use them when they are not.⁸⁴ The view of class actions that emerges from CAFA and the Supreme Court’s cases—not to use class actions in large-stakes litigation and to interpret narrowly the various provisions of Rule 23 (a)(2) and (b)(2) in *Wal-Mart*,⁸⁵ (a)(4) and (b)(3) in *Amchem*,⁸⁶ and (b)(1)(B) in *Ortiz*⁸⁷—is more confused. Although the sum total of the decisions shows the Court’s lack of interest in construing Rule 23 broadly,⁸⁸

83. See Tidmarsh, *supra* note 52 (discussing superiority); David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and “Indivisible” Remedies*, 79 GEO. WASH. L. REV. 542 (2011) (discussing optimality in small-stakes class actions); Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137 (2009) (discussing “do no harm” adequacy of representation); see also Linda Sandstrom Simard & Jay Tidmarsh, *Foreign Citizens in Transnational Class Actions*, 97 CORNELL L. REV. 87, 123–28 (2011) (discussing the more general question of using presumptions to help implement superiority insights in the context of transnational litigation). For an attempt to assemble these components into an overarching class action rule that also adds in providing proper incentives to class counsel, see JAY TIDMARSH, CLASS ACTIONS: FIVE PRINCIPLES TO PROMOTE FAIRNESS AND EFFICIENCY (forthcoming LexisNexis 2014) (on file with author).

84. See Tidmarsh, *supra* note 52, at 567 (discussing “the idea that class actions should be used only when they advance social welfare”).

85. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550–53 (2011).

86. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622–28 (1997).

87. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831–37 (1999).

88. Indeed, the Court has repeatedly stated that it does not want to construe Rule 23 in adventuresome ways in light of the command of the Rules Enabling Act, 28 U.S.C. § 2072 (2006). *Wal-Mart*, 131 S. Ct. at 2561; *Ortiz*, 527 U.S. at

they have no overarching theme that suggests either the reason or the limiting principle behind the Court's concerns. In my judgment, *Amchem*, *Ortiz*, and *Wal-Mart* were rightly decided; there was too much disunity among class members' claims to view the class action as presumptively superior.⁸⁹ But my approach does not rule out the possibility of large-stakes class actions as categorically as CAFA's vision and the Court's decisions do.

Second, a vision that begins with the use of class actions when they are superior and optimally sized argues for broad federal jurisdiction. The reason is the fear of a race to the bottom: lawyers who find themselves shut out of the optimally-sized class action have an incentive to undercut this class action by creating a new class in a different court and proposing to settle the case on better terms (for the defendant and the lawyer, not the class members) than the defendant could obtain in the optimal class action. Such "reverse auctions" are a recognized concern in the class action literature.⁹⁰ One way to prevent the race to the bottom, and thus to ensure that class counsel have an incentive to form optimal class actions, is to make it easier for all potential competing class actions to be concentrated in a single forum.⁹¹ In this regard, state courts have significant disadvantages, principally because they lack powerful inter-jurisdictional transfer mechanisms akin to the federal courts' multidistrict-litigation authority.⁹² Indeed, in terms of ensuring

845; *Amchem*, 521 U.S. at 612. These holdings are in modest tension with *Shady Grove*, in which the Court held that the Enabling Act did not preclude the application of Rule 23 to a case in which the state-court rules specifically prohibited class actions in circumstances in which Rule 23 permitted them. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1472 (2010).

89. See Tidmarsh, *supra* note 52, at 587–88 (discussing the relationship between the disunity of claims and a finding of superiority).

90. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370–73 (1995) (discussing the idea of reverse auctions). For one situation in which a reverse auction may have occurred, see *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997), *opinion withdrawn and superseded by* 179 F.3d 641 (9th Cir. 1999).

91. Cf. *In re Discover Card Payment Prot. Plan Mktg. & Sales Practices Litig.*, 764 F. Supp. 2d 1341 (J.P.M.L. 2011) (ordering multidistrict transfer of actions in part because the litigation involved "four overlapping class actions, three of which are brought on behalf of putative nationwide classes").

92. See 28 U.S.C. § 1407 (2006) (creating the Judicial Panel on Multidistrict Litigation and providing it with the power to transfer related cases for pretrial

optimal class actions, CAFA is not generous enough, even if it is a large step in the right direction.

Third, and relatedly, the superiority narrative admittedly fares less well than CAFA's narrative with respect to federalism concerns. The superiority narrative presents an argument for how a class action rule should be structured to maximize social benefit without causing individual harm, at least in terms of expected outcome. It does not focus on process or structural concerns, except to the extent that they can be included as costs that must be accounted for in the net-social-benefit calculus. Although a superiority-based class action rule should recommend itself to rulemakers at both the state and the federal level, they may disagree—or at least they may sort out the costs and benefits differently.

Something along those lines may have occurred in *Shady Grove*, in which New York's legislature made a judgment that class actions were too problematic to use for claims asserting a right to statutory penalties in excess of actual damages.⁹³ I happen to believe that *Shady Grove* was correct, but for *Erie*-based reasons unrelated to the superiority narrative.⁹⁴ Viewed only through the lens of this narrative, *Shady Grove* is a more difficult case. As I have said, class actions should typically be lodged in federal court to ensure optimality. As a general matter, applying a single class action rule (Rule 23) to these cases gives the federal court a better chance to shape a superior, optimally sized class action than applying a multitude of class action rules to various class members. If it can indeed be shown that a state legislature forbade class actions precisely because it believed that the costs of the class action outweighed its benefits for certain claims, the federal court can

purposes to a single federal court). A comparable power giving state courts the ability to transfer cases among themselves has been proposed. See Uniform Transfer of Litigation Act, 14 U.L.A. 661 (2005) (allowing courts in one state to transfer a proceeding to another consenting state that also has jurisdiction after a weighing of relevant factors). At present, however, no state legislature has enacted the proposal. See *Transfer of Litigation Act, Enactment Status Map*, UNIFORM LAW COMM'N (Feb. 26, 2013, 4:43 pm), available at <http://uniformlaws.org/Act.aspx?title=Transfer%20of%20Litigation%20Act> (last visited Jan. 23, 2013).

93. *Shady Grove*, 130 S. Ct. at 1440.

94. For an analysis of my reasons, see Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 877 (2011).

account for that fact in conducting its superiority analysis and deny class certification for those claims.⁹⁵

Finally, the superiority narrative is more agnostic about class action arbitration than the Court has been. It may be that, in given circumstances, class arbitration will be better than a class action brought in court. It may even be that individual arbitration leads to greater social benefits than a class action, whether brought in court or in arbitration. In both instances, the superiority principle requires that a court defer to the arbitration alternative. But the opposite could also be true, and the class action alternative could be superior from a social perspective. The Court's recent decisions that lie at the intersection of class actions and arbitration—*Stolt-Nielsen* and *Concepcion*—are insufficiently attuned to the superiority question. From the viewpoint of the superiority narrative, both cases raise a difficult question: whether we as a society should allow parties to contract out of the dispute-resolution form that is, by definition, socially superior and relegate them to the, by definition, inferior arbitration process to which they have agreed. Because neither Rule 23, the arbitration panel's class action rule in *Stolt-Nielsen*, nor the California state-court class action rule in *Concepcion* are presently construed to ensure that superior—and only superior—class actions are certified, the cases did not squarely present this question. But the superiority narrative's answer to the question is clear: use the class

95. This argument is roughly consonant with the argument that Justice Stevens made in his concurrence in *Shady Grove*. See *Shady Grove*, 131 S. Ct. at 1457 (Stevens, J., concurring) (arguing that Rule 23 should apply in diversity cases unless the state's class action rule was designed to affect "the scope of state-created rights and remedies"). The difference between my view and Justice Stevens is that, as a matter of the Rules Enabling Act, I believe that Rule 23 applies in federal court; but in determining whether to certify a specific state-law class action as being superior under Rule 23, a court should consider legislative determinations about the costs of using class actions to enforce "state-created rights and remedies" in rendering its superiority analysis. Cf. *Ratner v. Chem. Bank N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972) (denying class certification in a statutory-penalty case because using a class action to enforce the rights at stake would lead to such overwhelming liability that the class action failed to meet the superiority prong of Rule 23(b)(3)); but see *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 713 (9th Cir. 2010) (stating that a trial judge improperly found a lack of superiority because the liability in a statutory-damages case was disproportional to the actual harm suffered); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952–54 (7th Cir. 2006) (same).

action if it yields a greater social benefit without jeopardizing the expected recovery that individual litigation would yield.

At some point, respect for individual autonomy to enter voluntary transactions provides a limit on the superiority narrative. When parties of equal bargaining power voluntarily and consensually waive a class action remedy in favor of individual arbitration, judges may prefer to give effect to the agreement despite the social loss involved. Whether that same result should pertain in contracts of adhesion found in consumer settings like *Concepcion* presents a harder issue.

V. CONCLUSION

Pushed to its limit, respect for individual autonomy requires the abolition of all class actions other than opt-in arrangements in which class members voluntarily join together.⁹⁶ This outcome may satisfy absolutist opponents of class actions, but it is not consistent with either CAFA's stated narrative or the superiority narrative. Finding the right balance between social utility and individual autonomy is a constant problem in law. Unlike CAFA's narrative, the superiority narrative focuses directly on this fundamental matter. If we are to chart a different course for class actions than the one upon which CAFA has set us, we must recapture the sense that class actions are sometimes superior to their alternatives, and then dedicate ourselves to ensuring that we use class actions only when in fact they are.

96. As originally enacted in 1938, Rule 23(a)(3) contained a "spurious class action" provision that was in effect an opt-in rule. See 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1752 (3d ed. 2005) (showing that the original Rule 23(a)(3) was often used as a mechanism for the permissive joinder of interested parties). In addition, the Fair Labor Standards Act contains a "collective action" provision that likewise is an opt-in provision. See 29 U.S.C. § 216(b) (2006) (stating that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party . . ."); *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 192 (3d Cir. 2011) (discussing the history and use of collective actions under § 216(b)), *rev'd on other grounds*, 133 S. Ct. 1523 (2013)).

